

Special Fiscal Agents—Armed Peacekeepers

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Courts of equity are inherently tasked with expeditiously resolving unique and increasingly complex matters. As a result, courts of equity have broad powers to craft remedies to address the peculiarities that any case presents. One of the most powerful and, perhaps, useful tools a chancellor has in his or her arsenal is the special fiscal agent. The powers and duties of special fiscal agents arguably are limited only by the creativity of the judge making the appointment. From the practitioner's perspective, the appointment of a special fiscal agent can be a mixed bag. However, since the 1950s, courts of equity in New Jersey have used these equitable appointments without much formal critique, comment, or limitation.

What follows is a survey of the law establishing the scope of a court's authority to appoint special fiscal agents and some practical issues to consider in the special fiscal agent appointment process.

Creation of the Special Fiscal Agent

Often called on to protect corporate assets and shareholders, courts of equity have always had at their disposal the power to appoint a receiver. This drastic remedy takes two forms: custodial receiverships and statutory receiverships. Generally, custodial receivers are "appointed to maintain the status quo to preserve the corporate assets for a definitive period."¹ Statutory receivers, on the other hand, wield far greater power, including the acquisition of "legal title to corporate assets" and the power "to dissolve the corporation."²

In the 1950s, however, a chancery judge created a third option in the case that introduced special fiscal agents to New Jersey chancery practice, *Roach v. Margulies*.³ In that derivative action alleging mismanagement and self-dealing, the plaintiff filed a motion for the appointment of a receiver after being

stymied in its right to inspect corporate records. The judge denied the receivership application, appointing instead a special fiscal agent "with full power and authority to check the propriety of all disbursements to be made or proposed to be made by the corporation." The court also gave the special fiscal agent the power to report to the parties "any item of disbursement" the fiscal agent found questionable.

In affirming the chancery judge's remedy, the Appellate Division noted that the appointment of a receiver is a "drastic action [to be] avoided where possible, and if the relief necessary can be accomplished by some less onerous expedient." To protect the public image of the corporation by foregoing the appointment of a receiver, while also providing protection to the plaintiff, the appellate panel concluded that the appointment of a special fiscal agent was "an ingeniously equitable Pendente lite device...contrived to avoid more stringent measures."

The panel also noted the need for flexible equitable remedies and the seemingly unlimited power of chancery judges in creating such remedies, which have "*no limit to their variety and application*." (emphasis added.) The court added, in conclusion, that the absence of precedent for such an appointment did not preclude the relief designed.

Absent from the panel's opinion was any mention of limitations that should be set on the appointment of special fiscal agents, the powers that may be granted to them, or the qualifications necessary to serve in such capacity. Indeed, the broad and approving language used by the panel in *Roach* would signal the beginning of the use of special fiscal agents in many scenarios, with evolving responsibilities and increasing powers.⁴

Functions and Powers of the Special Fiscal Agent

As originally conceived, the primary functions of special

fiscal agents were to investigate and protect. Stated simply, their role was that of a peacekeeper, reporting to the court or even the parties, so that, when necessary, the parties could seek relief from the court based on the findings of the special fiscal agent.⁵ At the onset of their use, special fiscal agents were viewed as a means to continue corporate business in the interests of all parties until the disputes that brought the parties before the court could be resolved. Despite that original intention, the use of special fiscal agents has expanded beyond the role of protector and overseer in business litigation.

In fact, special fiscal agents have been appointed by New Jersey courts in diverse matters, at all judicial levels, with a wide variety of powers and duties tailored to suit the nature of the dispute. For instance, special fiscal agents have been appointed in landlord-tenant matters,⁶ in property disputes,⁷ and in a dispute between condominium owners.⁸ In an oppressed minority shareholder action, the Appellate Division suggested the appointment of a special fiscal agent may be appropriate “to represent the minority shareholders.”⁹ Interestingly, the Supreme Court of New Jersey has availed itself of the use of a special fiscal agent, ordering the appointment of one to oversee an attorney’s trust account in a disciplinary matter.¹⁰

Although used in a variety of contexts, courts of equity nevertheless have used special fiscal agents primarily in cases involving business disputes, such as oppressed minority shareholder actions,¹¹ disputes between majority and minority shareholders in closely held corporations,¹² and disputes involving family businesses and partnerships.¹³

As a judicial invention—rather than a statutory creation—special fiscal agents do not have discretely defined powers. Case law has placed few limitations on the scope of a special fiscal agent’s authority. For example, like

receivers, special fiscal agents cannot be appointed indefinitely. In fact, the Appellate Division noted that special fiscal agents should be appointed for a term equal to that necessary to protect assets and the corporation pending “a final resolution or a dissolution of the business enterprise.”¹⁴ In that instance, the Appellate Division therefore required the trial court “to fix a termination date” for the special fiscal agent.

