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RECEIVERSHIP NEWS

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CANDID COMMENTARY

The Origins and Effects of the 2005 Bankruptcy Reform Act: An Interview with Chief Judge Randall J. Newsome

(The recent changes to bankruptcy law discussed by Judge Newsome affect, directly or indirectly, most members of the receivership community and the interplay of bankruptcy and receivership law. Ron Oliner, Esq. of the Buchalter Nemer firm's San Francisco office conducted this interview for the Receivership News.)

The Honorable Randall J. Newsome

The Receivership News is extremely pleased to present the following interview with the distinguished jurist the Honorable Randall J. Newsome, Chief Judge of the United States Bankruptcy Court for the Northern District of California. RN asked Judge Newsome about the impact of and implementation of the recent watershed changes to the United States Bankruptcy Code.

Judge Newsome is the right person to address this issue. He is among the nation's most experienced bankruptcy judges, having been originally appointed in October 1982 to the Bankruptcy Court for the Southern District of Ohio, where he served until May 1988.

Judge Newsome joined California's Northern District bench in June 1988, and was elevated to Chief Bankruptcy Judge on January 1, 2004.

He earned his B.A. from Boston University in 1972 and his Juris Doctor degree from the University of Cincinnati College of Law in 1975. Judge Newsome practiced with the Dinsmore and Shohl firm in Cincinnati prior to his elevation to the bench.

Judge Newsome has been widely honored by his peers and the community. From 1998 to 1999, he was President of the National Conference of Bankruptcy Judges. He is a fellow of the American College of Bankruptcy and is a frequent panelist and lecturer on bankruptcy issues for the Federal Judicial Center, the American Law Institute -American Bar Association and many other organizations.

RN: Judge Newsome, we would like to ask you about the Bankruptcy Reform Act, how it came into being and where it is going in practical terms. To begin, we understand that you testified before Congress in connection with the process some years ago. Can you tell us a bit about that?

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Publisher's Comments

BY ROBERT MOSIER, PUBLISHER*

This issue begins the revised Receivership News' fourth year of publication. It remains the only quarterly periodical that circulates to the entire California receivership and insolvency communities, including 1,200 federal and state court judges. RN has a circulation of 5,000 per issue, 3,000 hard copies and 2,000 via PDF format over the web. We receive substantial feedback after each publication date, indicating that judges, court staff, lawyers, accountants and administrators (as well as receivership professionals) regularly read the RN. We appreciate the support of our advertisers, who have made reaching this milestone possible.

We delayed this issue one month so its publication date would coincide with the annual California Bankruptcy Forum statewide conference – being held this year at the La Costa Resort in Carlsbad, California. Our cover feature is an interview with the Honorable Randall J. Newsome, Chief Judge of the United States Bankruptcy Court for the Northern District of California, on the history and implementation of the 2005 Bankruptcy Reform Act. Ron Oliner, our Associate Publisher/Editor for Northern California (and a partner in Buchalter Nemer's San Francisco office) conducted the Q and A session.

I find that the revised Code impacts my receivership practice daily. We all must deal with insolvency issues and often must weigh receivership and bankruptcy options. We thank Judge Newsome for taking the time to provide his historical perspective and insight into implementation of the Bankruptcy Reform Act of 2005. We hope you enjoy this interview.

Alan Mirman, Esq. is the subject of our Professional Profile this issue. He is one of our own, having authored our Heard in the Halls column since our redesign in 2002. Alan is a Los Angeles attorney with the Horgan, Rosen, Beckham & Coren, LLP firm, and specializes in receivership and insolvency law (in addition to idle rumor and rank gossip). He is an exuberant, thoughtful fellow, and we think you will enjoy learning a bit more about him.

Selling real estate is prominent in the daily life of a receiver. This issue wraps up two complementary articles on preparing assets for sale and contrasts the benefits and potential detriments of conventional and auction sale. You will also find our usual tax column by Charles F. Rosen, Esq., but will not find Peter Davidson's Ask the Receiver column. He is on hiatus this issue.

Please take a moment to visit the new, improved California Receivers Forum website, at http://www.receivers.org/. The website has many useful features and helpful information, including a library of all past issues of the RN since Spring, 2003. There either is or soon will be an index to past issues so one may search the wealth of information presented in the past 12 issues. Please refer to the website for more information. Hard copies of most back issues of the RN may be obtained by contacting Bob Mosier, Publisher, at Rmosier@Mosierco.com.

We hope you will enjoy our Spring 2006 edition of the RN.

**Robert P. Mosier is a Southern California trustee and receiver and principal of Mosier & Company, Inc., a firm that has specialized in managing and turning around troubled companies for more than 25 years.*

Robert P. Mosier

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NEWSOME: Well, first let me start by saying that this all started back in 1994 with Congress setting up a commission to investigate revision of the bankruptcy laws. At the time, it was advertised as essentially fine-tuning the law rather than completely changing it. Without going into a lot of detail, the lending community became disenchanted with the commission process and came up with its own bill. The first one was introduced in the House in September of 1997. The second one was introduced in the Senate on October 20, 1997, the day the Bankruptcy Review Commission issued its report. A third bill, which more closely resembled what ultimately was enacted, was introduced in the House in February of 1998.

"THE SPONSORS OF THE STUDY REFUSED TO RELEASE THEIR SUPPORTING DATA...SO I DECIDED TO LAUNCH OUR OWN EMPIRICAL STUDY..."

I was asked to testify on that third bill by the House Committee on Commercial and Administrative Law. I was asked on a Friday to testify on Tuesday and to have my testimony submitted by Monday. So to say that I worked all weekend on it doesn't really do justice to what I actually had to do. While I had gone over the bill, I hadn't really tried to apply it and once I did I found it almost impossible to do. By the way, that hasn't changed.

I ended up testifying on a panel with Judge Edith Jones from the Fifth Circuit and Lloyd Cutler of Wilmer, Cutler & Pickering. Both of them were testifying essentially on behalf of the creditor community and in favor of the bill. I was the only spoilsport on that panel. Ultimately that bill wasn't enacted.

