



Are Nevada's Cannabis Receiver Laws Unconstitutional?

BY JEFFREY F. BARR, ESQ.

Nevada's cannabis receiver laws, Nevada Revised Statute (NRS) 678B.355 (and its attendant regulations), may very well violate the Nevada Constitution's Separation of Powers Clause. This article first looks at what a receiver is and why the state insolvency proceedings are so crucial to the cannabis industry. It then examines the Separation of Powers Clause in Art. III, Sec. 1 of the Nevada Constitution and the cannabis receiver statutes and regulations. Finally, the article turns to how Nevada's cannabis receiver laws may violate the Separation of Powers Clause.

What is a receiver?

“A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest.” *Bowler v. Leonard*, 70 Nev. 370, 382–83 (1954). Put differently, as a judicial officer, a receiver is “an arm or hand of the court.” *Jones v. Free*, 83 Nev. 31, 37 (1967).

Receiverships emerged out of the English Chancery Courts during the reign of Queen Elizabeth I to protect remainder interests when parties in possession of real property threatened waste or to dissipate rents, and both the English and the American courts of equity gradually expanded the remedy when it was necessary to administer the assets of insolvent or mismanaged corporations or other debtors. 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2918 (3d ed. 2014). With the advent of federal bankruptcy laws and jurisprudence, use of receivers in the federal court system fell precipitously. *See id.* But in the state courts, receiverships remain viable alternatives.

Receiverships are very viable under Nevada's jurisprudence, and the state has several statutes authorizing the appointment of a receiver. For example,

NRS 32.010 recites the general cases in which the courts may appoint a receiver, and this list includes, “all other cases where receivers have heretofore been appointed by the usages of the courts of equity.” NRS 32.010(6). In addition, the Nevada Legislature has authorized receivers in the following special cases:

- The insolvency of corporations (NRS 78.622); limited-liability companies (NRS 86.5411); and partnerships (NRS 87.280);
- The dissolution and liquidation of insurance companies (NRS ch. 696B); and
- The protection of real property during the pendency of a foreclosure sale (NRS 107.100).

Like these other statutes, the legislature also permits the appointment of a receiver over distressed or mismanaged cannabis establishments. NRS 678B.355.

Why are state-law receiverships crucial to the cannabis industry?

Manufacture, distribution, and possession of cannabis, a controlled substance, is illegal under federal law. *See* 18 USC § 841. Because cannabis is criminalized under federal law and because bankruptcy is a federal rubric, Nevada cannabis licensees cannot afford themselves the protection of the bankruptcy courts. *In re CW Nevada LLC*, 602 B.R. 717, 746 (Bankr. D. Nev. 2019).

In Nevada, cannabis is nearly a \$1 billion per year industry.¹ This billion-dollar industry is legally prohibited from accessing federal bankruptcy protection. Thus, the only option for a financially distressed cannabis company is state-law insolvency or receiverships. In short, receiverships are crucially important to Nevada’s cannabis industry.

Nevada’s Separation of Powers Clause

Unlike the U.S. Constitution, the framers of the Nevada Constitution specifically included a Separation of Powers Clause. *See* Nev. Const. Art.

III, Sec. 1. Importantly, the clause specifically prohibits one branch of government from performing the duties of another branch, stating, “no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others”

All judicial power in Nevada is vested in the judiciary. Nev. Const. Art. VI, Sec. 1 (“The judicial power of this State is vested in a court system”). Thus, neither the executive branch nor the legislative branch may interfere with or perform the functions of the judicial branch. *See Dunphy v. Sheehan*, 92 Nev. 259, 265 (1976).

Nevada’s Cannabis Receiver Laws

Under the current rubric, appointment of a receiver over a cannabis establishment is a two-step process in which the court first appoints the receiver and then the Nevada Cannabis Compliance Board (CCB) approves the receiver. Nevada Cannabis Compliance Regulation (NCCR) 5.175 mandates that the court must appoint the receiver before the CCB considers the approval of the appointment.

In the CCB approval process, NRS 678B.355(2)(e) requires the CCB to evaluate whether the proposed receiver has “experience or knowledge of the cannabis industry;” “experience as a receiver appointed by a court;” “knowledge and skills necessary to make reasonable financial decisions with respect to the finances of a cannabis establishment;” and “adequate financial capacity to fulfill the duties of a receiver.” If the CCB finds that the court-appointed receiver fails to meet these requirements, the court-appointed receiver “shall not act as a receiver for a cannabis establishment.” NRS 678B.355(1).

Potential Violation of Separation of Powers

As discussed above, the appointment of a receiver is, and always has been, a judicial function. Court-appointed receivers are judicial officers responsible to the court.

The two-step process in NRS 678B.355 and NCCR 5.175 effectively gives the CCB power to veto a judicial appointment of a judicial officer. This veto power potentially violates Art. III, Sec. 1’s prohibition on one branch of government encroaching on the authority of another in that the CCB (an executive branch agency) is determining who may and who may not be a judicial officer.

In practical terms, the two-step process raises the real issue of disagreement between the two branches of government. Hypothetically, a court could appoint a receiver that the CCB refuses to approve. Who resolves this issue and in what forum? The answers are unclear.

Receivers play a crucial role in the Nevada cannabis industry. The current appointment process may be unconstitutional in that it violates the Nevada Constitution’s Separation of Powers Clause.

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ENDNOTE:

1. “Reforms Are Needed As Nevada’s Cannabis Industry Continues to Mature,” Vegas Inc, B. Wiegand (Oct. 3, 2022), <https://vegasinclasvegassun.com/business/2022/oct/03/reforms-are-needed-as-nevadas-cannabis-industry-co/>, retrieved on January 19, 2024.



JEFFREY BARR is a co-founder and partner at Ashcraft & Barr LLP, and heads the commercial litigation, government relations, and civil rights practices of the firm. He has 25 years of experience in commercial transactions and litigation. Prior to forming Ashcraft & Barr LLP, he was the city attorney for the city of North Las Vegas.