

2 From the Publisher

4 Receivership
Flexibility

6 Heard in the Halls

10 The List

11 Ask the Receiver

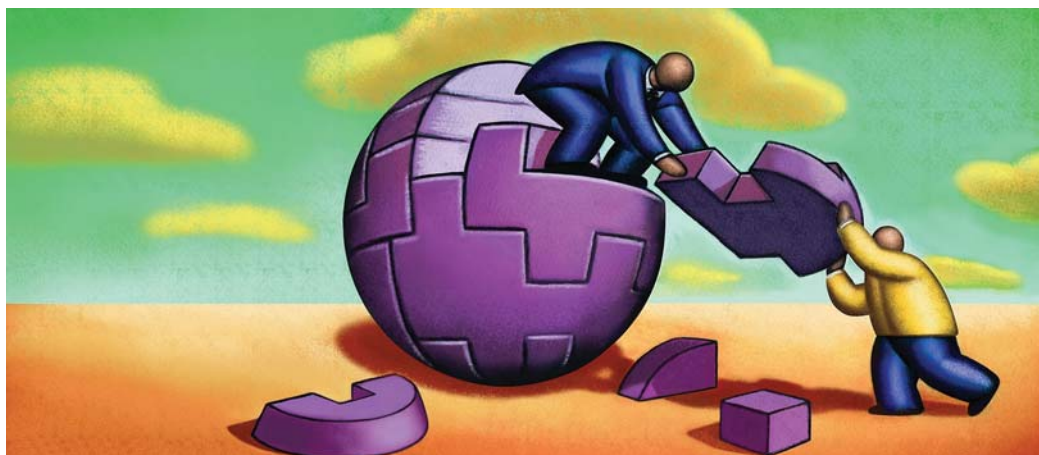
11 A Tribute to Robert
Chauncey Warren II

12 Worth the Cost?

14 Receivership
Professional Profile

RECEIVERSHIP

NEWS



A Primer on Receivers and Receiverships in a Nutshell

PART I: OVERVIEW OF THE APPOINTMENT PROCESS

(This is the first of a three-part analysis of receivership law and practice)

By EDYTHE L. BRONSTON*

A receiver is an agent of the court, acting for the court, holding assets in custodia legis, generally to preserve the status quo, but sometimes to maximize benefit to the estate, depending on the type of receivership. The receiver is neutral, represents neither party, and is a fiduciary to all persons or entities who or which are ultimately shown to have interest in the property or fund which comprises the receivership estate, or the proceeds of same. The receiver obtains the right to possession of the property, but not title. Receiverships are an ancillary remedy and are created only where authorized by statute or equity. The statutory bases run through the California Codes. Both the California Rules of Court and the Local Court Rules should always be consulted. Historically, imposition of a receiver has been considered a harsh,

expensive remedy. It is easier today to obtain a rents, issues and profits receiver, but the court always has discretion and will balance the equities.

An order granting appointment of a receiver is appealable under CCP §904.1(a)(7). An order denying appointment is non-appealable. An order refusing to vacate a prior appointment is ordinarily non-appealable. *City and County of San Francisco v. Shers*, 38 Cal.App. 4th 1831 (1995)]. An order discharging a receiver is appealable when it has the effect of being a final judgment. *Hibernia S&L Soc. v. Ellins Estate Co.*, Cal. 216 Cal. 280, 281-282 (1932). An order appointing a receiver in aid of execution may be appealable as to the particular receiver.

There are many advantages to having a

Continued on page 7...

The New and Improved California Receivers Forum Newsletter

By Robert P. Mosier, Publisher

I am particularly pleased to introduce this inaugural issue of the new and improved California Receivers Forum Newsletter featuring the following changes:

State and Federal judges throughout California have been added to our circulation.

Substantive articles on receiverships and receivership law are aimed at informing and educating judges, receivers, receiver's counsel and accountants about the nature, requirements and legal nuances of this unusual discipline.

Highlights of a member's career and accomplishments will be featured in each issue.

The latest in both personal and legal receivership news is presented for members of the

California Receivers Forum and the judiciary.

In addition to these strategic goals and changes, we have also introduced member advertising in uniform, tasteful tombstone ads in a dedicated section. This allows our members – receivers, attorneys, accountants and many others — to showcase a case or two that they have either been appointed to or have just completed work on. Members of the Forum are eligible to list themselves as active receivers, by region. We are also allowing vendor advertising for businesses that can be invaluable in the successful administration of a case.

These advertising dollars will assist in funding our State organization as well as covering the cost of publication. We believe these ads and listings will help keep both our members and the judiciary informed.

Continued on page 3 ...

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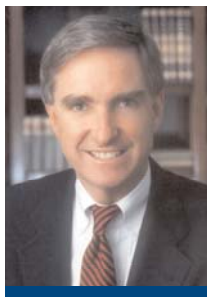
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Continued from page 2..

An effective staffing organization is crucial to the success of this enhanced Newsletter. The staff, all of whom are volunteering their time and energy to make all of this happen, is:

Robert P. Mosier, Publisher – That’s me. I have served as a court-appointed fiduciary in both state and federal courts for more than eighteen years. I am a businessman with over thirty years of experience in turnarounds, and bring substantial business experience to each assignment. I am headquartered in Orange County and am a founding member of the California Receivers Forum and a past co-chair of the Los Angeles/Orange County Chapter.



Kirk S. Rense, Editor – Mr. Rense is a lawyer specializing in insolvency and in representing court-appointed fiduciaries, with more than twenty years of experience. He also has a background in journalism as an editor and newspaper reporter, before attending law school at the University of Southern California Law Center. Kirk is a former board member of the California Receivers Forum, LA/OC Chapter.

