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Secured Transactions

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SECURED TRANSACTIONS

I. CRITERIA FOR DETERMINING RECEIVER FEES ESTABLISHED

Absent a statutory limitation, the amount of compensation awarded a court-appointed receiver usually lies within the discretion of the trial court.[1] In *Ex parte Simons*[2] the South Carolina Supreme Court, while recognizing the discretion of the trial judge, established a set of criteria providing new guidance to South Carolina courts in assessing receiver fees. By making the criteria exclusive, this decision limits the factors available for consideration by the court appointing the receiver. Three owners of real and personal property brought an action for partition. Pursuant to an Order of Settlement, a receiver was appointed[3] and empowered to secure appraisals, list the property for sale, and employ accountants to examine the books and records of the partnership. The receiver also was allowed to employ any others needed to dissolve the partnership and sell the property.[4] The three owners reached a second settlement, and the receivership was terminated.

The receiver, an attorney, had performed ninety-three hours of work during the two-month period of receivership. The trial court awarded $25,000 in compensation for his services and reimbursed his costs. The supreme court affirmed the award for costs, reversed the compensation award, and remanded the case

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1. Annotation, *Measure and Amount of Compensation of Receiver Appointed by Federal Court*, 6 A.L.R. FED. 817 (1971). In 1950, S.C. CODE ANN. § 584 (1942), providing for a five percent commission of the amounts received and disbursed by a receiver, was eliminated by an Act which allowed the amount of compensation to be determined by the court appointing the receiver. Note, *Recent Legislation—A Summary of the General Enactments of the 1950 General Assembly*, 3 S.C.L.Q. 51, 55 (1950) (citing 1950 S.C. Acts 721). S.C. CODE ANN. § 15-65-100 (Law. Co-op. 1976) provides: "Receivers of the property within this State of foreign or other corporations shall be allowed such commissions as may be fixed by the court appointing them."

2. 289 S.C. 1, 344 S.E.2d 151 (1986).

3. The respondent replaced the original receiver, who resigned and received $1,000 as compensation plus $30 reimbursement for eighteen hours and forty-five minutes of work. The petitioners did not contest the compensation of the original receiver. Record at 17-19.

4. *Id.* at 7.

for determination of fees.[5] The court adopted the following eight factors to be considered in determining fees: (1) The nature, extent, and value of the administered property; (2) the complexity and difficulty of the work; (3) the time spent; (4) the knowledge, experience, labor, and skill required of, or devoted by the receiver; (5) the diligence and thoroughness displayed; (6) the results accomplished; (7) the amount of money coming into the receiver's hands; and (8) the fair market value, measured by conservative business standards, of the services rendered.[6]

The appointment of a receiver by a court is a strong remedy which should be cautiously undertaken.[7] Although appointment is authorized by statute,[8] no formula previously existed for determining fees in South Carolina.[9] Several cases have involved disputes over the amount of compensation awarded, but no case law has provided a method for assessing the fee. In each case the court merely affirmed the award as within the discretion of the trial court.[10] The general tenets that compensation should never

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5. 289 S.C. at 3, 344 S.E.2d at 152.

6. *Id.*

7. "The effect of the appointment of a receiver is to take property, at the instance of the moving party, out of the possession of the person in whose possession it is found and place it in the hands of a third party pending litigation." Truesdell v. Johnson, 144 S.C. 188, 197, 142 S.E. 343, 345 (1928). All three corporations approved the appointment of a receiver by settlement. Record at 5-6.

8. Section 15-65-10 of the South Carolina Code provides as follows:

> A receiver may be appointed by a judge of the circuit court, either in or out of court:
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> (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court;
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> (2) After judgment, to carry the judgment into effect;
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> (3) After judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment;
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> (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations; and
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> (5) In such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.

S.C. CODE ANN. § 15-65-10 (Law. Co-op. 1976).

9. *See supra* note 1 and accompanying text.

10. "The commissions to be allowed a receiver are not definitely fixed by statute

be more than that which is fair and reasonable,[11] and that it should never be vicariously generous,[12] were too general to be of much practical use.

