The Priority of Receivership Certificates: *County of Sonoma v. U.S. Bank N.A.*

By Blake Alsbrook

In the Summer 2019 edition of Receivership News, I wrote an article about *City of Sierra Madre v. Suntrust,* a case where my late law partner David Pasternak and I were successful in obtaining a published opinion from the Second District Court of Appeal reaffirming a receivership court's discretion to authorize the issuance of receiver's certificates with priority over all other liens, including mortgages. As noted in that article, after we obtained the opinion, a mortgage lender filed a brief with the California Supreme Court attempting to have the opinion depublished, claiming, among other things, that the *Suntrust* holding would have calamitous effects on the lending industry by creating uncertainty regarding the priority of trust deeds.

Fast forward just over a year, and the same attorney that sought to depublish *Suntrust* filed an appeal in the First District hoping to create a split of authority between districts. For the nonlawyers reading, a split of opinion in the various Districts of the California Court of Appeal would help counsel bring the issue before the California Supreme Court for reconsideration. Thankfully, due to the hard work of Andrew Adams and Mark Adams, that attempt failed miserably, and the First District Court of Appeal produced yet another published opinion that follows *Suntrust* and is in many ways more helpful in providing guidance to receivership courts and reaffirming the discretion those court hold to authorize significant action by their receivers.

Specifically, in *County of Sonoma v. U.S. Bank N.A.*, (Case No. A155837, filed October 8, 2020 ("*County of Sonoma*")), the First District confirmed (or dusted off) many long-standing principles of receivership law well known to practitioners but which have increasingly come under attack by lenders' counsel. The critical takeaways of the opinion are as follows:

1. Relying on and agreeing with *Suntrust*, the *County of Sonoma Court* determined that trial courts have long held the power to authorize the issuance of receiver's certificates that prime existing liens under traditional receivership appointments made pursuant to Cal Code Civ. P section 564;
2. While the Court in *Suntrust* suggested as much, the C*ounty of Sonoma* opinion makes clear that receivers appointed solely pursuant to the Health & Safety Code also have the power to authorize the issuance of receiver's certificates that prime existing liens, rejecting a strained legislative history analysis set forth by U.S. Bank's counsel;
3. The Court then reaffirmed a receivership court's power to sell property free and clear of liens; and
4. The Court instructed that Receiver's fees and costs have super-priority under appropriate circumstances.

While the First District largely agreed with the receivership court below, it did take issue with one of the trial court's rulings, reversing in part, and clarified that fees and costs incurred by an enforcement agency like a city or county do not enjoy super priority as do a receiver's. This part of the opinion is not a surprise and should remind all of us that attempts by receiver to pay enforcement agency fees and costs through the use of receiver's certificates or ahead of senior liens is inappropriate.

The Court of Appeal here wrote an opinion that can be used as authority in many different circumstances and touches upon a lot of what we do as receivers. The *County of Sonoma* opinion is an excellent tool for practitioners of receivership law, as it updates and refreshes any number of 19th-century cases and arcane passages from Clark on Receiver's commonly relied upon by lawyers such as myself and frowned upon by those who are not fans of ancient law.

Finally, I believe that *County of Sonoma* should be viewed as a positive development by lenders, insofar as it provides significant clarification regarding the course of action that the holder of a senior trust deed should take if a receiver is appointed. Rather than ignoring issues occurring at the property that acts as security, lenders should do their best (within reason) to cooperate with receivers and work toward constructive solutions to problem solve. What is more, first trust deed holders may be wise to provide funding to receivers to complete necessary work so that they can not only retain their priority but be an active participant in approving draws and keeping an eye on expenditures. Doing nothing and utilizing lien priority to the detriment of other stakeholders is no longer an option.