A Publication of the California Receivers Forum

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Inside



RECEIVERSHIP NEWS

**EXPANDING YOUR HORIZONS**

# So, You Want to be a Partition Referee?

BY DAVID J. PASTERNAK, ESQ.*

*(An overview of the statutory duties and practical challenges of this unique position)*

Serving as a partition referee is similar to serving as a superior court receiver, but with some significant differences.

First and foremost, while California receivership law is often found in case decisions, there is a detailed statutory scheme regarding partition referees. The duties and responsibilities of a partition referee are detailed in Title 10 of the California Code of Civil Procedure at §§872.0101 et seq., which deal with the partition of real and personal property. Usually the underlying lawsuit involves the partition and sale of co-owned real property. Sometimes the parties at odds inherited property and are unable to agree on its sale or operation. Other times, the litigants acquired property jointly as joint venturers, partners, co-habitants, or simply co-owners, and have a similar disagreement.

Unlike most receiverships, a partition referee is appointed post-judgment - after the court has issued an interlocutory judgment that determines the interests of the parties in the property and orders its partition. (§872.720) The trial court then appoints and supervises the partition referee.

The appointing court may require the posting of a bond by the partition referee, (§873.010(b)(1)), but while a receiver always has to post a bond, a partition referee may not. Like a receiver, the partition referee (or any party) may file a motion for instructions regarding the partition referee's duties. (§873.070) The partition referee may hire attorneys, realtors, auctioneers, and other professionals, with court approval. (§873.110 et seq.)

While a partition referee may occasionally be appointed to divide co-owned property, far more often the partition referee is instructed to sell the property, with the proceeds thereafter divided among the co-owners. The property may be sold by public auction or by private sale, as determined by the Court. (§873.520) Following his or her appointment, the partition referee usually asks the Court to authorize a specific listing agreement, a sale or an auction contract. If the parties commu-

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# The Progress Continues

By Robert P. Mosier, Publisher/Judicial Receiver

Last issue introduced the "new and improved" Receivership News, and I am pleased to report that it is a success. I've received favorable comments from our readership — receivers, judges, attorneys, accountants and support organizations. Several advertisers say they've seen results from their ads. Special thanks to all of our advertisers, those who placed tombstone ads and the contributing authors for making the first issue a success.

Ron Oliner

Here is the second issue, which I hope is better than the first. We've filled the Chapter Associate Publisher for the Bay Area position with - Ron Oliner, an attorney with Buchalter, Nemer, Fields & Younger who specializes in insolvency and receivership. Ron agreed to join us during May's annual State Board of Directors meeting in Palm Springs. We are delighted to have him and his enthusiasm on board.

*Rob Warren with Robert C. Warren Service Award.*

In addition to the usual administrative matters, a notable event at the State Board of Directors meeting was the introduction of the Robert C. Warren Service Award, which will be presented periodically to individuals who have made an outstanding contribution to receivership practice and the receivership community. Forum member Edythe Bronston announced the creation of the award in memory of and to honor the late Robert Warren, one of the founding directors of the Forum and an exceptional contributor to receivership practice. Rob Warren represented his late father and acknowledged the creation of this award to honor his father's name.

Other key agenda items included the upcoming receiver directory, to be published later this year, and the possibility of a Loyola Law School II educational program, to be organized once again by Edythe Bronston. This comprehensive two-day program on receivership law and operation was held three years ago at the central Los Angeles campus to very positive comments from both attendees and faculty (prominent practitioners and members of the judiciary).

*Bob Mosier receives plaque commemorating first issue of redesigned* Receivership News *from Forum President Mike Essary.*

A recurring question I encounter is whether receivership work is picking up. The expectation that it must be, in light of the state's declining economy, is belied by reality, however. Receivers I speak with generally agree that the availability of inexpensive money has allowed interim solutions for what would otherwise have become equity or rents and profits receivership actions. As an example I recently negotiated a $1,250,000 "hard money" working capital loan for one of my estates. The terms were 3.5 points at 9.95% annual interest based on a 30-year amortization schedule, due in seven years. This is hard money? The "hard money" loans of yesterday typically cost 10 points at 12% to 15% interest. This underscores the availability of what many call "cheap money."