Kenton Johnson, Associate Publisher, LA of the LA/OC Chapter – Kenton Johnson’s 30-year career in business and banking has included responsibility at all levels including chief executive officer, division manager, and project manager. Since January 1996, Mr. Johnson has been a member of Robb Evans and Associates LLC. The firm serves as a fiduciary, usually as receiver or trustee, in regulatory or creditor legal actions.



Robert C. Warren III is Serving as Associate Publisher, OC of the LA/OC Chapter – Robert C. Warren III, is President of Investors’ Property Services, a Southern California management resource for over 20 years. He holds a BA in economics, an MA in Business Administration and is a Certified Property Manager. He has served as a receiver in over 250 cases in California and the western United States.



Beverly N. McFarland, Associate Publisher, Sacramento/Fresno Chapters – Ms. McFarland served as the Chair of CRF for 2001-2002 and was one of the founding directors and Chair of the Sacramento Valley Chapter. She has 30 years’ experience in the financial industry and serves as receiver in federal and state courts. Ms. McFarland is also the CEO of The Beverly Group, Inc., an asset management company in business since 1983.



Peter Ito, Associate Publisher, San Diego – Mr. Ito’s bio is featured in this initial issue.

Associate Publisher, San Francisco – Open, and we will welcome a motivated volunteer.

The Newsletter will also feature two regular columns — Heard in the Halls, written by Alan Mirman, and Ask the Receiver, written by Peter Davidson. A brief bio of the contributing author appears after each article.

I am both pleased and excited about this new and (I hope) improved Receivers Forum Newsletter for the California Receivers Forum. Please give me your thoughts on this inaugural issue. My e-mail address is Mosier@Mosierco.com and I welcome your feedback about what you liked and didn’t like. In the meantime, please enjoy this inaugural issue. ■

San Diego — CRF Newswire

By Dan Close

An excellent program was presented in San Diego on January 6, 2003, titled **Receiver Law in California**. Presenters included Katherine A. Bacal, a member of the Litigation Practice Group of Baker & McKenzie, Martin Goldberg, Receiver, Forensic Accountant and owner of Goldberg Consulting, and Bryan D. Sampson, owner of the law office of Sampson & Associates.

The full-day program covered topics such as, The History and Origin of the Receiver, Mechanics of Appointing a Receiver, Handling the Receiver’s Estate, Receiver Ethics and Liability, The Post-Judgment Receiver, Large Scale Receiverships, and Bankruptcy and Receivers. Also included in the excellent handout material were 20 exhibits ranging from Ex Parte Application to

Appoint Receiver to Memorandum of Points and Authorities in Support of Motion for Final Custodian Fees.

Bryan Sampson, Esq., indicated that he is available to provide the presentation in other areas of California. You can reach Bryan at (619) 557-9420.

Dan Close, founder and shareholder of Economic Dispute Resolution, Inc., specializes in Forensic Accounting, Business Valuation and Receiverships. He has testified in Superior and Federal Court in California and Nevada many times since 1993. ■



Using A Receiver To Resolve Community Association Disputes

BY STEVEN LINKON, ESQ.*

Using a court appointed receiver to temporarily operate a community association is a creative and cost-effective way to address a chronic repair issue, litigation or governance dispute. A receiver is appointed and supervised by a court and the receiver's duties are circumscribed by the court's appointing order. Community or homeowner's associations sometimes face a problem that (a) cannot be addressed effectively by volunteer homeowners (who typically lack legal or technical expertise), (b) where the volunteer board may have an "agenda" that is in conflict with the best interest of the Association, or (c) where the board itself is conflicted and cannot effectively take action. A receiver can act to address the troubling issue in place of the board.

Why should a volunteer director be placed at risk of losing his or her assets if there is a problem within the association?

Even sophisticated volunteer directors may prefer to have a receiver address certain problems so as to avoid personal liability if their decisions are later (sometimes years later) attacked in a lawsuit. Use of a receiver can insulate these directors from personal liability and the association benefits because the appointing court must approve the receiver's decisions.

A good example of the value of a receiver arises in the case of construction defect litigation and decisions concerning the scope of repair. Such decisions can involve huge sums of money and have long-term implications for the association. Lawsuits filed years later challenging earlier decisions made by volunteer directors as "grossly negligent" and seeking to hold the directors personally liable for the damages are not uncommon. What volunteer director would choose to serve on a board or make decisions in the face of such potential liability?

If the issue is construction repair, the board must decide the scope of the repairs to be undertaken. Obviously, the board does not want to waste money and perform repairs beyond the scope of what is absolutely needed. Conversely, the board does not wish to spend too little and fail to properly address the defects. No matter what amount the board decides to spend, their decision may be called into question years later if there is new or continuing damage to the property. Homeowners or third parties that suffer damages will naturally look to the individual members of the board that made the subject decisions, claiming that they were grossly negligent in determining an inadequate scope of repair. Such a lawsuit is difficult and expensive for the association to defend and may result in enormous personal liability for a director if successful.

May a receiver shield volunteer directors from personal liability?