I became President of the NCBJ in October, 1998. I realized that we had been caught completely off guard by what happened earlier that year and that we weren't prepared to respond as an organization to what was being said.

There were three or four big themes that were promoted as justification for the bill. First they claimed there was no stigma left to filing for bankruptcy. Second, they argued that there are lots of bankruptcy debtors that can afford to pay. In support of this proposition, they trotted out a study that said that at least 15% of the people in Chapter 7 could afford to pay in a chapter 13. The sponsors of the study refused to release their supporting data, however.

So I decided to launch our own empirical study. I had close to 66 judges participate with randomly selected Chapter 7 cases that were pulled in their districts. We presented data on 17 or 18 different categories of information. We ended up with about 5,000 cases, 3,000 of which were from 1997. The long and the short of it was that our data showed that a maximum of probably 3% of the people in Chapter 7 could actually afford to repay something in Chapter 13.

The median income of the people that were filing Chapter 7 from all over the country was about $21,000 and the median unsecured debt, meaning credit card debt and so forth, not priority debt, was like $23,000. These numbers were totally contrary to the numbers previously presented to Congress, and were consistent with the numbers arrived at in other studies.

I presented our findings in testimony before the House Committee on Commercial and Administrative Law in March of 1999. My testimony is a matter of record. I thought we were involved in a principled debate. Although I was told that the deal was already done, I didn't really believe it until later. But that really was the case. Essentially no one was listening. My testimony and that of others from the bankruptcy community was really window dressing, and I probably wasted everybody's time putting all this data together, although I didn't and don't regret it.

The bill stumbled along and I believe that 1999 was the year that President Clinton vetoed the bill. Well, we had an election in 2000. The bill was reintroduced and I was asked to testify yet again, this time before the full Senate Judiciary Committee in 2001. My feeling was "Oh God, not this again. Why am I doing this?" But it's hard to say no to the Senate Judiciary Committee. So I showed up and stumbled around and basically said the same stuff I said two years before. Predictably, the proposed bill passed by a huge margin, just as it had in the past. Once President Bush was re-elected in 2004, my feeling was that the ballgame was over, and that the bill would finally pass and the President would sign it. And he did, in April of 2005.

RN: Generally speaking, in your view, what's good about the Bankruptcy Reform Act insofar as substantive changes?

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Newsome Commentary...

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NEWSOME: What's good about the Act? You know, this is going to make me pretty unpopular I suppose, but I'm used to that. I don't think some of the Chapter 11 changes are that bad. I don't think it was ever right for a chain store to come into bankruptcy and sit on leases forever and ever and ever. I think that's wrong. Landlords should have the right to know what's going to happen to them within a reasonable period of time. It got so bad I had cases in Delaware where the debtor didn't want to assume the leases or decide whether to assume the leases until after confirmation. And I refused to go along with that. After confirmation of course, there is no debtor-in-possession and 365 doesn't even address what happens after confirmation. So I think that's an example of a worthwhile change.

I think the intent of some of the changes to the Act as to consumers isn't totally bad. Like the desire to cut down on frequent filings to stop foreclosures. Unfortunately, and everybody was told this, the manner in which the drafters of the Act tried to do it doesn't work because no matter whether you say that there's an automatic stay or there isn't an automatic stay, no title company is going to go forward with a foreclosure until they get an order from the Court that memorializes the fact that there is no stay. This is true even if the Act itself says there is no stay.

RN: Any thoughts about exclusivity, another big Chapter 11 substantive change?

NEWSOME: Well, there's a good point. Back when I first started in this business in 1982, nobody ever anticipated that exclusivity was going to go on forever. Suddenly, it became an entitlement in big cases that it would go on forever. The first time I heard of anybody threatening to lift exclusivity in a big case was in Texaco. And it got the job done, too.

> **"The Act was structured in a way to keep people out of bankruptcy...."**

In any event, nobody anticipated that the debtor would continue to hold all the cards for years and years and years in Chapter 11. So did they make it too short? I think they probably did in terms of the amount of exclusivity. You'll never be able to do a plan in an asbestos case in that much time, for example. But is the limitation reasonable in a lot of other kinds of cases? Probably. So I don't think that was all bad and I think it was something that was kind of a festering sore in the creditor community. I don't think it is a bad change.

RN: Looking at the kinds of issues you are dealing with post-October 17, what about this whole concept of consumer counseling before someone is entitled to file a bankruptcy? A prospective debtor has to go talk to a sanctioned counselor about his or her financial options and so forth. Are consumers complying with that? To the extent they are not, are you kicking them out of bankruptcy as the new Act seems to require?

NEWSOME: Well the answer is that apparently some of them are. The fact is we have very few cases. We had a combined total of only about 400 cases filed in this district in November and December of last year. I haven't seen the statistics for January and February. But you're talking about a district that traditionally had, before 2005, around 20,000 cases a year. To have 400 cases filed in the whole district for two months gives you an indication as to what happened. I might note that we had 9,000 cases filed in the first two weeks of October. So we kind of flushed out, if you will, those people who were on the fence. If they were trying to decide whether to file, they obviously decided by October 16. In any event, the credit counseling requirement is an example of the way the statute is structured.

The Act was structured in a way to keep people out of bankruptcy, not to move them into Chapter13, which was its claimed purpose. The real purpose of the bill was to keep them out altogether. And if they got in, to throw them out and if they got thrown out, to keep them out. That's what the bill's intent was notwithstanding what everybody was saying the bill's intent was. So the credit-counseling requirement has turned out to do an excellent job at that. Many people don't think about filing until the last minute, just before the hammer drops on a foreclosure, for example. They don't try to get credit counseling within five days prior to the filing. They try to get it the day of the filing and by that time they may not be able to get it.