Our next issue is scheduled for publication in early October. We invite and welcome your feedback and contributions (Rmosier@Mosierco.com). Keep those cards and letters coming in. ■

*Robert P. Mosier has served as a judicial receiver and federal trustee (among other assignments) in state and federal court for the past 18 years. He has worked as a turnaround specialist for the past 30 years.*

Robert P. Mosier


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nicate with an experienced partition referee before the court issues the interlocutory partition judgment, this subsequent motion and hearing (and costs related thereto) can be avoided by inserting specific sale instructions and procedures in the proposed interlocutory judgment. For example, the proposed judgment can authorize the partition referee to list the real property for sale with a specified broker for a specified listing priced for a specified time (such as 90 days) with a specified sales commission.

The partition referee must determine if there are any tenants or occupants at any real property to be partitioned. It is not unusual for the partition referee to have to file an unlawful detainer proceeding (with appropriate court authorization) to evict occupants or tenants before listing the real property for sale.

The partition referee can and should negotiate the highest possible price on the best terms when selling the property. The partition referee should not necessarily accept any offer without trying to negotiate a higher price. It is also important that any final contract of sale specifies that court confirmation is required before any sale is final and that overbidding may occur in court.

The partition referee files a report and noticed motion to confirm the sale after the property has been sold in accordance with the court's instructions. In the case of real property, escrow usually opens and the buyer engages in his/her due diligence during this same period. However, if the partition referee has some sincere doubt about the purchaser's ability or intention to ultimately close the transaction, the partition referee may choose to delay filing this motion until those doubts are allayed.

Section 873.710 requires that the partition referee's motion to confirm the sale must include (along with other appropriate data) all of the following:

(1) A description of the property sold to each purchaser.

(2) The name of the purchaser.

(3) The sale price.

(4) The terms and conditions of the sale and the security, if any, taken.

(5) Any amounts payable to lienholders.

(6) A statement as to contractual or other arrangements or conditions as to agents' commissions.

(7) Any determination and recommendation as to opening and closing public and private ways, roads, streets, and easements.

(8) Other material facts relevant to the sale and the confirmation proceeding.

It is also a good idea for the partition referee to specify in the motion the minimum permissible overbid, for the information of the court and interested parties. Section 873.740(a) requires that any overbid be in writing and exceed the proffered sales price by at least ten percent (10%) of the first ten thousand dollars of the offered price and five percent (5%) of the offered sale price in excess thereof. As an example, if the partition referee submits a $500,000 offer for court approval, the minimum overbid would be $525,500 ($1,000 — 10% of the first $10,000, plus $24,500 — 5% of the remaining $490,000).

While not required, if real property is being sold it also is a good idea for the partition referee to serve the sale confirmation motion on the purchaser's realtor. The partition referee also should inform the purchaser's realtor about the possibility of overbidding in court, and that it is advisable for the purchaser and his/her realtor to attend the hearing if they are interested in participating in a judicial auction if one commences. Overbidding is infrequent, though it does occur on occasion. Overbidding most often occurs when real estate is rapidly escalating in value, when there were multiple competing purchase offers before the partition referee conditionally accepted the highest offer and one of the competing purchasers reappears in court with a new higher offer, or when one of the parties to the suit (or someone affiliated with one of the parties) attempts to purchase the property in court. While a litigant purchaser may credit a set-off against the purchase price (§873,770), the partition referee should make sure that the net cash to be received includes adequate funds to satisfy all liens, costs of the sale, and costs of administration (including the partition referee's anticipated fees and costs).

Upon approving the sale, the court will issue an order authorizing the partition referee to sell the property to the specified purchaser (or designee) on specified terms (or terms substantially similar thereto). It is a good idea for the partition referee's proposed order to specify that the property can be sold to the purchasing bidder's designee, or on terms substantially similar to the proposed agreement. This avoids the possible necessity of a last minute motion and hearing for approval of relatively insignificant matters. If the property being sold is real property, the partition referee should promptly deposit a certified copy of the Court order approving sale in escrow so the purchaser can obtain title insurance.

After sale, the partition referee files a final report and motion to disburse the remaining funds among the parties, for approval of the partition referee's fees and costs, and to terminate the appointment. The interlocutory judgment usually provides guidelines for the partition referee's recommended division of the sale proceeds among the parties. If the partition referee is uncertain how the funds are to be allocated, the report should say so and ask the court to make those determinations. An experienced partition referee will include requested orders in this motion paralleling standard orders typically requested in a receiver's final report - such as a requirement that the parties defend and indemnify the partition referee against any future claims, and that the court retains jurisdiction over any such claims.