A receiver can make these critical determinations and obtain court approval for such decisions. This insulates the individual board members from personal liability, and protects the association in future litigation by providing evidence that the scope of repair was reasonable under the circumstances known at the time. The association's defense to a future lawsuit would be to point out that not only did a disinterested

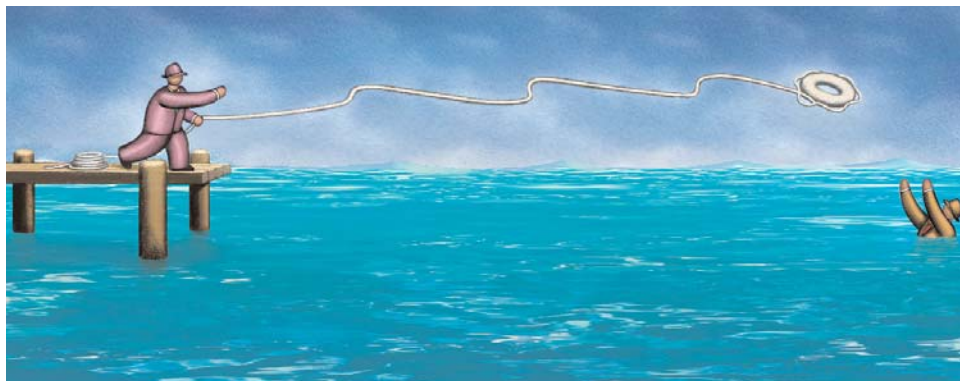
receiver determine the necessary scope of repair, but the appointing court also approved the receiver's recommendation. This is powerful evidence that the association was not negligent, and the individual directors would be insulated from liability since they did not make the decision.

The receiver is also in a better position to amend CC&R's and the governing documents of the association. Normally these require either 100% approval of the homeowners or such a high percentage of approval that, as a practical matter, amendments may be impossible. A receiver can simply obtain a court order on notice to the homeowners allowing amendment of the CC&R's or other governing documents.

Sometimes it is better to use a professional to deal with weighty legal and business problems.

The receiver can also act on behalf of the association in dealing with municipal agencies, or opposing parties in litigation. Often these parties will be more deferential to a receiver, who is operating under court appointment, and then they would be to a board comprised of volunteer homeowners lacking legal or technical sophistication. And managing outside counsel can be a daunting task for a board unfamiliar with the intricacies of association law. This task can be delegated to a Receiver.

Continued on page 5...



Continued from page 4.

There are costs to having a receiver appointed.

The cost of a receiver must be considered. One should be employed only where the scope of the problem justifies the cost. A receiver's compensation can be limited in many ways — either a fixed hourly rate, a sliding hourly rate or by a flat rate. The receiver's duties can also be limited by the court's appointing order to specific tasks or responsibilities.

In short, the receiver is a powerful tool with a myriad of uses to solve a particular problem facing an association.

Statutory basis for appointment.

Several provisions in CCP § 564 may be argued to authorize appointment of a receiver to protect a homeowner's association in light of the facts described above. CCP §564(b)(6) provides that a receiver may be appointed where a corporation is insolvent, or in imminent danger of insolvency. CCP § 564(b)(9) provides that a receiver can be appointed where such receiver is necessary to preserve the property or rights of any party.

Typically, homeowners' associations experiencing management problems are insolvent on a balance sheet basis. There are also often facts suggesting that the current board of directors may not be acting properly to preserve the property of the association.

Alternatively, one may look to the catch-all provision, CCP § 564(a), which provides that a receiver may be appointed in any case in which the court is empowered by law to appoint a receiver. The California Supreme court has held that a court of equity has the power to appoint a receiver of a going corporation upon a showing that there are such dissensions in its governing body as to create a virtual

suspension of its business. *Golden State Glass Corporation v. Superior Court* 13 Cal. 2d 384, 393 (1939). 1

A court of equity also has authority to appoint a receiver to preserve assets of a corporation and prevent irreparable loss or injury, pending suit. *Misita v. Distillers Corp.*, 54 Cal. App. 2d 244, 250. An appellate court will not disturb the trial court's appointment of a receiver, provided there was no abuse of discretion resulting in a miscarriage of justice. (See *Misita, Id.*, at 249.)

Misita involved a challenge to the validity of an ex parte appointment of a receiver to manage and conserve the assets of a business corporation where there was considerable dissension between stockholders and a deadlock in the corporate directorate. In upholding the validity of an ex parte appointment, the court stated that the ability to appoint a receiver to preserve the assets of a corporation, and protect the rights of the stockholders is well established in California jurisprudence in situations where internal dissensions deadlock or frustrate the corporation. Dissension, or even honest differences of opinion that make it impossible for the corporation to carry on its business to advantage (or to carry it on at all), are sufficient to invoke the action of a court of equity. *Misita, Id.* at 251; see, also, *Pomeroy's Equity Jurisprudence*, 4th ed., §§ 1537, 1541, 1543, 1545; *Boyle v. Superior Court*, 176 Cal. 671 [170 P. 1140].

The Golden State trial court appointed a receiver, and request for a writ of prohibition followed. Although the Supreme Court granted the writ, it affirmed that the trial court was authorized to appoint a receiver in such cases where courts of equity had previously done so, including the appointment of a receiver for a going corporation. Here, an uncontroverted showing that the corporation was being conducted in a solvent fashion placed the need for a receiver in doubt. The Supreme Court held that stronger proof was needed to justify a receiver where specific and detailed evidence that the corporation's business was being successfully conducted is presented in opposition to the appointment of a receiver. ■

A court of equity also has authority to appoint a receiver to preserve assets of a corporation and prevent irreparable loss or injury...



STEVEN K. LINKON of the Wolf Firm has substantial experience representing receivers and obtaining the appointment of receivers in various matters. He has served as a regulatory receiver for the Securities and Exchange Commission and the Federal Trade Commission.

CALIFORNIA RECEIVERS FORUM SACRAMENTO VALLEY CHAPTER

Kim Sackett, Chapter Administrator (916) 779-1154

is pleased to announce that in the first two months of 2003, members have been appointed in 12 cases as Receiver, Referee or Provisional Director. Counsel was retained in six cases.