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Commercial Real Estate Dispositions 101: A Primer for Receivers

By Kevin P. Cavanaugh, CPA*

(This concludes the outstanding article on preparing commercial real estate for sale, begun in our Winter issue. The first portion stressed the importance of complete and clear disclaimers to protect the receiver and the six topics every disclaimer should address. Part Two walks the receiver through preparation of confidentiality agreements, pre-qualification of buyers and completing the transaction. Ed.)

Confidentiality Agreements

Much of the information assembled for dissemination to potential purchasers may be sensitive and require safeguarding. The receiver loses control of the information upon dissemination to a broker or potential purchaser, however. For this reason, the receiver should obtain a properly executed confidentiality agreement from persons to receive the information prior to delivery.

Like disclaimers, confidentiality agreements are extremely varied. There are core critical items that belong in any well-crafted confidentiality agreement, however. Here is a non-exhaustive list of those critical items *(again, commentary in parentheses):*

1) The information being provided is gathered from what are believed to be reliable sources *(as was the case with the disclaimer, the difference between belief and reality could be enormous);*
2) The receiver makes no representations or warranties regarding the information's accuracy and will have no liability in the event that it is wrong *(again disclaimer-type language alerting the recipient that he / she should independently verify all information);*
3) The information provided will be kept confidential by the recipient *(and anyone remotely associated with the recipient who has access to the information);*
4) The information provided and any information, analyses, etc. derived from the information must be returned by the recipient immediately upon request *(compliance verification with this provision could be problematic, if not impossible);* and
5) The recipient will defend and hold the receiver harmless for any misuse of information or breach of the confidentiality agreement *(if you release this information and anything bad happens, you are paying our attorney fees).*

The terms "we" and "us" are meant to include the plaintiff, the defendant, any lenders or stakeholders, the receiver and, of course, anyone associated with those parties. In our litigious society it is naïve to believe that even the most bullet-proof confidentiality agreement (or disclaimer, for that matter) will shield the receiver from all lawsuits. The confidentiality agreement together with the disclaimer should provide valuable defenses for the receiver if the matter winds up in court, however.

Now, assuming all goes well, the receiver may receive an offer or letter of intent from a prospect. What does the receiver do next?

Qualification of Buyers

Once a potential purchaser delivers a letter of intent offer to purchase the property the receiver must qualify the prospect. This is important to avoid wasting your valuable time and that of the court, the parties and the involved attorneys. Working through the purchase and sale agreement only to discover that the buyer is either financially incapable of completing the transaction or is disreputable does not benefit anyone. A receiver will need to research both the financial capabilities of the potential purchaser and his/her/its reputation/track record to avoid winding up in this unpleasant situation.

A simple request for financial statements, references and details of recently completed real estate transactions with contact information for the parties involved will assist the receiver in the investigation. While in theory obtaining this information should not be difficult, it often is. Resistance to a receiver's request should be a flashing red light indicating that the receiver is probably dealing with an unqualified buyer.

Another method to obtain this information is to require that it be included with any written offer, as a condition of the offer's validity. A receiver may need this information to substantiate the fact that he or she was acting in the best interests of the receivership estate, so obtaining this information at the outset of the transaction is a good idea.

Once obtained, the receiver must verify and analyze the accuracy of the prospective purchaser's business information and financial statements by contacting the parties and references identified. Furthermore, the internet should be used in this exercise to perform a basic search of the individual prospect's name (and entity name, if applicable). Finally, the receiver should use her/his

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If they file without unsuccessfully having sought credit counseling within 5 days prior thereto, the Code seems to say we have to dismiss the case for lack of eligibility. Numerous published decisions have been issued so interpreting the statute, the most recent one being authored by Judge Montali of this District. For most of these people, what is the penalty? It probably won't be any more than a new filing fee, which by the way is going up to $299.

RN: Many creditors' lawyers may find themselves on your relief from stay calendar more seldom that under the prior law. There were always a number of bad faith filers in the system. How do you feel about the in rem provision? [Ed. Note: This refers to new section 362(d)(4) that in appropriate circumstances makes the granting of relief from stay prospective for a period of two years regardless of changes in ownership to the real property in question. This provision is designed to avoid serial bad-faith filings for the purpose of forestalling foreclosure by secured lenders.]

NEWSOME: That's a good thing.

RN: Are you of the view — and it may be too soon to tell and the cases too few to draw any conclusions yet — but are you of the view that the unworthy debtor who is just trying to save real property he can't afford and is not paying for is not filing as frequently now?

NEWSOME: I don't know. It's too soon to tell. It's too soon to really tell what's going on with this bill. We haven't had enough cases filed. I have had a couple of instances where I've thought to myself you know I am glad there is no stay in this particular case because this guy shouldn't have a stay. But I know the creditor is still going to file the motion and seek an order that says there's no stay.

RN: What's going on in Chapter 11 in your court? The generally held assumption is that there isn't a whole lot of Chapter 11 work.

"The trends that I see are that this Act isn't going to make any difference at all in the long run."

NEWSOME: I wouldn't know. I don't have any Chapter 11s to speak of. My Chapter 11s consist of maybe a guy with a small plant and 15 employees. He doesn't exactly qualify for what's going on in Chapter 11 as far as I'm concerned. And I only get one of those every six months. So I really don't know what's going on in Chapter 11.

RN: Can you rub your crystal ball and glean any kind of longer-range trends that are going to arise as a result of the Act? How is the world going to look different to you from your desk and from the bench?

NEWSOME: The trends that I see are that this Act isn't going to make any difference at all in the long run. And the reason is that I believe we may be cooking up a really perfect financial storm. Adjustable mortgage rates are going up, and house prices are flat or declining, which means that people who probably couldn't even afford the tickler rate they got when they bought the house will be really struggling to pay the new rate, and they may have a hard time refinancing to a rate they can afford.

Second, we've now had an increase in minimum payments on credit cards, which in some cases may mean the minimum payments will double. That's a tough nut for a nation where the average family is carrying about a $10,000 balance on their credit cards.