Then, following the court's approval of the partition referee's final report and account, the partition referee usually receives his/her initial and only payment for serving as the court's partition referee. ■

[1] All citations are to the California Code of Civil Procedure.

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*Mr. Pasternak, a member of Pasternak, Pasternak & Patton, a Century City law firm, is a founding Co-Chair of the L.A./Orange County branch of the California Receivers Forum. He serves as a receiver, provisional director and partition referee, and represents the same as counsel. He recently represented a former L.A. Superior Court judge serving as a partition referee.*

# Beware of Withholding Tax Requirements on Proceeds of Real Property Sales

BY CHARLES ROSEN, ESQ.*

How can relatively obscure provisions of the Internal Revenue Code and the California Revenue and Taxation Code dealing with sale of interests in real property by foreign nationals make it difficult or impossible for a receiver to liquidate real property owned by US citizens? Never underestimate the subtleties and potential ramifications of the tax codes.

The Internal Revenue Code and the California Revenue and Taxation Code require the withholding and payment to the taxing agencies of 10% and 3.5%, respectively, of the gross sales proceeds from a sale of an interest in real property unless the owner/seller of the property signs a form avowing that the seller is not a foreign national ( i.e. a non-resident individual, a foreign corporation, a foreign partnership, a foreign trust or a foreign estate). The purpose is to ensure collection of tax that may be due from a foreign seller who sells real property in the United States. [Certain exceptions to and reductions in the amount to be withheld based on tax treaties are set out in the table in IRS Publication 515.] See Internal Revenue Code ' 1445 (26 U.S.C. ' 1445) and California Revenue and Taxation Code ' 18662, and IRS Form 8288-B and FTB Form 597-W.

If these forms are not signed, the withheld amount must be paid by the buyer to the IRS and FTB as a credit toward potential income tax liability of the seller for the year of the sale. This withholding requirement can cripple a sale or prevent it from being completed where the seller won't cooperate with the receiver. Even if the sale does go forward, the seller's not signing will trigger the withholding requirements and can result in a windfall tax credit for the seller even if the seller is not a foreign national or entity.

For example, assume several individuals jointly purchased a commercial income-producing property for $100,000 many years ago, which is now worth $3 million. As the property appreciated new secondary loans secured by the property were taken out to improve the property, enhance its revenue stream, and generate cash for the owners. The joint owners are now at odds over whether to sell the property and, if sold, how the sales proceeds or profits are to be split. To resolve their irreconcilable conflict, the court appoints a receiver to take control of the property, manage it, and sell it (after noticed motion and approval of the court).

On the date of the receiver's appointment there is $2.2 million in secured debt and unpaid property taxes encumbering the real property. The receiver has found a buyer for the property at $3 million and the court has authorized the sale. Through escrow the receiver will have to pay the $2.2 million of secured debt and property taxes, a broker's commission, and additional costs of sale. If just one of the joint sellers refuses to sign the requisite IRS and FTB forms, the buyer of the property (and more likely the buyer's title insurer) will require the escrow to withhold from the sale proceeds and pay over $300,000 to the IRS and $105,000 to the FTB. There will be insufficient net funds generated to pay the capital gains tax on a capital gain of $2.9 million (less the costs of sale) after $2.2 million is paid to the secured lenders and the property tax collector. Result: likely there is no sale.

### SO, IF THE $300K AND $105K ARE WITHHELD AND USED TO PAY THE CAP GAIN TAX, WHAT IS THE PROBLEM?

A party who is not liable to pay the amount of the required withholding will reap a windfall in withholding tax credit, to be used toward the payment of his/her income tax, merely by declining to sign the forms. This could confer tremendous leverage on one of the disgruntled joint owners / sellers. If you think this is unusual and likely not to occur, think again. In just this past year I have acted as special tax counsel to two receivers who had just such situations arise.