Superior Court: Counties of Alameda, El Dorado, Placer, Sacramento, Sonoma, Sutter and Yuba.

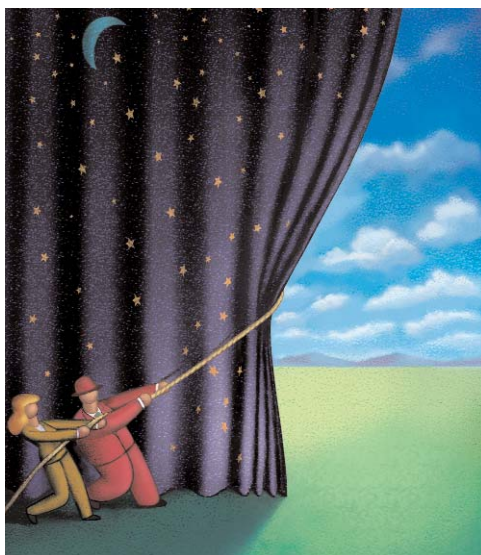
Heard in the Halls

NOTES, OBSERVATIONS, AND GOSSIP RELAYED BY ALAN M. MIRMAN*

This is the ninth edition of *Heard in the Halls*, an informal compendium of thoughts, questions and information contributed by California Receiver's Forum members, and not official Forum announcements. Don't rely on any quasi-official pronouncements in this column! Send me tidbits you would like to see in future issues, such as: procedures in various courtrooms, questions on legal issues, rank gossip, firm transitions and updates on practitioners, receivers, etc. Provide your input by telephone, mail, fax, or E-mail as follows: Alan M. Mirman, Horgan, Rosen, Beckham & Coren at 23975 Park Sorrento, Suite 200, Calabasas, California 91302. Phone: (818) 591-2121; Fax: (818) 591-3838; E-mail: amirman@horganrosen.com

Here is what we have Heard in the Halls . . .

- Give us your feedback as to our newly revamped and expanded Newsletter. It is the result of the creativity and hard work of Bob Mosier (the first co-President of the Forum), and a long time state Board Member. If you'd like to see any other features, or changes, I think Bob would welcome your input...
- The new statewide Receivership Rules seem to be well accepted. What has been your experience with them, and with the new forms? Any controversies? Some revisions to the Rules are in the drafting stages, and should go to public comment stage soon. We'll keep you posted...
- We were shocked and saddened at the early passing of Bob Warren, a founding Board member of the Forum. You will read more about Bob elsewhere in this Newsletter. The good news is that the LA/OC Board has voted Bob's son, an eminently qualified receiver, to join our Board. Robert C. ("Rob") Warren III is President of Investors' Property Services, a Southern California management resource for over 20 years. He holds a masters degree in business administration and is a Certified Property Manager. He has served as a receiver in over 250 cases in California and the Western United States...
- How's this for a gig: Edythe Bronston of the LA/OC Chapter has been appointed receiver to complete two television movies which will be shown on ABC, based on the "Eloise" stories, starring Julie Andrews. They are in post-production and the first one is expected to air April 27...
- Movers and shakers: Peter Ito of the San Diego Chapter just changed firms and is now with Foley Lardner to head up their west coast insolvency practice. Also, Judge John C. Woolley, Orange County Superior Court, who handled the Teachers Management, Inc. receivership a couple of years ago has retired and is planning to become a private judge with JAMS after May 1, 2003, and after he runs in the Boston Marathon. Good luck Judge Woolley...
- Legal and practical issue ... the LA/OC Chapter recently presented a program that addressed the pros and cons of whether a court can grant super-priority status to a receiver's certificate. Can the lien of a receiver's certificate trump an existing first lien? This issue is of particular importance in cases in which the property is substandard housing, and it is likely there is no equity to



support a new loan, unless super-priority is given. The statute [Health & Safety Code Section 17980.7(c)(4)(H)] relating to substandard housing provides for the creation of a lien, but was amended during the legislative process to strike the word "first" in referring to that lien. A 1915 case, however, still stands for the proposition that a lien of a receiver's certificate can be a first lien. Lots of arguments on each side of this one...

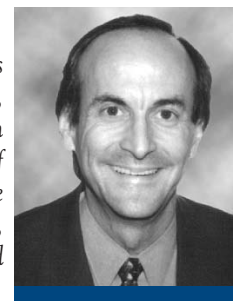
- From our Sacramento Chapter, we hear that Judge Loren E. McMaster was the first appointment by Governor Gray Davis to the Sacramento County Superior Court. He had a distinguished career specializing in public employment law issues. Judge McMaster succeeded Judge John Lewis as one of the two law and motion judges and

s an avid fan of the San Francisco 49ers...

- We can introduce another new Board member in LA/OC, Howard Grobstein, CPA who is a partner at Grobstein, Horwath & Company LLP, and specializes in insolvency and litigation support. Howard represents receivers, trustees, creditors, creditor committees, debtors and debtors-in-possession, and is frequently hired by attorneys in insolvency and litigation type engagements...
- Last, but not least...Bob Mosier reports another two settlements in the Class Action receivership of a large real estate syndication. Roughly 5,600 individuals reportedly invested \$100 million in several real estate projects that proved to be less than spectacular. Settlements with various professional firms that assisted the defendants have produced over \$13 million, in addition to approximately \$15 million in property sales. The five-year old case has one piece of litigation pending before closure ...

Until next time...

*Alan M. Mirman is a partner in the Calabasas law firm of Horgan, Rosen, Beckham & Coren, LLP, and specializes, not surprisingly, in *Creditor's Rights*. He is a founding director of the California Receiver's Forum. His practice includes various aspects of provisional remedies, representation of receivers, litigation, loan and lease documentation, and the like.