Third, we may be moving into a weaker economy going forward, but people continue to incur more debt. At some point the piper has to be paid. So I think eventually filings are going to creep right back up to where they once were. Now, could I be wrong about that? Obviously I could. I don't have a crystal ball. But one thing I know is, this bill didn't change mathematical principles. If your debt burden has outstripped your income, your choices are few and they're all bad, the most obvious being bankruptcy, regardless of what it takes to file. And I think that's probably the bottom line. ■

Auctions: Resolving the Distressed Receiver's Dilemma

By Mike Walters and Stephen Karbelk*

(This concludes the article on auction sale of real property to achieve maximum value for receivership properties, begun in the Winter 2006 issue of RN. Part One discussed how an auction sale avoids listing price and selling price valuation issues and costs of property preservation resulting from a conventional listing. It also discussed how all costs of sale could be transferred to the purchaser and the property can be sold without representations or warranties in an auction setting. Ed.)

Marketing

The key to ensuring a "commercially reasonable sale" is to expose the property to potential purchasers through a strategically implemented marketing campaign. While there is currently an abundance of capital pursuing all types of real estate, there are many first time buyers entering the market who do not work with conventional brokers. A recent CCIM report disclosed that more than one-third of commercial real estate buyers in 2005 were first time buyers.

Reaching out to this market is key to obtaining maximum value for a property. Exposing the property through website placements, e-mail campaigns, newspaper ads, direct mail pieces and other guerilla marketing techniques accomplishes this task. A well-executed auction marketing campaign will expose the property to conventional and nonconventional buyers, adding legitimacy to the process while insuring a commercially reasonable sale.

Positioning the Property

A little distress never hurt a sale. Buyers are looking for distressed properties and value-added opportunities. In a recent sale of an industrial property in Irvine, California, eleven buyers qualified to bid for the property that had an estimated pre-sale value of $3,300,000. After spirited bidding, the property sold for $4,400,000, a 33% increase. When the successful bidder was asked what he planned for the property he responded that he was going to tear it down and build an office building. The property was not worth the bid price as existing industrial property but the auction process brought out alternative users and added value.

We seldom recommend pre-sale upgrades or improvements to properties (in non-contentious situations) because of this potential for value added buyers. These decisions about the property should be left to potential buyers, each with a long-term vision for the property. There are other reasons to leave renovations or improvements to the purchaser:

1. The buyer can usually make renovations for less than the receiver.

2. The time it takes to recover the costs of renovation may be too long i.e. doing tenant improvements on a shopping center can often take years to recover.

3. If a property has multiple potential uses, the repairs and improvements (in a non-contentious sale) made might not be for the highest and best use as defined by the market. For instance, if a big box is vacant in a shopping center, how can the receiver know if that space is best suited for another big box retailer, or should be divided into smaller spaces for smaller retailers, or even converted into another use, like offices or self storage?

There can be a large net benefit to selling a property as-is and letting the potential buyers bid accordingly.

Creative Solutions

Every receivership has its own nuances. Each step in receivership administration should be considered in terms of enhancing potential net recovery for the estate. Animosity often exists between the parties that can limit potential solutions. Auction sales provide a tool for avoiding many such roadblocks, however. In partnership disputes, for example, allowing the competing parties to bid for assets at a properly conducted receiver's auction can be the perfect open forum to preclude any possibility of an insider deal. Special allowances can be made for credit bidding and loan assumptions, with prior court approval.

Conclusion

It is certain that the "Distressed Receiver's Dilemma" and the receiver's uncomfortable position squarely between competing interests will not change. But the open, public forum and level playing field of properly-conducted real property auctions affords a tool to maximize estate values while reducing potential liability to receivers.

**MIKE WALTERS, senior partner of Tranzon Asset Strategies, a financial company specializing in real estate sales, is also a member of Tranzon, LLC, an auction marketing company with 20 offices nationwide.*

Mike Walters

**STEPHEN KARBELK is a partner of Tranzon Fox, a Tranzon, LLC affiliated company specializing in real estate marketing and sales in the mid-Atlantic region.*

Stephen Karbelk

Continued from page 5.

own industry contacts to find out what is generally known about the prospective purchaser. By using such attorney, lender, vendor, real estate broker and tenant contacts, the receiver will probably be able to assemble a representative file on the prospective purchaser's track record and reputation. This information will enable the receiver to make a well-supported recommendation about the advisability of continued negotiations with a given prospect.

Conclusion and Disclaimer

As the title of this article suggests, this discussion is only intended as a primer and is not an exhaustive discussion of the mechanics of sale of a commercial real estate asset. As is always my practice, I highly recommend that each receiver consult with his or her own legal advisor as to how best to handle the documents and procedures I've discussed as they relate to each particular property and situation.

I purposely have not discussed either the negotiation of an offer or the resulting contract, as the multitude of nuances associated with the "art of the deal" is a subject unto itself (as are the legal protections that should be integrated into a commercial real estate contract).

Nor have I attempted to address how to best determine the adequacy of a given offer. Suffice it to say that market knowledge equals power. A receiver can be instrumental in facilitating a sale of commercial real estate by crafting a well-thought-out confidentiality agreement and by carefully compiling the required due diligence information, bringing substantial value to the marketing and selling process. ■

Kevin P. Cavanaugh

**KEVIN P. CAVANAUGH, CPA is the Managing Director of Douglas Wilson Companies' San Francisco office. He is also a licensed real estate broker in the states of California and Florida and has participated in more than $1 billion in commercial real estate sales.*

IN CASE YOU'VE FORGOTTEN... SOME RECENT RECEIVERSHIP NEWS ARTICLES ON TOPICS OF CONTINUING INTEREST*

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♦ John M. "Jack" Wolfe	949-476-2696	jackwolfe@sbcglobal.net
♦• Adrian Young	909-945-4586	adrian@delmar1.com
Andrew R. Zimbaldi	714-751-7858	azimbaldi@aldenmanagement.com
San Diego Area		
■♦ M. Daniel Close	858-792-6800	closeedr@msn.com
■♦• Martin Goldberg	858-560-7515	marty@cni4you.com
• William J. Hoffman	858-720-6701	bill.hoffman@trigild.com
• Richard M. Kipperman	619-668-4500	rmk@corpmgt.com
Douglas P. Wilson	619-641-1141	dwilson@douglaswilson.com

• The bullet indicates those receivers who completed a comprehensive 16-hour course on receivership administration and procedures presented at Loyola Law School in April 2000.