In short, the powers granted to a special fiscal agent can be as broad or narrow as the court decides. Indeed, in the years since special fiscal agents first surfaced, they have been armed with expanding powers, and their duties not only have grown immensely but also have evolved from a traditional peacekeeping role. In relatively recent litigation, special fiscal agents have been granted the power to manage the environmental remediation of property,¹⁵ to supervise condominium board elections,¹⁶ to develop a proposal for the terms and conditions of the sale of stock,¹⁷ and to appoint an arbitrator if the parties could not agree on one.¹⁸ Courts have even recognized that special fiscal agents can have the extraordinary power to wind down corporate affairs in some circumstances,¹⁹ which more traditionally would have been handled through the appointment of a statutory receiver.

Even though the appointment of special fiscal agents emerged as an equitable remedy in general equity matters, their use has drifted into family matters as well.²⁰ Family courts have used special fiscal agents in their traditional role,²¹ but family courts also have given special fiscal agents extraordinarily broad powers. In one case, a court appointed a special fiscal agent and rent receiver “to manage the property of a supporting spouse to assure compliance with pendente lite support obligations,” and the fiscal agent “issued a series of orders, including one which increased defen-

dant’s support obligations and awarded plaintiff counsel fees and another which ordered the sale of certain properties and business equipment owned by defendant and his companies.”²² The court concluded these orders were improper because the Divorce Act prohibited delegation of “judicial powers to a receiver.” This holding is significant because the Appellate Division’s reliance on the Divorce Act to strike down the judicial actions taken by the special fiscal agent in that case leaves open the possibility that a special fiscal agent may take judicial or quasi-judicial actions so long as other law does not expressly forbid it.²³

Indeed, at times special fiscal agents have made legal determinations traditionally reserved for the courts. For example, in one case a court affirmed the recommendation of a special fiscal agent that a document was subject to attorney-client privilege.²⁴ It should be noted, however, that the expansion of the special fiscal agent’s power into the realm of adjudication of legal issues has drawn some criticism from commentators, concluding that “the absence of established standards creates more than chaos: It fosters a perception, if not a reality, of, at best, ‘rough justice,’ rather than equity.”²⁵

Clearly, the role of the special fiscal agent has seen “no limit in variety and application,” as foreshadowed in *Roach*. As such, practitioners who appear before the courts of chancery in New Jersey would be well served to take note of the frequency, scope, and consequences of the appointment of a special fiscal agent when developing case strategy.

Special Fiscal Agents: Practical Considerations

The frequency in the use of special fiscal agents surely relates to the advantages presented by their appointment. First and foremost, the Chancery Division presides over unique cases, where

exigencies of time and circumstance benefit from the ability to craft flexible and evolving remedies. The special fiscal agent, in particular, provides courts with the ability to assign powers and duties based on the facts presented in each case. Put another way, chancery judges are not constrained by the strictures of traditional equitable remedies. Instead, by appointing a special fiscal agent, the court can tailor a custom-fit *pendente lite* remedy to address the peculiarities of the case presented.

Second, the appointment of a special fiscal agent carries with it a less negative impact on the public image of a corporation than does the appointment of a receiver. Indeed, as a greater volume of business litigation finds its way into the courts, special fiscal agents have become a trusted tool of judges to balance the interests of the parties and corporation and maintain the *status quo* while litigation is pending.

Third, the appointment of a special fiscal agent often allows litigants to achieve quicker results when issues arise during litigation. For example, rather than petitioning the court, litigants often can rely on special fiscal agents to assist the parties in resolving disputes, ranging from minor litigation squabbles to settlement of ultimate issues, or to inform the court when matters necessitate judicial intervention. This benefit is symbiotic; judges also can rely on special fiscal agents to keep them abreast of matters relevant to the case.

That said, the appointment of special fiscal agents is not without drawbacks. Primarily, as a judicial creation without governing court rules or legislation, the use of special fiscal agents lacks specificity. Though it can be advantageous for courts to rely on such a flexible remedy, special fiscal agents are used inconsistently, with broad and sometimes undefined powers. As a result, litigants from one case to the next cannot predict what powers will be granted to spe-

cial fiscal agents or how different fiscal agents will interpret and exercise those powers. To be sure, the lack of specific rules governing special fiscal agents leaves open the possibility they may act in ways exceeding the power intended by the appointing court, thus resulting in the time and expense of correcting such errors.