In *Simons* the court looked to other jurisdictions in formulating the South Carolina rule. The Texas Court of Civil Appeals in *Bergeron v. Sessions*[13] set forth the first six criteria adopted in *Simons*, calling them "the controlling factors in ascertaining this value [of receiver compensation]."[14] The *Simons* court added two other factors: the amount of money coming into the receiver's hands[15] and the fair value of the services rendered measured by conservative business standards.[16] The court noted that the first of these two additional elements, although apparently duplicative of "the results accomplished," should be distinguished because "[i]t is conceivable that a receiver may achieve beneficial results other than simply assembling funds."[17] The distinction indicates that a trial judge may consider achievements which are more difficult to quantify. The second of the two additional elements makes clear the propriety of considering evidence of the value of comparable work in the private business sector.[18]

. . . but that seems to be a matter left to the discretion of the Court." Mann v. Poole, 48 S.C. 154, 163, 26 S.E. 229, 233 (1897); "There is but one question in this case, and that is as to the amount of these [receiver] allowances. The amount is within the discretion of the Circuit Judge, and it does not appear that Judge Sease abused his discretion." Carroll v. Cash Mills, 123 S.C. 506, 507, 117 S.E. 184, 184 (1923); "As to the receiver's compensation: the general rule is that it is within the discretion of the court. No abuse of that discretion appears." Turner v. Washington Realty Co., 125 S.C. 109, 114-15, 118 S.E. 30, 31 (1923) (citations omitted). In *Simons* the trial judge apparently recognized the problem when he stated, "I wish I had a formula that I could go by." Record at 66.

11. Guaranty Trust v. Seaboard Air Line Ry., 68 F. Supp. 304 (E.D. Va. 1946).

12. Coskery v. Roberts & Mander Corp., 200 F.2d 150, 154 (3d Cir. 1952).

13. 561 S.W.2d 551 (Tex. Ct. App. 1977).

14. *Id.* at 554.

15. *See* Feemster v. Schurkman, 291 So. 2d 622 (Fla. Dist. Ct. App. 1974).

16. *See* 200 F.2d 150 (3d Cir. 1952).

17. 289 S.C. at 3 n.2, 344 S.E.2d at 152 n.2.

18. The displeasure of the Petitioners with the trial court's award was succinctly summarized in their brief to the court:

> The Appellants offered testimony that a South Carolina bank would have performed the same services as the receiver here for a maximum fee of $10,625.00, which included a $50.00 per hour charge for problematic work which would not always be charged, and a termination fee. The award made by the lower court was more than twice this amount. Moreover, the Receiver, in his ordinary practice, charges an hourly rate of $65-75 per hour. Again, the compensation awarded this receiver was more than three times his hourly rate.

Although the court did not indicate the relative weight to be accorded the new criteria, the selection of the eight factors is important because the criteria are apparently exclusive. The supreme court expressly rejected the conclusion of the trial judge who based the award upon " 'duly and carefully considering the proceedings and detailed testimony herein and, further, upon my knowledge of the complexities and difficult circumstances confronted by the Receiver.' "[19] Because the eight factors are exclusive, the "anxiety that may have been caused the receiver and the difficulties he[] encountered"[20] are not compensable under the new rule. In an unsuccessful argument, the respondent contended "that stress, strain, and anxiety are natural concomitants to the undertaking of any task which is complex, difficult and laden with sobering responsibilities. The emotional responses can and should be considered in evaluating the degree of difficulty and/or complexity of any human endeavor."[21] The difficulty of the work then is determined by individual tasks accomplished, not by particular, even significant difficulties caused a receiver because of the uncooperative nature of the parties involved.[22]

Generally, the burden is on the receiver to establish the services provided and benefits obtained which entitle him to compensation.[23] In *Simons* testimony indicated that the receiver's task involved a diversity of business activities.[24] Despite this tes-

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Brief of the Appellant at 22-23. The lower court dismissed the bank's testimony as irrelevant at the close of the hearing. Record at 60-62.

19. 289 S.C. at 2, 344 S.E.2d at 152 (quoting the Order for Judgment dated January 29, 1985).

20. Record at 68.

21. Brief of Respondent at 5.

22. The receiver described the difficulties of his duties as follows:

> The following areas of responsibility were the Respondent's basic charge, each of which required time, care and attention:
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> (1) Analysis of accountant's reports, equalization of capital accounts, and making demands on the parties for funds to pay ongoing expenses;
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> (2) Preparation for sale, and sale of, furniture; and
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> (3) Renovation and repair of, and subsequent sale of, Joye Cottage.
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> The total failure of one or more of the Appellants to cooperate in no. 1, supra, created havoc with the Receivership and rendered it more time-consuming and frustrating than it otherwise might have been.

Brief of Respondent at 7 (citation omitted).

23. *See, e.g.*, Lewis v. Gramil Corp., 94 So. 2d 174, 176 (Fla. 1957).

24. *See* Record at 25-33.

timony, the court implicitly cautioned receivers to account carefully for their time and expense.

Although *Simons* may discourage receiverships in particularly difficult or problematic circumstances, the opinion clarifies the standards for determining fees. The criteria, employed by courts in a more formal and exclusive manner than in the past, will be as useful to receivers as they will be to judges.