*Continued on page 5 ...*

*Continued from page 4.*

## How can this dilemma be resolved?

The receiver must be creative, based upon the particular factual situation he or she is confronted with. Paying 3.5 % to the FTB can be avoided under certain circumstances. If the receiver can successfully argue that the true identity of the seller cannot be determined at the time of close of the sale, the California Attorney General has been amenable to a stipulation allowing the receiver or the escrow holder (or the court's registry) to hold this 3.5% of the gross sales price separate from other receivership funds in an interest-bearing account (rather than paying it to the state). This stipulation protects the buyer who was required to withhold, providing reasonable cause for the non-assertion of tax penalties for not timely paying over these sums.

The IRS is not so easily moved. The United States Attorney will not agree to a non-court stipulation, and the appointing court may not independently implement such an alternative. The Anti-Injunction Act contained in the Internal Revenue Code (26 U.S.C. ' 7421(a)) prohibits any court from enjoining the Federal government from assessment or collection of any tax.

But there is a judicial approach to avoid this problem. The buyer (or the title company for the buyer) may file a suit in interpleader in the United States District Court to achieve the same result. The receiver cannot be the plaintiff in the suit (since the receiver will be one of the defendant claimants to the money), but once the interpleader suit is filed a motion may be made to the court to have the receiver hold the funds in a separate interest-bearing account for later distribution.

An interpleader suit is filed under the Federal interpleader statute. (28 U.S.C. ' 1335.) While such a suit is sometimes filed in state court as part of a state court receivership, be prepared to have the suit removed to the United States District Court on request of the United States Attorney (a statutory right). Assistant U.S. Attorneys (AUSAs) will do this almost automatically because this is their known, comfortable home court. If at all possible, save time and expense and have the buyer initiate the interpleader action in the U.S. District Court.

In the first of my two recent encounters with this problem, the sellers were an estranged husband and wife who may or may not have held title to the property as partners. During the course of ownership they received funds from an out-of-state corporation which they secured by a grant deed to the property intended only as a security instrument. Thereafter the corporate beneficiary of the grant deed assigned its interest - as either a security interest or an outright transfer — to another out-of-state corporation. Complicating matters, the primary owner of both corporations was believed to be the same individual. While these corporations were U.S. entities, the owner of the corporations was not an American and it was not known whether he was subject to U.S. or state taxation.

## Solving real-world problems requires creativity and flexibility.

Neither corporate entity agreed to sign the requisite tax forms to assert either exemption or non-exemption from withholding. The buyer named the sellers, the receiver, and the two corporations as defendants in a 'friendly' interpleader suit to determine the identity of the seller for tax purposes. Not being sure of the seller's identity, the AUSA was willing to stipulate to having the ten percent withholding amount escrowed with the receiver in an interest-bearing account pending the outcome of the interpleader suit and a determination by the court of who the true seller of the property was. This also provided the buyer with a defense against assertion by IRS of late filing and late payment penalties for not timely paying over the required withholding.

The second matter was in U.S. District Court, where the receiver was appointed in a FTC enforcement action. The sellers, two of the targets of the FTC litigation, were a foreign-based trust and a foreign corporation, each of which was believed to be wholly owned by different American citizens residing in the U.S. In this case it appears the trust and corporation would have been subject to the required withholding for foreign sellers.

But if funds had been withheld and paid over to the taxing authorities, it was feared the withheld amounts would pass through the trust and the corporation as tax credits to the returns of the controlling individuals. The individuals might have claimed the sale income and the withholding credits to pay their personal income tax liabilities and pocket the difference (or otherwise have applied the tax credits to offset other taxes they might owe). This would have thwarted the intent of the FTC action, i.e. to recover as much money as possible for the individuals who had allegedly been fleeced by the defendants.

Here the possible solutions were less straightforward. The receiver was powerless to stop the funds from being withheld and paid over, but he was able to minimize the financial loss such a withholding might cause. It was recommended that the receiver obtain a district court order requiring the controlling individuals to prepare but not file their personal income tax returns and any U.S. returns required from the foreign trust and corporation. The returns were to be given to the receiver for filing, with any tax refunds to be deposited into the court's registry pending the outcome of the litigation. An alternative suggestion was that the individuals be compelled to turn over to the court any refunds they received from any original tax returns where withholding tax from the sale was claimed, and that the individuals be barred from claiming such credits on other returns they might otherwise be legally able to adjust.

As can be seen, a receiver must be aware of problems that may be caused by these mandatory tax withholding requirements for real property sales and act creatively to preserve those withholdings for the benefit of the appropriate parties. ■

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

Charles Rosen, Esq.