♦ The diamond indicates those receivers who completed a comprehensive 16-hour course on receivership Administration and procedures presented at Loyola Law School in October 2004.

■ The square indicates those who facilitated the October 2004 Loyola Law School course.

Douglas P. Wilson
Douglas Wilson Companies
Tel: 619-641-1141
dwilson@douglaswilson.com

Is pleased to announce
its appointment as

Receiver for
LaTour Partners, LLC
A Condominium Conversion

Superior Court of Fulton County
State of Georgia

Douglas P. Wilson
Douglas Wilson Companies
Tel: 619-641-1141
dwilson@douglaswilson.com

Is pleased to announce
his appointment as

Receiver for
Bonaparte Partners, LLC
A Condominium Conversion

Circuit Court
State of Florida

Robert C. Warren III
Investors' Property Services
Tel: 949-660-7978
rob@investorsHQ.com

Is pleased to announce
his appointment as

Receiver for
Caltron Construction
An Operating Company

Superior Court
County of Los Angeles

Thomas A. Seaman, CFA
Thomas Seaman Company
Tel: 949-222-0551
tom@thomasseaman.com

Is pleased to announce
his appointment as

Federal Equity Receiver for
Carolina Development Company
An S.E.C. Enforcement Action

U.S. District Court
Central District of California

Beverly N. McFarland
Kevin J. Whelan
The Beverly Group, Inc.
Tel: 916-783-3552
beverlygroup@att.net

Are pleased to announce
their appointment as

Receiver for
Central Valley Dairyman,
a California food & agricultural
nonprofit cooperative association
An equity Receivership

Superior Court
County of Merced

James H. Donell
Jalmar Properties, Inc.
Tel: 310-207-8481
James.Donell@Jalmar.com

Is pleased to announce
his appointment as

State Court Receiver to
sell a building and fixtures in
satisfaction of a judgment

Superior Court
County of Los Angeles

Thomas Henry Coleman
Tel: 661-284-6104
thomas-coleman@sbcglobal.net

Is pleased to announce
his retention as

Counsel for the
Receivership Estate
of Saxonia Apartments, Ltd.
Rents and Profits Receivership

Superior Court
Central District
County of Los Angeles

Thomas Henry Coleman
Tel: 661-284-6104
thomas-coleman@sbcglobal.net

Is pleased to announce
his appointment as

Receiver for
Parr Development Company
of Santa Monica
Winding –Up of Real Estate
Partnership

Superior Court
Central District
County of Los Angeles

Edythe L. Bronston
Law Offices of Edythe L. Bronston
Tel: 818-528-2893
ebronston@bronstonlaw.com

Is pleased to announce
the completion of her duties as

Receiver for
Beautiful Dreamer
Sale of a movie

Superior Court
County of Los Angeles

David Pasternak
Pasternak Pasternak & Patton
T: 310-553-1500
djp@paslaw.com

Is pleased to announce
the termination of his equity receivership of

Master Home USA, Inc., in which he sold Wickes Furniture Company and distributed over $53,000,000 to the creditor banks.

He thanks his forensic accountants/tax advisors, Howard Grobstein and David Agler of Grobstein Horwath & Company, and his attorneys, Harry Hathaway and Steve Salch of Fulbright & Jaworski LLP, for their invaluable assistance.

Superior Court
County of San Bernardino

David Wald
Wald Realty Advisors, Inc.
Tel: 310-979-3850
dwald@waldrealtyadvisors.com

Is pleased to announce
his firm's engagement as

Investment and
development advisor
For the 7,000 acre
Black Oaks Ranch

WRA was retained by
Receiver David Pasternak

Tehachapi, California

Robert P. Mosier
Mosier & Company, Inc.
Tel: 714-432-0800 x222
rmosier@mosierco.com

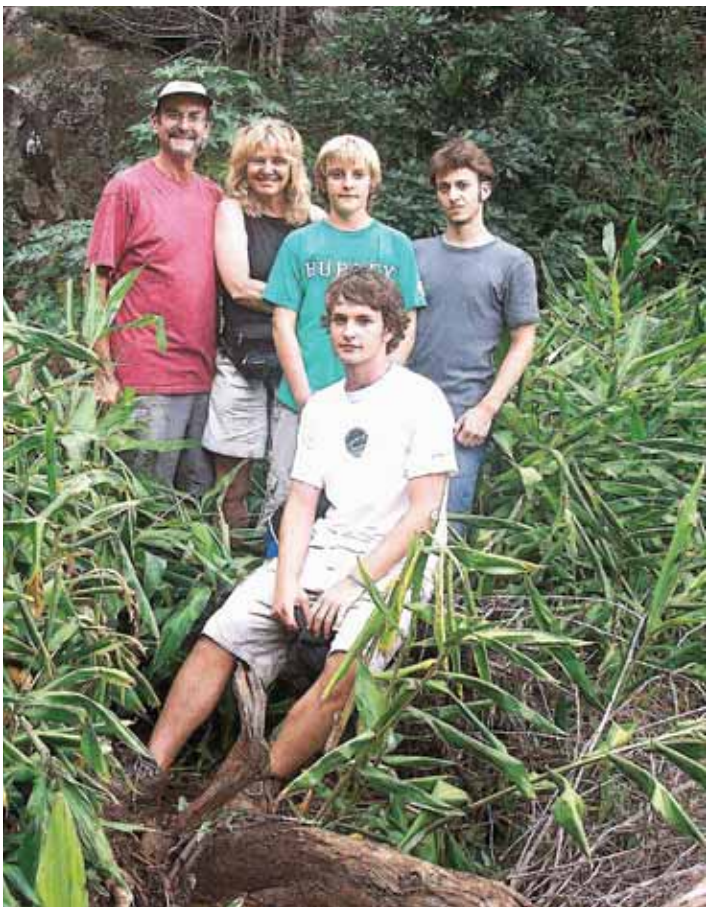
is pleased to announce
that he has completed a

100% payment plan to Creditors
as President & CEO
of a Chapter 11 Debtor,
Premier Laser Systems, Inc.