James D. Myrick

II. NOTICE, COMMERCIAL REASONABLENESS UNDER U.C.C. SECTION 36-9-504(3) INTERPRETED

Section 36-9-504(3) of the South Carolina Code[25] was the subject of two recent cases of first impression involving deficiency judgment actions. The South Carolina Supreme Court interpreted the "notice" requirement of section 36-9-504(3) in *Altman Tractor & Equipment Co. v. Weaver*.[26] In *Mid-Continent Refrigerator Co. v. Carpenter* the South Carolina Court of Appeals decided who should bear the burden of proving whether a sale was conducted in a "commercially reasonable" manner as required by the statute.[27]

In *Altman* the supreme court held that the notice provision of section 36-9-504(3) does not require that the debtor actually receive the notice if the secured party takes reasonable steps to

25. S.C. CODE ANN. § 36-9-504(3) (Law. Co-op. 1976) provides as follows:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

26. 288 S.C. 449, 343 S.E.2d 444 (1986).

27. 287 S.C. 624, 340 S.E.2d 559 (Ct. App. 1986).

see that the debtor is notified.[28] In applying this rule to the *Altman* facts, the court noted that the secured party complied with section 36-9-504(3) by sending the notice by registered mail properly addressed to the debtor.[29] The court further held that the secured party was not required to take any additional action, even though a third party had signed the return receipt.[30]

The *Mid-Continent* court held that in accordance with section 36-9-504(3), a secured creditor has the burden of proving that the resale of secured collateral was conducted in a commercially reasonable manner.[31] The court ruled that because the secured party did not present evidence of the value of the collateral at the time of the resale or other evidence which would enable the jury to determine whether the sale was commercially reasonable, the secured party was not entitled to a deficiency judgment.[32] *Altman* and *Mid-Continent* follow the general rule on their respective issues.[33]

In *Mid-Continent* the Carpenters purchased grocery store equipment from Mid-Continent. Mid-Continent repossessed the equipment after the Carpenters defaulted on their payments. When Mid-Continent could not resell the equipment, it purchased the equipment and brought a deficiency judgment action against the Carpenters.[34] At trial the parties stipulated that the sole issue in deciding if Mid-Continent was entitled to a deficiency judgment was whether Mid-Continent sold the equipment in a commercially reasonable manner. On appeal the South Carolina Court of Appeals reasoned that when the secured party has not introduced evidence supporting the commercial reasonableness of the resale of repossessed collateral, the secured party has not met the burden of proof on the issue and is not entitled to a deficiency judgment. Citing *Associates Commercial Corp. v.*

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28. 288 S.C. at 451, 343 S.E.2d at 445.

29. *Id.*

30. *Id.*

31. 287 S.C. at 625, 340 S.E.2d at 560.

32. *Id.*

33. *See generally* Annotation, *Sufficiency of Secured Party's Notification of Sale or Other Intended Disposition of Collateral Under UCC § 9-504(3)*, 11 A.L.R.4TH 241 (1982); Annotation, *Uniform Commercial Code: Burden of Proof As To Commercially Reasonable Disposition of Collateral*, 59 A.L.R.3D 369 (1974).

34. 287 S.C. at 625, 340 S.E.2d at 560. Mid-Continent sought a deficiency judgment from the Carpenters for the difference between the balance owed on the account and the price realized upon purchase.

Hammond,[35] the court noted that although the determination of whether a sale was conducted in a commercially reasonable manner is usually a jury question, "it is a matter for the court when the evidence is capable of only one reasonable inference."[36]

The court was unwilling to weigh evidence presented by Mid-Continent of *how* the resale was conducted without introduction of evidence of the value of the collateral or other evidence indicating commercial reasonableness.[37] Apparently, the court examined the elements of method, manner, time, place, and terms collectively; some evidence of the commercial reasonableness of each of these aspects is necessary for a secured creditor to meet its burden of proof.[38]

In adopting the rule that the secured party bears the burden of proving that a sale of secured collateral was conducted in a commercially reasonable manner, the court relied on *Henderson Few & Co. v. Rollins Communications, Inc.*[39] This rule is common to other jurisdictions.[40]

The facts in *Altman Tractor & Equipment Co. v. Weaver* are similar to those in *Mid-Continent*. In *Altman* Weaver purchased from Altman farm equipment which Altman repossessed after Weaver defaulted on his payments. After repossession Altman sold the equipment and brought a deficiency judgment action against Weaver. Before the sale Altman sent a properly addressed notice to Weaver by registered mail and received a return receipt, signed by a third party whom Weaver claimed he did not know. In a nonjury trial the court granted a deficiency judgment in favor of Altman. On appeal Weaver argued that the trial judge erred in finding that Altman had sent reasonable notification of the sale as required by section 36-9-504(3) and, therefore, erred in allowing the deficiency judgment.