Continued from page 1..

receiver appointed, not the least of which is that the lender is insulated from being deemed a mortgagee in possession. This protects a lender from the increased exposure of application of a prudent business standard and responsibility for losses caused by the lender's negligence. In addition, the receiver will make certain that the property is insured and maintained and, in the case of a non-rents receivership, that the business is appropriately operated. In addition, a receivership order can specify that senior liens are to be kept current and real property taxes paid. Further, the lender will be kept informed as to the status of the property or business.

Conversely, a receivership is an additional layer of expense for which the lender may ultimately be held liable, should the receivership estate be insolvent. Ephraim v. Pacific Bank, 129 Cal. 589, 592 (1900). In addition, should anything out of the ordinary arise, a receiver will undoubtedly petition his or her appointing court for instructions, which can lead to delay and extra expense. Note that Civil Code §2938, effective 1997, deals with perfection of a lender's rights to rents, issues and profits of real property, and also addresses in Subsections (c) and (d) the rights of a lender/assignee of rents to collect and receive rents, issues and profits which have accrued but remain unpaid and uncollected on the date on which an enforcement step is taken. Those enforcement steps include appointment of a receiver, obtaining possession of the rents, issues or profits, delivery of a written demand to one or more tenants, and delivery of a written demand to the assignor/borrower. The statute, which applies to contracts entered into on or after January 1, 1997, also provides that any of the enforcement actions taken by a lender/assignee do not have the effect of making that assignee a mortgagee in possession unless the assignee obtains actual possession of the real property. Civil Code § 2938 (e)(1). Further, rents collected under this statute may be received and applied by the lender/assignee without the risk of a CCP §726 violation.

Be aware, however, that although "perfection" protects the security interest

against an intervening third party, an additional enforcement step is mandated to allow the creditor to begin collecting the assigned rents. Federal National Mortgage Assn. V. Bugna, 57 Cal.App. 4th 5291 (1997). Under Civil Code §2938 (g) once a lender has availed itself of these enforcement rights, the borrower/assignor can demand that the rents be used for the reasonable costs of protecting and preserving the property. Lenders will probably want a receiver to oversee this process . . . there is statutory authority for appointment of such a receiver pursuant to CCP §564(b)(11). ■

There are many advantages to having a receiver appointed...

Edythe L. Bronston is a Founding Director and Past President of the California Receivers Forum L.A./Orange County and a Founding Director of the State organization. She is an attorney in Sherman Oaks, California and also acts as a receiver, court-appointed referee, and mediator.



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Is pleased to announce the appointment
as administrator of

Alta Healthcare District,
a liquidation
Federal Bankruptcy Court
Northern District, Fresno

EDYTHE L. BRONSTON

Law Office of Edythe L.
Bronston
Tel: 818.528.2893

Is pleased to announce the
appointment as Receiver for

ABC v. Eloise Productions, Inc.
and Handmade Films, Inc.,
a completion of films receiver-
ship
Superior Court
County of Los Angeles
Burbank

**M. DANIEL CLOSE, CPA,
CVA, RECEIVER**

Economic Dispute
Resolution, Inc.
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Is pleased to announce the
completion of duties as a
Receiver for

Waterguard Corporation,
Post Judgment receivership
Superior Court
County of Orange

JAMES H. DONELL

Jalmar Properties, Inc.
Tel: 310.207.8481

Is pleased to announce the
appointment as Receiver for the
United States Security & Exchange
for J.T. Wallenbrock and
Citadel Capital Management Group,
an equity receivership

U.S. District Court
Central District of California

MIKE ESSARY

Calsur Management & Realty
Tel: 858.560.1178

Is pleased to announce the
appointment as Receiver for
TJ&W v. Silverado Investment
Group, for construction completion

Superior Court
County of San Bernardino

ROBB EVANS

Robb Evans & Associates LLC
Tel: 818.768.8100

Is pleased to announce the
appointment as Receiver for
La Luz de Oro,
for asset collection and distribution

Superior Court
County of Los Angeles

PETER ITO

Foley & Lardner
Tel: 619.685.6456

Is pleased to announce that
he has joined the San Diego
Office of Foley & Lardner.
Mr. Ito will head the firm's
West Coast bankruptcy,
creditors' rights and financial
restructuring practice.

DOUGLAS MOREHEAD

Optima Asset Management
Services
Tel: 949.852.0900

Is pleased to announce the
completion of duties as Receiver for
Thomas & Kellogg,
an operating company

Superior Court
County of Orange

ROBERT P. MOSIER

Mosier & Company, Inc.
Tel: 714.432.0800

Is pleased to announce the
completion of duties as Receiver for
Crystal Cove Pools and Spas;
an operating company

Superior Court
County of Orange
Family Division

DAVID J. PASTERNAK

Pasternak Pasternak & Patton

Tel: 310.553.1500

Is pleased to announce the appointment as Receiver for Death Row Records, an operating company

Superior Court
County of Los Angeles

DAVID L. RAY

Saltzburg Ray & Bergman

Tel: 310.481.6700

Is pleased to announce the appointment as Receiver for Solution Central Media, Inc., a liquidation

Superior Court
County of San Mateo

**THOMAS A. SEAMAN, CFA,
RECEIVER**

Thomas Seaman Company

Tel: 949.222.0551

Is pleased to announce the completion of duties as Receiver for Pasadena Village Assisted Living Community, an operating company

Superior Court
County of Los Angeles,
Northern District

STEVE SPEIER

Squar Milner

Tel: 949.222.2999

Is pleased to announce the completion of duties as Receiver for Riverside Communications, a partnership liquidation