Federal Bankruptcy Court
Santa Ana

Alan Mirman's Philosophy for Success: Do Your Best Every Moment, At Work or Play

By Alan M. Mirman, Esq.



Traipsing the Tropics – The entire Mirman clan takes a breather during a vacation hike in Kauai's Alaki Swamp while in search of a remote waterfall. Alan and Nancy, his spouse of 23 years, and the boys: Aaron, 20, Zack, 17 and Jesse, 14.

When Bob Mosier invited me to write my profile for the Receivership News my first thought was how to make such a piece interesting to RN readers. I decided the right formula is a combination of personal background, career history and a little insight into our profession and why we do what we do. Here goes….

I've been practicing law for more than 30 years. That seems like a very long time, but in taking stock, I'm happy to say that I still enjoy what I do. Bizarre as it may seem, I knew as a junior high school student growing up in West LA, that I wanted to be a lawyer (actually, a litigator). This early focus on a career in the courtroom was one of the rationalizations I used when skipping Political Science theory seminars to play Frisbee with David Pasternak, then my undergraduate classmate at UCLA, and now my colleague on the Receivers Forum Board. We knew we wouldn't really need to learn the history of war, or the details of the soon-to-be moot Cold War anyway. Had I then anticipated some of the aggressive tactics used by litigators perhaps I would have paid more attention to the classes on warlike behavior.

I began practicing in the creditors' rights field after graduating from UCLA law school by joining Epport & Delevie, which by 1983 became Epport, Kaseff & Mirman. After five subsequent years of partnership with friend and law school classmate Allen Michel at Michel, Cerny & Mirman, I became a partner at Horgan, Rosen, Beckham & Coren in 1992.

I've always emphasized litigation, workouts, and documentation of loans and real estate transactions in my practice. My current firm represents numerous financial institutions and small businesses, and has a broad range of specialties, including corporate work, health care, and general business litigation. Needless to say, we also handle a great deal of litigation relating to receiverships.

Having practiced with "boutique" firms throughout my career, I am committed to the concept that small firms provide the best in talent, service, and "bang for the buck." I also like the lifestyle and the camaraderie found in smaller firms (at least in the firms with which I've been associated).

My practice also includes an emphasis on provisional remedies. I've served on the State Bar Debtor-Creditor and Bankruptcy Committee, and as Chair and Newsletter editor of the LA County Bar Remedies Section (then known as the Provisional and Post-Judgment Remedies Section). I'm also on the Commercial Law Committee of the LACBA Commercial Law and Bankruptcy Section.

One of the more interesting roles I played in this area was when I successfully lobbied for a revision to writ of attachment statutes to allow under-secured personal property creditors to obtain such writs. I've been retained many times as an expert witness in pre-judgment remedies cases and have spoken on many panels for the California Receivers Forum, various bar associations, and similar groups.

My involvement with receivership law began in the 1990's when I was appointed by Judge Robert O'Brien to the Ad-Hoc Committee on Receiverships, formed to propose standardized rules and forms in that area. I joined with many members of that committee to form the California Receivers Forum, and have been on the board of the LA/Orange County Chapter since its founding. Kent Johnson and I were the co-chairs of the Chapter in 2004. Faithful readers of the Receivership News know that I author the Heard in the Halls column, which regularly (but often unsuccessfully) solicits comments, questions or other input from the readership.

I have never served as a receiver but my practice has focused more and more in recent years on representing receivers, and the lenders who get receivers appointed. The cases have been varied and the work interesting. There is something to be said for representing the Court's appointed agent. Judges tend to support the receivers they appoint, so long as that receiver is doing a good job, reporting regularly, and working to keep expenses under control.

Continued on page 13...

Continued from page 12.

I can't overstate the importance of the receiver communicating well with the parties and the court, and of retaining the trust of the appointing judge. I'm honored to represent some of the finest receivers in the state. It can be a challenge to protect a "troubled" estate against multiple attacks by competing creditors, or to cultivate an atmosphere of cooperation when the parties have a history of litigation and animosity.

I come from a family of teachers and educators. My parents founded the Mirman School for Gifted Children, and I've learned a lot from my lifelong involvement with the school. I was Board Chair for many years, and now serve as a board and committee member. I have particularly enjoyed serving on the Board of Directors of the UCLA Law Alumni Association, the Los Angeles Regional Foodbank (a great charity to support), and Rampage Futbol Club, in addition to the Mirman School Board and the Receivers' Forum.

It is probably true that the personality traits that bring each person his or her successes as a lawyer, a receiver, a real estate agent, a property manager or in any other profession are reflected in the non-work components of one's life. In other words, even when a person is relaxing he or she tends to bring the same characteristics to "play" that they bring to work. I've taken a look at some of the consistencies in what I do at work and when away from work, and imagine that you might find the same consistencies about yourself.

My avocations seem in many ways like mirror images of my vocation, in other words. Besides my number one avocation — which is my focus on family — my hobbies are golf, soccer refereeing, and vegetable gardening. No diving with sharks or hang-gliding in my game plan. I have been married for 23 years to my wonderful wife Nancy. Ours is a "my 3 sons" family, with Aaron, 20, a sophomore at Oberlin College in Ohio, Zack, 17, finishing his junior year in high school, and Jesse, 14, getting ready to start ninth grade in the fall. Soccer and music fill our home, and our love of travel leads us to regular and relatively lengthy vacations, most recently to Spain, Hawaii, Italy, Greece, Costa Rica and the Yucatan.

