Financial Services Flash

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The Beginning of the End: Standard Disclaimers in Court Reports

By James Desjardins

It has long been standard practice for Court-appointed receivers, monitors and trustees in bankruptcy to include comprehensive disclaimer language in the reports they submit to Court in connection with insolvency proceedings. The reason is simple – these reports are relied on by the Court and other parties to the proceedings, and are often prepared using unaudited and unverified information obtained from management of the debtor company. As most can appreciate, it is simply not possible for Court-appointed receivers, monitors and trustees to do a significant review or audit of the information from both a time and cost perspective. These disclaimers, however, have evolved, in some cases, to preclude anyone (including, in some cases, the Court for whom the reports are authored) from relying on the contents of the report.

A standard disclaimer may look something like this:

> The [receiver/monitor/trustee] assumes no responsibility or liability for any loss or damage incurred by or caused to any person or entity as a result of the circulation, publication, re-production or use of or reliance upon this report. Any use which any person or entity makes of this report or any reliance on or a decision to be made based on it is the responsibility of such party.

Recently, Justice Brown and Justice Newbould of the Ontario Superior Court of Justice (Commercial List) have taken issue with this standard disclaimer language as it prevents the Court or any other party from relying on the contents of the report. The use of boilerplate disclaimers is currently being considered and reviewed by a subcommittee of the Commercial List User's Committee.

Until an official pronouncement on disclaimers is released by the User's Committee, Court-appointed receivers, monitors and trustees in bankruptcy should pay close attention to the wording of their disclaimers and avoid sweeping qualifications and comprehensive releases. The Court has expressed the need for all stakeholders in a proceeding to be able to rely on the report. Below are two examples of disclaimers that qualify the information obtained from the debtor company rather than the entire report and which have recently earned the approval of the Commercial List Court:

1. In preparing this report, the [receiver/monitor/trustee] has relied upon unaudited and draft, internal financial information obtained from the [debtor's] books and records and discussions with former management and staff (collectively, the "**Information**"). The [receiver/monitor/trustee] has not

audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information and expresses no opinion, or other form of assurance, in respect of the Information.

2. This report is prepared solely for the use of the Court and the stakeholders in this proceeding, for the purpose of assisting the Court in making a determination whether to approve the appointment of the [receiver/monitor/trustee], and to approve the proposed transaction, and other relief being sought. It is based on the [receiver/monitor/trustee]'s analysis of information provided to it by the management and directors of the [debtor], which included unaudited financial statements and internal financial reporting. The [receiver/monitor/trustee]'s procedures did not constitute an audit or financial review engagement of the [debtor's] financial reporting. The receiver has relied upon the financial statements and financial and other records of the [debtor] in reaching the conclusions set out in this report.

While we await news from the User's Committee regarding standard disclosures, Court-appointed receivers and monitors can take solace in knowing that, disclaimer or not, section 251 of the *Bankruptcy and Insolvency Act* (for receivers) and subsection 23(2) of the *Companies' Creditors Arrangement Act* (for monitors) operate to insulate them from liability associated with any person relying on their reports that were made in good faith and in compliance with applicable law.

It is a reality of the profession that Court-appointed receivers, monitors and trustees in bankruptcy have to rely on unverified information of varying quality. The Commercial List Court has clearly indicated that it will no longer accept reports that contain blanket disclaimers which preclude the ability of the Court or of any other stakeholder to an insolvency proceeding from relying on the report. Although a report to Court may qualify the information it's based upon, and notwithstanding the statutory protections afforded to receivers and monitors, authors of reports should carefully and clearly set out the analysis, source and nature of the information used in making them.

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