Although a special fiscal agent may not carry the same negative connotations as a receiver, clients and employees may be concerned when a fiscal agent is appointed. Inevitably, the special fiscal agent must, at a minimum, interact with some employees because he or she has to learn the essentials of the business to perform the duties ordered by the court. When a business is already under the strain of litigation, the presence of a court-appointed stranger can be disruptive.

Another significant downside of the appointment of a special fiscal agent is cost. In addition to paying party lawyers, litigants end up paying another lawyer to serve as the special fiscal agent. Unfortunately, this cost typically is not covered by traditional insurance policies. Further, the expense associated with the appointment of a special fiscal agent is often significant as special fiscal agents may be assigned to a case for months or years at a time. Indeed, once appointed, special fiscal agents are difficult to remove and can remain with the case until final disposition.

When wading into the waters of chancery court, practitioners should be mindful that the court has this powerful tool in its arsenal and attempt to prepare for such an appointment. When making a request for the appointment of a special fiscal agent, lawyers should first consider all available alternatives. A complete evaluation of the company and the circumstances of the litigation must occur to gauge the ability to sustain the special fiscal agent, if appointed. Careful consideration must be given

to whether a client has the financial ability to pay the cost associated with the special fiscal agent or whether such an appointment would create a financial strain that would outweigh the benefits of having a fiscal agent appointed.

Conversely, when opposing the appointment of a special fiscal agent, attorneys should plan for the worst. If the court decides to appoint a special fiscal agent, it is critical counsel take an affirmative role in crafting an order a judge will enter, circumscribing and delineating the powers and length of appointment of the fiscal agent. It is obvious the lawyers and their clients know far more about the underlying interests at stake than the court. The court therefore must be alerted to the potential negative impact a special fiscal agent may have on those interests and be creative in constructing an order to avoid the disruption.

As a judicially created remedy, special fiscal agents indeed are unique. Little precedence exists governing their use and powers, and courts retain discretion to appoint them and prescribe their authority. Like many other common-law creations, the role of special fiscal agents has evolved, expanded, and continues to grow. They have become a tried and tested tool of the general equity courts, and practitioners can best serve their clients by being aware of the advantages and disadvantages of this unique instrument of the courts. At bottom, special fiscal agents are a part of the fabric that today comprises chancery practice. ☞

Endnotes

1. William Drier and Paul Rowe, *Guidebook to Chancery Practice in New Jersey* 109 (8th ed. 2012).
2. *Id.* at 111.
3. *Roach v. Margulies*, 42 N.J. Super. 243, 245 (App. Div. 1956).
4. Curiously, special fiscal agents appear to remain principally a crea-

ture of the New Jersey court system. A review of published case law reveals few jurisdictions appointing special fiscal agents; though a few jurisdictions have recognized special fiscal agents as an available remedy to courts of equity. *See, e.g., Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 527 (Iowa 1974); *Fix v. Fix Material Co., Inc.*, 538 S.W.2d 351, 357 n.3 (Mo. Ct. App. 1976); *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395 (Or. 1973). While it is possible that these and other courts routinely appoint special fiscal agents, that remedy is not explored further in published case law. Federal courts also have appointed special fiscal agents, but the use has primarily occurred in New Jersey, with other cases reported in the Southern and Eastern Districts of New York, and one case in the District of Maryland. Like New Jersey state courts, federal courts have appointed special fiscal agents in a variety of cases, with powers similar to those granted by New Jersey courts. That said, what is most apparent is that the overwhelming majority of reported cases using special fiscal agents are in New Jersey—and references to special fiscal agents often are followed by citations to *Roach v. Margulies*.