# A Primer on Receivers and Receiverships in a Nutshell

## Part II: Types, Powers & Qualifications

*(This is the second of a three-part analysis of receivership law and practice. The first installment dealt with the appointment process. This installment addresses mainstream types of receivers, their powers and factors disqualifying a person for appointment.)*

By Edythe L. Bronston*

### Types of State Court Receiverships

There are many different types of receiverships created in a variety of circumstances to meet a panoply of judicial needs. Here are a few examples, with the applicable California Code of Civil Procedure code sections and seminal cases. A receiver may be appointed:

~ as a rents, issues and profits receiver, appointed under the specific performance provision of a deed of trust or assignment of rents. CCP §564(b)(11); Mines v. Superior Court, 216 Cal. 776 (1932);

~ to take possession of real property, pending judicial foreclosure, where the property is in danger of being lost, removed, or materially injured, or where conditions in the deed of trust or mortgage have not been performed, and the property is probably worth less than the debt it secures. CCP §564(b)(2);

~ in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between joint owners of property, where the party's right or interest is probable and the property or fund is in danger of being lost, removed or materially injured. CCP §564(1);

~ to preserve community property pending completion of a marital dissolution. Family Code §290;

~ to preserve property pending completion of a corporate dissolution. Corporations Code §§ 1801(e), 1803; CCP§§564(b)(5), 565. Upon dissolution, to take charge of the estate and collect the debts and property due and belonging to the corporation, pay the outstanding debts and divide the monies and property remaining among the shareholders;

~ to preserve property pending a partnership or joint venture dissolution. CCP §564(b)(1); Corporations Code §15028;

~ in an unlawful detainer action. CCP §564(b)(7);

~ to enforce a judgment. CCP §§708.610-708.630; 564(b)(3)(4);

~ to dispose of property according to a judgment or to preserve it during the pending of an appeal. CCP §564(b)(4);

~ to collect, expend, and disburse rents during the redemption period following a judicial foreclosure. CCP §§564(b)(4); 729.090(a). Note that during the redemption period, a receiver may be appointed to collect rents, but may not take possession of the real property, as the mortgagor/trustor retains the right to possession until the end of the statutory redemption period;

~ to collect accounts receivable;

~ to enter and inspect real property security to determine the existence of hazardous waste. CCP § 564 (c);

~ at the request of the Office of Statewide Health Planning & Development, or the California Attorney General, pursuant to Section 436.222 of the Health and Safety Code;

~ at the request of the Public Utilities Commission pursuant to Section 855 of the Public Utilities Code. CCP §564(b)(8);

~ in an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment. The appointment may be continued after entry of a judgment, if appropriate to protect, operate or maintain real property encumbered by the deed of trust or mortgage or to collect the rents therefrom during the pendency of a nonjudicial foreclosure sale. CCP §564(b)(11);

~ or to take charge of fraudulently transferred property. Civil Code §3439.07(3)(B); CCP § 564(b)(1).

Equity Receivers are totally different from rents, issues and profits receivers. An equity receiver is generally appointed in connection with an action brought by a state or federal governmental regulatory agency in connection with a statutory enforcement action. The regulatory receiver will take possession of all assets of the defendant company or individual, for the benefit of all parties ultimately shown to have an interest in those assets. This type of receiver can be likened to a bankruptcy trustee, who preserves and generally liquidates a pool of assets.

A very high burden of proof is required of the federal or state regulatory agency to obtain this type of appointment. Creditors of a defendant whose assets become part of the receivership estate are generally stayed by an injunction which is issued by the appointing court as part of the appointing order. The appointing order should be recorded in all counties where real property is located.

*Continued on page 7 ...*

*Continued from page 6.*

Federal Court Receiverships are different than state court receiverships in several ways. A higher burden of proof may be required for appointment of a receiver in federal court. Factors the court will look at include the adequacy of security and the financial position of mortgagor. N.Y. Life v. Watt West Investment, 755 F.Supp. 287 (E.D. Calif. 1991); Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314 (8th Cir. 1993).

Federal law mandates that a receiver appointed in any court of the United States must manage and operate the property placed in his or her possession according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. 28 U.S.C. §959(b). Note that a federal receiver, unlike a state court-appointed receiver, may be sued without permission of the receivership court with respect to any acts or transactions performed or entered into in carrying on business connected with the receivership property. 28 U.S.C. §959 (a).