Superior Court
County of Riverside

ROBERT C. WARREN III

Investors' Property Services

Tel: 714.708.0180

Is pleased to announce the appointment as Receiver for the former Ramada Inn, Santa Ana, a rents and profits receivership

Superior Court
County of Orange

DOUGLAS P. WILSON

Douglas Wilson Companies

Tel: 619.641.1141

Is pleased to announce the appointment as Receiver for Vallco Fashion Park, a rents and profits receivership

Superior Court
County of Santa Clara

DOUGLAS P. WILSON

Douglas Wilson Companies

Tel: 619.641.1141

Is pleased to announce the completion of duties as Receiver for Car Wash of America LLC, an operating company

Superior Court
County of San Diego

DOUGLAS P. WILSON

Douglas Wilson Companies

Tel: 619.641.1141

Is pleased to announce the completion of duties of construction management and litigation support consultant for

Ocean Trails Golf Course, an operating company

Consultant for Credit Suisse
First Boston

ANDREW R. ZIMBALDI

Alden Management Group

Tel: 714.751.7858

Is pleased to announce the appointment as Receiver for Regency Highlands, a completion of construction receivership

Superior Court
County of Riverside

THE LIST

WHILE THERE IS NO COURT-APPROVED LIST OF RECEIVERS, THE FOLLOWING IS A PARTIAL LIST OF RECEIVERS WHO ARE MEMBERS OF THE CALIFORNIA RECEIVERS FORUM:

AREA/E-MAIL

PHONE

AREA/E-MAIL

PHONE

BAY AREA

David A. Summers 925-933-2875
 Davidsummers@aol.com

SACRAMENTO VALLEY

* Beverly N. McFarland 916-408-3755
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FRESNO AREA

Clifford E. Bressler 559-298-1089
 cliffordbressler@earthlink.net
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ASK THE RECEIVER

BY PETER A. DAVIDSON, REIN EVANS & SESTANOVICH LLP



Have a receivership question you want answered? E-mail it to pdavidson@resllp.com and your question and the answer may appear in an upcoming column.

1. Can a receiver be assigned to a referee by stipulation, and take instruction from the referee?

Answer: A receiver is an officer of the court, appointed by and directed

by the court. After the receiver's appointment, the receivership proceeding can be assigned to a referee, either by stipulation or otherwise. The receiver as an officer of the court cannot take instructions directly from the referee, however. Any instruction or orders issued by the referee and intended for the receiver must first be submitted to the court for review and approval. In effect, the referee may make a report and recommendation to the court, which then may (or may not) issue the recommended order. See generally, C.C.P. §§639, 643, and 644. For the same reasons, receivers cannot be appointed by arbitrators or take instruction from arbitrators. *Marsch v. Williams*, 23 Cal. App. 4th 238 (1994).

A TRIBUTE TO ROBERT CHAUNCEY WARREN II

Virtually every receiver, receiver's counsel and state and federal judge in Southern California knew and respected the late Robert Chauncey "Bob" Warren II, a prominent member of the receivership community for more than 20 years. Mr. Warren passed away on February 24, 2003 just shy of his 74th birthday. Rob Warren, Mr. Warren's son and business partner, provided the California Receivership News with this personal commentary on his late father's life and career.

Many of us know Bob Warren from working with him as a receiver and property manager over the last twenty years. But there is a great deal more about my father that people ought to know. Robert C. (Bob) Warren II was born in Little Rock, Arkansas in 1929. He grew up in Pine Bluff, Arkansas and Jackson, Mississippi, and attended Rice University, graduating in 1952 with a bachelor's degree in English.

While there he met his wife-to-be, Barbara, who was also a student at Rice.

They married in Alexandria, Virginia in 1953 – after Bob had joined the Army and completed Officer Candidate School. After a tour in Korea with the Army Corps of Engineers (Bob had put "Eng" for his degree on his application), Bob and Barbara lived for a time in Texas, Mississippi and Missouri, as Bob worked in national radio and in local television as a newscaster. He loved the news and he loved broadcasting, but it took time away from his family. He and his family later lived for a time in Illinois, Minnesota and Iowa, as Bob moved from newscasting to public relations work to property management. His travels finally took him and his family to California in 1975, when Bob took a job as general property manager for the Irvine Company. He subsequently opened his

2. Which of these constitutes adequate notice of hearing on an ex parte receivership application: (i) telephone messages to on-site property manager who states that he or she will tell owner (when lender does not know owner's whereabouts); (ii) telephone message on owner's answering service; (iii) telephone message on owner's home answering machine; (iv) message by carrier pigeon?

Answer: A telephone message to the on-site property manager does not constitute proper notice. If the lender does not know the owner's whereabouts, the lender must take other steps to find the owner prior to giving ex parte notice. A telephone message given to the owner's answering service is sufficient notice. A telephone message on the owner's home answering machine may not be sufficient. As to carrier pigeon, that notice is acceptable so long as the pigeon in question will sign a declaration re notice, under penalty of perjury, and will be available to testify in court should the notice be questioned. See, Cal. Rules of Court, Rule 379. ■

Peter A. Davidson, located in Los Angeles, is a receiver and an attorney who specializes in representing receivers in state and federal court. The views of Mr. Davidson are not necessarily those of the California Receivers Forum or the California Receivers Forum Newsletter. Nor are the views expressed by Mr. Davidson intended to be relied upon as legal advice.



own business, Investors' Property Services, in 1980.