I say that avocations mimic vocations (or is it vice-versa?) because I realize that refereeing a soccer match is like being a lawyer in so many ways – it requires the extrapolation of a set of laws to apply to a given situation, usually with extremely little time to make the analysis, and one or more affected parties ready to argue passionately about the result. At least the referee gig isn't sedentary and I'm pleased to say that confirming letters and requests for sanctions are not part of the terms of engagement.

This is also true in golf. There, as in the legal arena, one is always "practicing." We know that success depends on doing our best at every moment, and that we must learn to manage the game instead of taking wild risks. Whether one takes the safe approach by laying up instead of aiming for the narrow space between the trees, or by advising the client to settle instead of rolling the dice with a jury, attorneys are often risk-adverse.

How do practicing law and vegetable gardening complement one another? Organization, advance preparation, paying attention to the calendar, and constant tending – these are the keys to success.

I hope I've provided some food for thought. If you have a comment, please send it to me for my Heard in the Halls column. That will ensure someone is reading it. ■

CHUCK DOES TAXES

Does Constructive Trust Raise Harmed Parties' Claims Above Pre-Receivership Tax Debts?

Suppose you are the receiver for a defendant business, an investment scam or similar venture where claimants were harmed by the fraudulent acts (civil or criminal) of the receivership entity or its principals. Your appointing order directs you to take control of the entity's assets, recover misappropriated assets and/or funds, and reduce the assets to cash for distribution to valid claimants. As additional duties you are directed to reconcile financial records, incur and pay appropriate administrative expenses, file appropriate reports with the court and regulatory agencies, and file and pay tax returns of the receivership estate.

Your sleuthing determines that the defendant(s) is/are indebted up to their collective eyeballs to taxing authorities — either pre-receivership tax debts or tax debt incurred as the result of the receiver's sales. Can you as receiver legally avoid paying these taxes and preserve the estate's assets for the harmed parties?

First (and most important!) — Federal statutory law and reported cases make it clear that you as receiver may pay your reasonable costs of administration (including any taxes on receivership administrative operations) before pre-receivership tax liens attach. Thus be sure to first make a detailed application to the court for allowance of your fees and expenses and distribute what the court allows.

Second, in cases where it can be established that creditors / investors of /in the receivership entity were indeed defrauded, the receiver may ask the Court to determine (by motion or otherwise) that the funds held by the receiver are held in 'constructive trust' by her/him for the benefit of the defrauded parties.

State or federal law will determine whether and to what extent a constructive trust will be imposed over assets ostensibly belonging to the defendant receivership entity. Successful imposition of a constructive trust will endow the trust beneficiaries – the defrauded creditors — with a non-statutory priority over other creditors (including tax creditors) of the receivership estate.

Speaking generally, a constructive trust may be imposed to exclude property from a defendant's estate as a remedy where the debtor wrongfully deprived another party of some right, title, benefit, or interest in the indicated property. Proof that the debtor acquired the property in issue by wrongful or fraudulent conduct may not be required to establish a constructive trust, however. Instead, the remedy may be imposed by the court when it appears the debtor entity would be unjustly enriched if permitted to retain interest in the property. A motion seeking the imposition of a constructive trust should include substantial evidentiary support for the allegation of fraud, however. The court should include its findings of fact validating the fraud theory and constructive trust determination in its order.

But the best case in the world for imposition of a constructive trust will be for naught if notice of your motion – including a copy of the pleading and supporting documents, etc. – is not properly served on all appropriate taxing authorities and government attorneys.

Giving notice serves two purposes. First, it puts the government on notice of your action and allows the government to respond accordingly. Second, and even more important, it gives you as receiver a far better chance of prevailing against a later government attempt to set aside the court's constructive trust order.

It is not uncommon for the Federal government to come into court months (or years) after a state court has granted a constructive trust motion, arguing that the court's decision was in error because of a lack of jurisdiction or because it misunderstood applicable substantive law. If you, as a careful receiver, properly served the government with full notice of the intended action and the government failed to take part in the proceedings, the government will likely not appeal the court or bring a new action to overturn the constructive trust. Affording the government an adequate opportunity to timely object to jurisdiction will weaken any jurisdictional argument the government may wish to make after entry of the order.

What must a receiver do to ensure full notice (and complete disclosure) of the intended action to all interested agencies? I shall limit my suggestions to cases filed in either California Superior Court or in U.S. District Courts located in California. With respect to state agencies, be sure to give notice of the hearing and a copy of the motion by certified mail to each state taxing agency that might have a claim to the funds. All three California taxing authorities — the Franchise Tax Board, the State Board of Equalization and the Employment Development Department — maintain special procedures branches in Sacramento that are designed, in part, to serve as the conduit to the agency for service of process. Also be sure to serve the California Attorney General, also by certified mail, since that office is the state's lawyer.

With respect to the Federal government, in most instances the taxing authority involved will be the Internal Revenue Service, but other taxing agencies or regulatory authorities like Customs (now a part of I.C.E.), the main U.S. Treasury, and the Securities and Exchange Commission (among many others) may be involved.

To provide notice to the IRS both notice and the pleading should be sent by certified mail to the Civil Suit Advisor in the Advisory Unit serving your geographic area of the court. This used to be part of the old IRS Special Procedures Branch and the old SPB mailing address may still be used.

Service of the notice and pleading should also be made by certified mail to the local U.S. Attorney's office (in the Central and Northern Districts of California: address it to the Tax Division of the U.S. Attorney's office). Finally, service by certified mail should be made on the United States Attorney General. This is best done by mailing the notice and moving papers to Chief, Tax Division – Civil Trial West, U.S. Department of Justice, P.O. Box 683, Ben Franklin Station, Washington, D.C. 20044 or to main Justice, at simply Washington, D.C. 20530.