## Powers of a Receiver

A receiver's powers are defined by statute, by the appointing order and by subsequent orders of the court on petitions for instruction. Because a receiver's decisions are backed by the authority of the appointing court, a receiver should be chosen by the court with care, as it is always more difficult to address the effect of acts already concluded. The receiver's powers may include: bringing and defending actions; investigating and bringing property into the receivership estate; bringing a party before the court for examination; collecting rents; collecting and compromising debts; making transfers; doing any acts as the court may authorize; and selling real or personal property of the receivership estate. CCP §§ 568, 568.5.

## Qualifications of a Receiver

The qualifications of a receiver are addressed at CCP §566. A receiver may not be a party, attorney of a party, or person interested in the pending action or related to any judge by consanguinity within the third degree, without written consent of the parties. The receiver must be an individual, not a corporation, and appointment of a receiver is reviewed under an abuse of discretion standard. City and County of San Francisco v. Daley, 16 Cal.App.4th 734, 744 (1993). ■

**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.*

Edythe Bronston

**Edythe L. Bronston**
Law Office of
Edythe L. Bronston
Tel: 818.528.2893

Is pleased to announce her appointment as Receiver for

Victoria Apartments,
a post-judgment receivership

Superior Court
County of Los Angeles

**Robb Evans**
Robb Evans & Associates LLC
Tel: 818.768.8100

Is pleased to announce,
as the Receiver of SkyBiz.com,
the repatriation of

$20,000,000 from a foreign jurisdiction for victim restitution

U.S. District Court
Northern District of Oklahoma

**Beverly N. McFarland and Kevin J. Whelan**
The Beverly Group, Inc.
Tel: 916.408.3755

Are pleased to announce their completion of duties as Receiver for

Matrix Network Solutions,
an operating company

Superior Court
County of Sacramento

**Robert P. Mosier**
Mosier & Company, Inc.
Tel: 714.432.0800

Is pleased to announce his completion of duties as Independent Fiduciary for

Department of Labor vs
Metacor Profit Sharing Plan,
an asset recovery receivership

U.S. District Court
South Florida

**Robert P. Mosier**
Mosier & Company, Inc.
Tel: 714.432.0800

Is pleased to announce his appointment as Receiver for

LLC Partnership Multi Purpose Building, a mold remediation and fire rehab receivership

Superior Court
County of Los Angeles

**David J. Pasternak**
Pasternak Pasternak & Patton
Tel: 310.553.1500

Is pleased to announce his appointment as Receiver for

Beverly Hills
Estate Funding, Inc.,
a loan fraud receivership

U.S. District Court
Central District of California

**Theodore G. Phelps**
Audigators
Tel: 714.734.0479

Is pleased to announce his completion of duties as Receiver for

Valley Western Distributors,
Inc., an operating company

Superior Court
County of Los Angeles

**Theodore G. Phelps**
Audigators
Tel: 714.734.0479

Is pleased to announce his completion of duties as Receiver for

Crinklaw Farms,
an operating company

Superior Court
County of Monterey

**David L. Ray**
Saltzburg Ray & Bergman LLP
Tel: 310.481.6700

Is pleased to announce his appointment as Receiver for

North Communications
a dissolution

Superior Court
County of Los Angeles

**Kirk Rense**
Law Office of Kirk Rense
Tel: 714.317.3869

Is now providing
legal services

to the receivership and
insolvency communities in

Los Angeles/Orange and
Riverside Counties

**Thomas A. Seaman, CFA, Receiver**

Thomas Seaman Company

Is pleased to announce his
completion of duties as Receiver for

Ground Zero Demolition,
an operating company

Superior Court
County of Los Angeles
Department 86

**Thomas A. Seaman, CFA, Receiver**

Thomas Seaman Company

Is pleased to announce his
completion of duties as Receiver for

5805 Sepulveda,
a rents & profits receivership

Superior Court
County of Los Angeles
Department 59

**Steve Speier**
Squar Milner
Tel: 949.222.2999

Is pleased to announce his
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 his
appointment as Receiver for