Bob was the proud father of two sons, Kyle and me, and was the proud grandfather of three girls, Sally Jean, Robyn and Rachel. He was a man of many loves and many dreams. He never stopped dreaming about new things and new ideas. He was passionate about his family, about seeing the beauty of the desert mountains, and about the open sky. He completed his lifelong dream of obtaining his private pilot's license a few years ago at the age of seventy. Bob was an eternal optimist and a vibrant encourager. He loved life, and he looked forward to the surprises of each day and to the warmth of his relationships with his friends and coworkers. He never lost the same passion for living that had been with him since his youth. He was special, and he will be greatly missed. ■

Do the Benefits of a Receivership Outweigh Expenses of Administration?

BY DOUGLAS WILSON AND ROBERT RICHLEY*

At the expense of waxing philosophic, life often hands people situations in which there are only two kinds of choices: bad or worse. It is certainly the case in business when hard times or internal disputes threaten the viability and even the survival of a company.

The choices facing companies in financial or organizational crises are not pleasant and, therefore, not easy to make. One recurring problem is that companies wait far too long to seek an effective means to deal with whatever the problem is, preferring instead to plod along in denial. Then, when this deferred attention takes the company to the brink of insolvency, business owners often conclude they have no choice but to rush into bankruptcy court, ignoring other options such as a receivership.

It is not a case of ignorance as much as it is a common belief among business owners that a receivership is a very expensive process and that the owners whose business is being affected loses all control during the term of a receivership.

TRUE OR NOT?

It depends. Actually, there are many receivership cases that can be cost effective for a troubled company, and where management continues to play a meaningful role during the process.

For example, a receivership is a cost-effective alternative to bankruptcy where there is a true conflict or dispute between or among the business's partners. Economics may be the core of their dispute, but not necessarily. It may well be a control squabble, or, just as likely, differences over the strategic direction the business should take in any number of situations.

Whatever the reason, these conflicts have at least two things in common: If the conflicts are not resolved, the company's viability will be negatively impacted, and the conflicts can only be resolved through outside intervention in order to assure the company's assets aren't jeopardized.

A third-party receiver can come in and, based on the scope of the receivership order, bring about a resolution. While the receiver is a neutral party, under the direction of the court and not beholden to the individual owners, a good receiver communicates openly and proactively with all the parties in order to bring about an effective solution through collaboration. The objective here is that all parties will be able to stipulate to the actions taken by the receiver. Under this scenario, with cooperation from the antagonistic parties, the receiver can accomplish the objectives of the receivership at a reasonable cost.

Receiverships also are less disruptive than bankruptcies since the company continues to operate during the process without any formal announcement, and the expenses of the receivership are funded during its term with completion of the payments handled at the time the receiver files the final accounting with the court.

Since the company is still operating on a day-to-day basis, its creditor issues are handled in the regular course of business. In some respects, creditors are just as important a group of stakeholders as the business owners. It is not only the business owners who may put the business into bankruptcy: creditors also have the option to file an involuntary bankruptcy in cases where the company's economics are upside down and creditors aren't being paid.

It is important to keep in mind that the receiver is a single-source solution to the problems the subject company has. Once a bankruptcy proceeding is initiated, voluntarily or otherwise, all receivership activities that were in place to keep the company operating day to day cease immediately. This can have a tremendous cost impact, a fact many owners don't take into account in deciding whether to pursue a receivership or the bankruptcy process.

On the other hand, a bankruptcy filing immediately freezes the company's debt structure, to allow management time to attempt to develop a reorganization plan. Such proposed plan is then presented to the creditors and court for approval. If approved and feasible, the plan may allow the company to emerge from bankruptcy and continue its business operations.

A great deal of cooperation from the creditors is usually essential in a bankruptcy case, depending on the company's financial condition. Along with existing company management, there is a bankruptcy creditors' committee that has a direct influence in determining the future of the company.

In bankruptcies, there is the dreaded issue of liquidation and the resultant situation in which creditors will opt for the best current value they can achieve. That well may not be in the best interests of the company's owners and management.

Continued on page 13 ...

Continued from page 12.

So, WHAT DOES ALL THIS MEAN?'

Company owners need to think long-term, and in both the best interests of the company and of themselves, as partners. Bankruptcies are all too often a knee-jerk "let's-put-it-out-of-its-misery" response on the part of owners, wearied by all the business's problems and disputes. Owners need to take into account and seriously consider all available options to solve partnership disputes and financial problems.

Nor should the initial cost be the sole deciding factor. A receivership may appear at first to be a more costly approach, but it often is more cost effective in the long term. This is especially true where the use of a receiver keeps in place all the vision, all the hard work, and the financial commitments that built the company into a successful-enough enterprise to give rise to such disputes and conflicts. The value of this continuity in the life of the business needs to be taken into account when selecting the right tool to resolve business control or financial difficulties.

Douglas Wilson is president and CEO and Robert Richley is COO and general counsel of the Douglas Wilson Companies, a diversified real estate and business services firm specializing in problem resolution, receivership, and conflict resolution. With headquarters in San Diego, and offices in San Francisco, Los Angeles and Denver, the company has handled more than 400 matters and over \$3 billion in assets throughout the Western United States. They may be contacted at dwilson@douglaswilson.com and richley@douglaswilson.com.



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Bankruptcies are all too often a knee-jerk "let's-put-it-out-of-its-misery" response...

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Receivership Professional Profile

PETER ITO – A MAINSTAY OF SAN DIEGO’S RECEIVERSHIP AND BANKRUPTCY BAR

This is the first in a series of profiles of prominent receivers and receivership professionals that will appear regularly in the California Receivership News



Peter W. Ito heads the West Coast bankruptcy practice of *Foley & Lardner*, a national law firm with more than 1,000 attorneys. During his 15 years of practicing in the San Diego area, Mr. Ito has worked primarily in bankruptcy, financial restructuring, creditors' rights and structured finance. In addition, Mr. Ito has significant experience in representing and counseling directors and officers of troubled companies, securitizations, and in provisional and post-judgment remedies. *California Receivership News* asked Mr. Ito to provide a biographic sketch for our first *Receivership Professional Profile*.