Of course, by giving notice you are inviting government opposition to your motion. Even so it is wise to face this issue if it is going to be raised before you have disbursed all funds to other claimants. ■

**CHARLES F. ROSEN, ESQ. of the Law Offices of A. Lavar Taylor has substantial tax expertise involving receiverships and bankruptcy. Mr. Rosen served as a bankruptcy advisor for the Special Procedures Branch of the Internal Revenue Service for more than twenty years.*

Charles F. Rosen

Heard in the Halls

Notes, Observations, and Gossip Relayed

by Alan M. Mirman, Esq.*

Welcome to the seventeenth edition of Heard in the Halls. Provide your snippits of news about the receivership professional community by telephone, mail, fax, or email to: Alan M. Mirman, Horgan, Rosen, Beckham & Coren at 23975 Park Sorrento, Suite 200, Calabasas, California 91302. Phone: (818) 591-2121; Fax: (818) 591-3838; email: amirman@horganrosen.com

Here is what we have Heard in the Halls …

★ Check it out: The newly revamped Receiver's Forum website is up and running. The directory includes extensive search capabilities. It is open to non-members, and would seem to be a good opportunity for receivers, lawyers, vendors, etc. to get referrals, etc. Go to www.receivers.org

★ Jim Lowe is the incoming State Chair. He has been an active member of the Central Coast Chapter for years. His work includes numerous agricultural receiverships (from vineyards to calf ranches), as well as management and business consulting. Jim reports that the Chapter congratulates Irene Clements, Peter Zeitler, Gary Lento, Terry Long and Jim Gerone for their appointment to the Board of Directors of the Central California Receivers Forum. The Chapter also thanks its new officers: Cecelia Dorian, Chairman; Terry Long, Vice Chairman; Irene Clements, Secretary; and Debbie Stimpson, Treasurer. Clifford Bressler and Jim Lowe are the new State Delegates.

★ What do you think? – Plaintiff sought appointment of a receiver over a restaurant that was serving alcohol to minors. The proof was undisputed. Judge denied the application, saying there are other less intrusive orders or remedies that Plaintiff should pursue. Was the Judge right or wrong? Does it matter whether the Plaintiff was a creditor, an injured party, or an agency? (This is a contest: the best submission by May 15, in my sole discretion, wins a gift certificate).

★ Chuck Rosen, a regular contributor to the RN, has been honored with the Peter M. Elliott Award from the Orange County Bankruptcy Forum for his outstanding contributions to the Orange County insolvency professional community and practice. Congratulations, Chuck, on this well-deserved award. Chuck is a former Insolvency Advisor for the IRS, and has been in private practice since 2000, with an emphasis on receivership, bankruptcy and other insolvency issues. The award is named in honor of the late Peter M. Elliott, a longtime and highly respected bankruptcy judge formerly sitting in Orange County.

★ Lifetime gigs/happy endings department: At the request of the Department of Corporations, David A. Gill was appointed the receiver in a no-asset liquidation of a self insurance medical malpractice trust. In 1997, he sued more than 750 doctors for contribution to pay the debts of the company, which debts consisted primarily of the claims of the doctors' patients or the claims of indemnity and defense of the doctors themselves. After 8 years of litigation, including a number of

appeals, he has just finished paying 100% including accrued interest to the unsecured creditors. He has thus far paid out over $35,000,000 received in litigation and settlements and is now looking into paying other subordinated claims of that entity. The case has been the subject of numerous appeals, the most illuminating of which is Gill v. Rich, (2nd Dist. 2005) 128 Cal.App.4th 1254, 28 Cal.Rptr.3d 52. His counsel is Danning, Gill, Diamond & Kollitz, LLP.

★ Heads Up: The annual CRF State Board of Directors meeting will be held Thursday, May 18th at 10:00 a.m. at the La Costa Resort in Carlsbad. All CRF members are welcome to attend the meeting. If you are interested in attending, please RSVP to Megan Connelly (mconnelly@jbsassociates.ws)

★ Robert Greeley from the Sacramento Chapter reports on indications that the "receiver's economy" is improving: three chief lenders for Sacramento banks at a recent RMA meeting noted that new home sales are off 45% this year, and that commercial and industrial vacancies are actually 15%. A local realty firm reported Sac area single family foreclosures are still low in number, but up over 100% YTY in January. There are indicators, however, that cut both ways: at the Nor Cal TMA in SF's annual meeting of chief lenders, it was projected that Turnaround Managers will be very busy by the end of the year. This forecast is tempered by US Bank's Chief Economist John Mitchell's St. Patrick's Day eve comments in SF where he said areas of the market like Silicon Valley, SF and California in general will experience economic growth in 2006.

★ Good works department: Edythe Bronston, a co-founder of the California Receivers Forum and immediate past President....and avid jazz fan.... has formed a non-profit organization called the California Jazz Foundation to assist jazz musicians (and others who have substantially contributed to the art form) in need. Edy is looking for a grant writer and referrals to medical professionals willing to commit to a limited number of pro bono cases per year.

Alan M. Mirman is a partner in the Calabasas law firm of Horgan, Rosen, Beckham & Coren, LLP, and specializes in creditor's rights. His practice includes aspects of provisional remedies, representation of receivers, litigation, loan and lease documentation, and the like.

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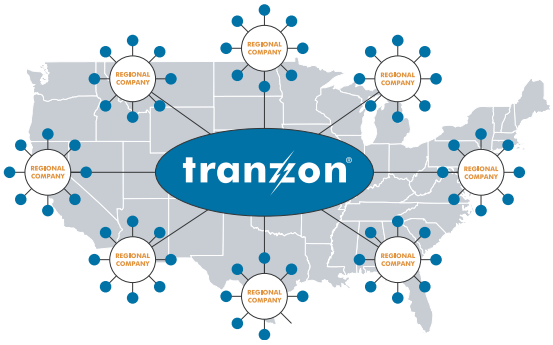

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