5. *See Drier and Rowe, supra*, at 112.
6. *49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc.*, 227 N.J. Super. 449 (App. Div. 1988).
7. *Kassover v. Kassover*, 312 N.J. Super. 96 (App. Div. 1998).
8. *Gurriere v. Brookdale Condo. Assocs.*, No. C-143-00 (Ch. Div. July 6, 2012) (dispute in which “non-sponsor condominium unit owners” failed to sell units and instead rented them while “maintaining control of the condominium association”).
9. *Kelley v. Axelsson*, 296 N.J. Super. 426, 437 (App. Div. 1997).
10. *In re Blunt*, 187 N.J. 71, 72 (2006).
11. *Balsamides v. Protameen Chems., Inc.*, 160 N.J. 352 (1999); *Bonavita v. Corbo*, 300 N.J. Super. 179 (Ch. Div. 1996); *Jovanov v. Moschillo*, No. A-3286-10T4 (App. Div. Nov. 15, 2012).
12. *Elison v. DGE Corp.*, No. BER-C-388-05 (Ch. Div. 2005).
13. *Sipko v. Koger*, 214 N.J. 364 (2013); *Gladstone v. Ludsin*, No. A-2432-04T2 (App. Div. June 15, 2006).
14. *Kassover, supra*, 312 N.J. Super. at 100-01.
15. *In re Litwin*, No. MONC28402 (Ch. Div. Dec. 29, 2005). Interestingly, in this case the court added that the special fiscal agent also would maintain “all of the usual powers and duties of a special fiscal agent.” But as is evident in light of the ever-evolving role of special fiscal agents, it is unclear what would be considered “usual” powers and duties of a special fiscal agent today.
16. *Gurriere, supra*.
17. *Bonavita, supra*, 300 N.J. Super. at 201.
18. *Weinstock v. Weinstock*, 377 N.J. Super. 182 (App. Div. 2005). The special fiscal agent ultimately appointed the arbitrator and subsequently issued a ruling based on a conference with the parties that the arbitration would be directly “appealable to the Appellate Division to the same extent and in the same manner as if appealed from a decision of the trial court of the Superior Court of New Jersey.” In confirming the arbitration, the chancery judge glossed over the parties’ agreement to modify the appeal process, but the appeal to the Appellate Division dismissed the appeal because the panel found “no authority for this approach” and that “direct appeal is to the Chancery Division.”
19. *Elison v. DGE Corp., supra*. The court

noted that the parties had consented to the appointment of a special fiscal agent with “the authority to act on behalf of DGE Corp. in connection with any business affairs of DGE Corp.” (emphasis in original). Interestingly, when the case reached bankruptcy court, the judge noted the special fiscal agent’s powers are “undeniably limited,” and special fiscal agents require court approval to act in certain circumstances. The court concluded that appointing a bankruptcy trustee would be “more expeditious” than continuing with a special fiscal agent. *In re DGE Corp.* No. 05-60608(DHS) (Bankr. D.N.J. Feb. 6, 2006).

20. In one family matter, a special fiscal agent was appointed to effectuate the sale of a marital home (*Madden v. Madden*, No. A-4878-07T2 (App. Div. Oct. 28, 2009)), and in another, the Appellate Division suggested the appointment of a special fiscal agent, with the traditional fiscal agent duties of inspecting books and records, might be appropriate in a case where an ex-husband intentionally concealed or destroyed financial documents in an effort to frustrate litigation related to the amount of alimony he was required to pay (*Rolnick v. Rolnick*, 290 N.J. Super. 35 (App. Div. 1996)). The panel in *Rolnick* suggested the trial court should “consider the appointment of an accountant or fiscal agent” to evaluate the ex-husband’s “expenditures and acquisitions of property and assets.” The panel further directed that, if a fiscal agent was appointed, the agent “shall have the right to interrogate defendant and his accountant for such purposes.” *See also McCarthy v. McCarthy*, 319 N.J. Super. 138 (App. Div. 1999) (involving appointment of special fiscal agent to oversee business of ex-husband and second

wife in alimony dispute).

21. *D'Atria v. D'Atria*, 242 N.J. Super. 395 (Law. Div. 1990) (suggesting appointment of “custodial receiver/fiscal agent/special fiduciary” to seize and control husband’s stock when his corporation, in violation of divorce decree, opened retail store near one operated by his wife). Even though the court’s order provided for the appointment of a “custodial receiver/fiscal agent/special fiduciary,” and not solely a special fiscal agent, the order allowed for the appointment of a special fiscal agent with powers far broader than merely investigating or protecting a corporation. Indeed, the court specifically empowered the “special fiduciary” to “take over in the place and stead of defendant as an officer and director” in the corporation.
22. *Maragliano v. Maragliano*, 321 N.J. Super. 78 (App. Div. 1999).
23. *Contra Advance Residential Cmtys., LLC v. Hamilton*, No. A-5148-07, slip op. at *14 (App. Div. July 31, 2009) (citing *Maragliano, supra*, 321 N.J. Super. at 82).
24. *Heritage Estates, LLC v. Bel Air Holdings, LLC*, No. ESX-F-16406-1 (Ch. Div. April 25, 2007).
25. Laurence B. Orloff and Eileen A. Lindsay, *The Chancellor’s New Clothes: The Special Fiscal Agent as Deputy Judge*, *New Jersey Lawyer* 18 (1994).

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