# Management Case Study #2 - court HOA receivership; attorney sued; case sealed

George K. Staropoli
March 13 2022

The events of 2008 – 2012 presented here span wrongful acts by an Arizona HOA and its attorney resulting in a court appointed receivership and leading to the attorney being sued for aidding and abetting, among other things. The case then disappears from county court public records and the outcome remains unknown.

## What is court receivership?

How does it work? Can it help remove rogue HOA boards of directors? This case study provides answers to these questions from a nonlegal, but authoritative HOA advocate's perspective. The quote from LexisNexis provides a general answer to these questions.

Receivership, like RICO or a class action, is a complex and tedious undertaking requiring a specific showing how the actions of the HOA constituted a violation of the law. I believe the homeowners were in the dark as to how the money was being spent because of no access to the HOA's financial records. The alternative was to continue bleeding or to move out.

Legal Basis for Receivership (LexisNexis)

> *A receiver is a court-appointed officer who acts as a neutral to manage assets (real property or personal property) or even manage businesses as going concerns when they are the subject of a legal dispute. The appointment of a receiver is an equitable procedure that a court uses when it believes that a party to an action is not in a position (or, in some circumstances, refuses) to comply with the desires of the court.*
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> *Appointment of a receiver is also a provisional remedy that allows courts to preserve and/or maintain assets, so that waste does not occur and the value of an asset in dispute can be preserved pending final adjudication. This concept of waste in recent times has given receivers broad authority to maximize the value of businesses, receivables, and other assets through effective management and sale.*

**HOA grossly negligent in removal of $665,000 HOA funds**

A Rico complaint — yes a RICO complaint — was filed in 2008 by 40 members against their HOA, DC Lot (Arizona), naming among others, the 6 board members personally, alleging that

> *"Defendants have conspired to take over their homeowners association . . . for improper purposes. Defendants have utilized the Association to gain control of as much property in the community as possible, through improper means . . . so as to cause [the owners] to lose their property through foreclosure or sell their property to Defendants at discounted rates."*
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> *Defendant Desert Carmel is not a successor-in-interest of the Declarant, and has wrongfully declared itself the "Declarant" in an effort to avoid its obligation of paying assessments. Although Defendant Desert Carmel has not paid its assessments and therefore was not entitled to vote, based upon its ruse that it was the Declarant, Defendant Desert Carmel voted anyway and elected Defendant Bealmear as the President of the Association. Thereafter, Defendants Bealmear, Lampman, Isaacson, Sweiboda, and Lozzi (hereinafter collectively the "Director Defendants"), through the numerous entities named as Defendants herein, purchased a significant number of lots . . . .*
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> *Defendants, acting in concert with each other, committed, and continue to commit, racketeering . . . . directing Defendants to forthwith pay to the Association . . . in the amount of at least $7.4 Million . . . ."*
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> (*Braslawsce et al v. DC Lot*, Second Amended Complaint, Pinal County Superior Court, CV2007-026 17).

**Court appointment of a Receiver**

The following is illustrative of the decisions of the court ordering the appointment of a Receiver. The Court ruled,

> *The Court FINDS, by substantial evidence, that the property rights of Plaintiffs require immediate protection . . .No other remedy will adequately protect Plaintiffs' property rights, including injunctive relief . . .* ***Specifically, there is no dispute that more than $665,000 was removed from the Association's bank account(s),*** *without authority,*
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> *The Court FINDS . . . that the parties controlling DC Lot Owners Association were grossly negligent in failing to protect, preserve or detect these withdrawals, which constituted the bulk of the liquid assets of the Association. This alone justifies the appointment of a receiver.*

The Court issued several Orders, among them were,

- The Receiver shall assume general control over the association, and take all appropriate and lawful actions that the Association has the responsibility and authority to perform.
- that the parties controlling DC Lot Owners Association shall take no further actions on behalf of the Association; protect the status quo until the Receiver affirmatively takes possession of the Association; shall deliver the assets, accounts and records of the Association to the Receiver, at the Receiver's direction; and shall cooperate with the Receiver.