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35. 285 S.C. 277, 220 S.E.2d 82 (Ct. App. 1985).

36. 287 S.C. at 625, 340 S.E.2d at 560 (citations omitted).

37. *Id.*

38. Annotation, *What is "Commercially Reasonable" Disposition of Collateral Required by UCC § 9-504(3)*, 7 A.L.R.4TH 308 (1981).

39. 148 Ga. App. 139, 250 S.E.2d 830 (1978).

40. *See, e.g.*, Giddens v. Bo Lovein Ford, Inc., 167 Ga. App. 699, 307 S.E.2d 271 (1983); Tauber v. Johnson, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1972); Chemlease Worldwide, Inc. v. Brace, Inc., 338 N.W.2d 428 (Minn. 1983).

Applying the U.C.C. definitions of "notifies"[41] and "send,"[42] the *Altman* court reasoned that the notice provision of section 36-9-504(3) does not require that the debtor actually receive the notice, but, instead, that the secured party take reasonable steps to see that the debtor is notified. The court reasoned that the secured party had complied fully with section 36-9-504(3) by sending a properly addressed notice to the debtor by registered mail; the secured party did not have to take further action simply because a third party, rather than Weaver, signed the return receipt. The court's reasoning in *Altman* is consistent with the U.C.C. definitions of "send" and "notifies." The decision marks South Carolina's adoption of the general rule in this area.[43] In supporting its decision that actual receipt of the notice of sale is not required, the court relied on *Day v. Schenectady Discount Corp.*,[44] *Hall v. Owen County State Bank*,[45] *James Talcott, Inc. v. Reynolds*,[46] and *First National Bank & Trust Co. v. Hermann*.[47] Decisions from other jurisdictions also support this rule.[48]

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41. S.C. CODE ANN. § 36-1-201(26) (Law. Co-op. 1976) provides as follows: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know it."

42. S.C. CODE ANN. § 36-1-201(38) (Law. Co-op. 1976) provides as follows:

> 'Send' in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances.

43. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-10, at 1112 (2d ed. 1980). *See generally* Annotation, *Sufficiency of Secured Party's Notification of Sale or Other Intended Disposition of Collateral Under UCC § 9-504(3)*, 11 A.L.R.4TH 241 (1982).

44. 125 Ariz. 564, 611 P.2d 568 (Ct. App. 1980) (under a statutory definition of notice for a proposed sale of repossessed collateral, the test is not whether the debtor received notice, but only whether the secured party made a good faith effort to give notice).

45. 175 Ind. App. 150, 370 N.E.2d 918 (1977) (the test is not whether the debtor receives the notice, but whether the secured party made a good faith effort and took such steps as a reasonable person would have taken to give notice).

46. 165 Mont. 404, 529 P.2d 352 (1974) (U.C.C. requires only that creditor take reasonable steps to insure that debtor is notified).

47. 205 Neb. 169, 286 N.W.2d 750 (1974) (notification under U.C.C. for disposition of collateral does not depend upon whether the notification actually reached the person to whom it was sent).

48. *See* Steelman v. Associates Discount Corp., 121 Ga. App. 649, 175 S.E.2d 62 (1970); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428 (Minn. 1983); Cessna

In support of its holding that a return receipt signed by a third party does not create a need for further action on the part of a secured party, the *Altman* court relied on *Central Trust Co. v. Cohen*[49] and *General Motors Acceptance Corp. v. Thomas*.[50] The rule insures that an undue burden will not be placed on a secured party who takes reasonable steps to see that the debtor is notified.

Mid-Continent and *Altman* place South Carolina in the mainstream of jurisdictions on their respective issues. The practitioner representing a secured creditor in a deficiency judgment action should note that he must present evidence of the commercial reasonableness of the method, manner, time, place, and terms of the sale in order to sustain his burden of proof.

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Fin. Corp. v. Meyers, 575 P.2d 1048 (Utah 1978).

49. 14 Ohio Misc. 2d 8, 470 N.E.2d 498 (1984) (service by certified mail to the address listed by defendants as residence was reasonable notification despite receipt of letter by third party not known to defendants).

50. 15 Ohio Misc. 2d 267, 237 N.E.2d 427 (1968) (holder of a retail installment contract was entitled to deficiency judgment when notice of sale was sent by certified mail and delivered at trailer court which was given as buyer's address and where buyer still lived, although receipt was signed by third person and buyer never received notice).