I was born in Denver, Colorado in June 1963, where I was adopted by Sueo and Taeko Ito. I have one sister, Emilie. I am most proud of my parents and their accomplishments. Both are second generation Japanese Americans. I am so fortunate to have been adopted by my parents — the principles and values that I learned from them permeate every facet of my life.

My father was born in Hawaii in 1919, where he started working in the sugar cane fields at the age of 7. He earned a degree in agriculture at the University of Hawaii, taught agriculture at that institution, and then served during World War II as an officer with the Military Intelligence Service. After the war, he served as an interpreter in many war crimes trials, including the trial of General Yamashita, the infamous "Tiger of Manila." After leaving the service, my father attended dental school and, upon graduation, joined his three brothers in their dental practice in Denver, Colorado.

My mother was born and raised in San Francisco. As a teenager, she was interned

along with 112,000 other Americans of Japanese ancestry, spending four long years at a relocation camp in Heart Mountain, Wyoming. She returned to San Francisco after the war, staying there until she married my dad and moved to Colorado, where they still reside.

My life has been pretty boring in comparison. I spent my entire life in Colorado until I left to attend law school. I was active in sports as a kid — I participated in little league football, was an avid skier like my dad, who holds the rank of Rokudan (Sixth Degree Black Belt), I participated in Judo. I started Judo at about the age of 8 and continued until I was about 22. I won numerous Colorado state championships during that time, and competed in multiple national championships. I trained with the Olympic judo team at the Olympic Training Center in Colorado Springs, Colorado, for 18 months leading up to the 1984 Los Angeles Olympics. I was in very good shape at that point in my life (unlike my current physical condition). I also have fond memories of fishing with my dad on the rivers of Colorado, Utah and Wyoming, playing golf with my dad and family vacations. These are all things that I now do with my own family.

I earned a B.A. in political science from the University of Colorado in 1986, working as an intern with the Office of the General Counsel for the University during my last two undergraduate years. During that time, I became friends with one of the attorneys in the office, who recommended that I apply to Washington University School of Law in St. Louis, Missouri. I visited the school, met with the professors and

ultimately ended up going to school there. It was a wonderful experience. Washington University is the oldest private school west of the Mississippi, has an outstanding reputation and is located on a beautiful hilltop campus overlooking urban Forest Park, which is second in size only to New York's Central Park.

I developed life-long friends while at law school, one of whom is David Becker, one of my law school professors who I consider a mentor and close friend. David initially guided me to a career in bankruptcy. During my second year of law school, he suggested I intern with one of his former students, Barry Schermer, then a bankruptcy judge in St. Louis and now the Chief Judge of the United States Bankruptcy Court for the Eastern District of Missouri. I took David's advice and spent the summer with Judge Schermer. After my internship, Judge Schermer assisted me in obtaining a one-year appointment as a law clerk for the Honorable Louise DeCarl Adler, bankruptcy judge in the United States Bankruptcy Court for the Southern District of California.

My wife and I moved to San Diego upon my graduation from law school, where we have now lived for 14 years. After my clerkship, I joined the bankruptcy department at an old line San Diego law firm known as Jennings, Engstrand & Henrikson. Ross Pyle, a former Chief Judge of the bankruptcy court, headed the group of eight bankruptcy attorneys. Nearly three years later, the bankruptcy lawyers left to form a boutique bankruptcy firm — Pyle Sims Duncan & Stevenson, where I worked as a partner until leaving to join Baker &

Continued on page 15...

Continued from page 14.

McKenzie about four years later. In March of this year, after nearly five years with Baker & McKenzie, I left to join the San Diego office of Foley & Lardner. I head the West Coast bankruptcy practice for Foley.

In May, my wife Ashley and I will celebrate our 15th wedding anniversary. We have been together for 24 years. We have two beautiful girls, Kristin (8) and Megan (6), both of whom attend La Jolla Country Day School. Kristin is in the third grade and enjoys music, art and math. She plays the piano and occasionally does print advertising. She has appeared in a Guess Jeans advertisement for Vogue Magazine, a layout in Child Magazine and did a national commercial last Spring with actor George Hamilton for Old Navy. She is featured on the website for Gapkids.com. Megan is in kindergarten. Like her sister, Megan plays the piano. She plays softball and is interested in playing soccer.

As a family, we enjoy skiing and travel. Last year we took a two-week trip to Japan with my parents — a once-in-a-lifetime experience. We started in Tokyo and worked our way south, eventually finishing

our trip in Kumamoto, where my parents' relatives still reside. It was great to meet our relatives and to experience Japan with my parents. During part of our trip, we stayed two nights at a traditional Japanese Inn called a Ryokan. Thankfully, my parents speak fluent Japanese as no one who worked at the inn spoke English. The food was awesome and the culture incredible.

Before the trip we all committed to not eating any Western food — no McDonald's, no Kentucky Fried Chicken! Surprisingly, we lived up to our commitment. Kristin and Megan did a terrific job; they were great travelers and ate Japanese food the entire time. Their favorite was udon noodles. After a couple of scotches with relatives I tried "Bashimi," which is raw horse meat, a specialty in Kumamoto.

I am goal-oriented — I have set and continue to set both personal and business-related goals. One of my personal goals is to find ways to thank my parents for their support and the values that they taught me. Another is to give my girls the same opportunities that my parents provided for me. ■

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