- that the law firm of Maxwell & Morgan [HOA attorney and outstanding CAI member] shall take no further action on behalf of the Association, without the consent of the Receiver,

## HOA attorney sued for "aiding and abetting"

The power and benefit of a Receiver to homeowners with a solid, valid complaint becomes clear in the study. Less than a year after the appointment of a Receiver, DC Lot HOA attorney and CAI member Charles Maxwell was personally sued for: "*Breach of Ethical Duties: Disgorgement; Aiding and Abetting; Professional Negligence; Breach of Contract; Breach of Fiduciary of Duty."* "Disgorgement" is seeking a return of illegal monies received.

"Aiding and abetting" is a serious offense, as alleged, by the HOA attorney, in this instance, whereby Maxwell knew a crime was being committed by the HOA and assisted the HOA in committing the crime. The complaint, filed by the Receiver, sought inter alia to "*recover significant legal fees paid to the Maxwell Law Firm by the Association, as well as to recover damages caused by the Maxwell Defendants conduct . . . "*

The complaint alleged, among other things, that,

- The Maxwell Firm sent collection letters to virtually all owners (other than the Majority Owners), claiming thousands of dollars owed to the Association. The letters did not specify how the amounts claimed due were calculated, but demanded payment within thirty days if the owner wanted to avoid foreclosure.

- The Maxwell Firm added late fees and attorneys' fees to each lot owners' account subject to one of its demand letters, charging owners late fees in the amount of $192 per year, even though the annual assessment is only $160.

- When the Majority Owners were not successful in their initial efforts to purchase lots they were targeting, additional collection efforts by the Maxwell Firm ensued.

- Although the Association had reputable insurance defense counsel defending it free of charge in the Braslawsce Litigation, the Maxwell Firm remained actively involved in the litigation for the next eighteen months, billing the Association an additional $300,000 or more during that time period.

The Complaint sought compensatory, ongoing, and punitive damages against Maxwell.

I do not have any additional court filings, either updates or final disposition. In May 2012, after 1 ½ years of silence, **I looked into the court records only to discover that the case disappeared from public view.**

**Maxwell lawsuit sealed because harmful to society**

The public, using Arizona's Pinal County's court website, will not find a trace of this lawsuit. Even a court clerk did not find this case. Only after showing the complaint's cover sheet with a case number did the clerk find the case. I was told that the case was settled and sealed from public access. The clerk could not find it by party name or title and could explain why not. (Pinal County Case # CV 2010-004684).

My challenge to this wrongful sealing of this case of statewide importance was ignored and denied when appealed to the Supreme committee on judicial conduct with the terse: *"After reviewing the information provided by the complainant, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. "* (Complaint 12-148, August 15, 2012).

My charge was simply stated:

> *"The sealing of this civil case records in violation of the Arizona Rules of the Supreme Court, Rule 123(d) that requires a statement to be made giving the reasons for the sealing of case records. There is no record of this case on the Pinal County Superior Court official public website, not even an entry that the case was sealed, and not even an entry that the case was dismissed."*

My charge was a prima facie (black-letter law) accusation of wrongdoing. Rule 123(c)(1) states *"[T]he records in all courts and administrative offices of the Judicial Department of the State of Arizona are presumed to be open to any member of the public for inspection . . . ."*

Rule 123(d) specifies public justification for sealing a case.

> *All case records are open to the public except as may be closed by law, or as provided in this rule. Upon closing any record the court shall state the reason for the action, including a reference to any statute, case, rule or administrative order relied upon.*

The only rationale I could find, since aside from juvenile or certain criminal records Arizona law is silent, relates to the view that exposure may create a harmful effect to the greater community.

> *"Under the common law, court records can be sealed on a showing of a 'compelling need' for secrecy sufficient to overcome the public's interest in access.*
> *"[The] right of access may only be overcome by an 'overriding [governmental interest] based on findings that closure is essential to preserve higher values.'*
>
> *"To make this showing, a part seeking secrecy must demonstrate both a 'high probability' that this interest would be harmed if the documents were disclosed and that 'here are no alternatives to closure that would adequately protect the compelling interest.'"*

(40 Public Justice).

It is safe to say that this was a coverup — judicial collaboration — to protect Charles Maxwell's reputation and standing, and any fallout relating to wrongful acts by HOAs, and the integrity of HOA attorneys and CAI member attorneys. What other explanation could there be?

**To serve the greater good**

But then again, isn't that just what state legislatures have been doing since the 1964 inception of the HOA mode of local governance? Benefitting the greater community by encouraging, supporting, and permitting private government HOAs to function outside the Constitution.