Mello Service, Inc.,
a gas station
a rents/profits receivership

Superior Court
County of San Bernardino

**Douglas P. Wilson**
Douglas Wilson Companies
Tel: 619.641.1141

Is pleased to announce his
appointment as Receiver for

Rams Hill Golf Club,
An operating company

Superior Court
County of San Diego

**Douglas P. Wilson**
Douglas Wilson Companies
Tel: 619.641.1141

Is pleased to announce his
completion of duties as Receiver for

El Dorado Concrete,
an operating company

Superior Court
County of San Diego

**Douglas P. Wilson**
Douglas Wilson Companies
Tel: 619.641.1141

Is pleased to announce his
Appointment as Receiver for

Pacifica Square,
A rents & profits receivership

Superior Court
County of Los Angeles

**Andrew R. Zimbaldi**
Alden Management Group
Tel: 714.751.7858

Is pleased to announce his
appointment as Receiver for

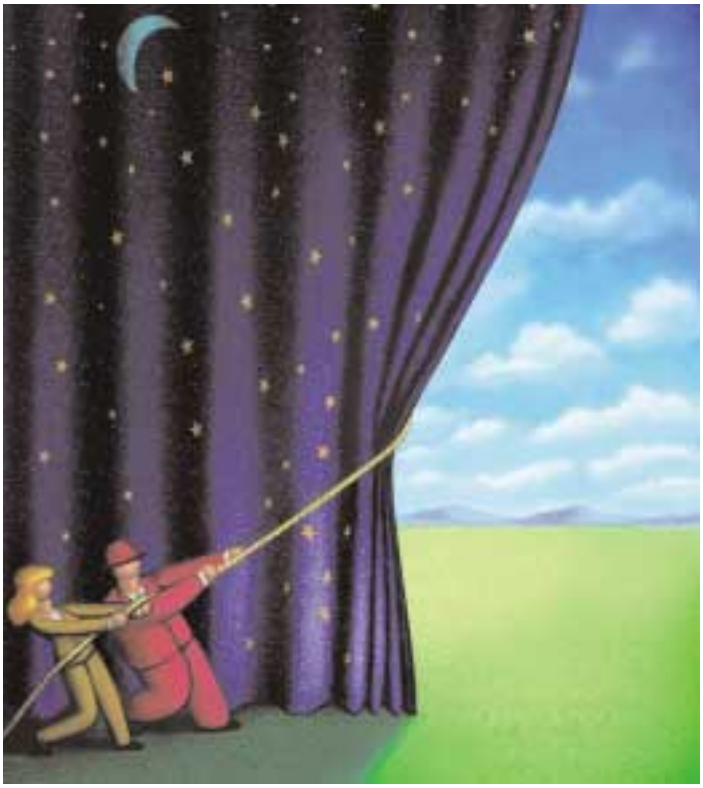
Hudson vs Hedazi,
an equity receivership

Superior Court
County of Orange

# Heard in the Halls

## Notes, Observations, and Gossip Relayed by Alan M. Mirman*

*This is the tenth edition of* Heard in the Halls, *an informal compendium of thoughts, questions and information contributed by California Receivers 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 . . .*

- In today's hot real estate market fueled by low interest rates, some parties are reporting success at real property and personal property auctions. In one receivership, Bob Mosier scheduled an auction to coincide with the foreclosure sale. Good advertising led to a big crowd, 31 registered bidders, and enough action to result in the secured lender being paid in full. The property actually sold above the appraised value. Lenders obviously are looking for an approach whereby they get paid, without all the risks created by having to take title to real property. If the bidding doesn't materialize, the lender can always bid in at the foreclosure sale. This may be an approach that has appeal in today's market, if the property has the value...

- Update: Last issue, we reported that Edythe Bronston of the LA/OC Chapter had been appointed receiver to complete two movies for television. This unusual — to say the least — appointment has culminated in the completion of production, and the airing of the first movie on the Wonderful World of Disney. I can just hear the announcement at the Emmy Awards: "Accepting the award for the defunct production company is the receiver, Edythe Bronston"...

- Upcoming programs: In September, the LA/OC Chapter will present two lunch programs on the benefits and costs of receiverships, assignment for the benefit of creditors, and other remedies. Do you, as members of the Forum, have suggestions or requests for any particular program content? If so, let me know and I will pass it along to your chapter...

- A very unscientific sampling among receivers indicates that the number of rents and profits receiverships is still down, but that there is more activity in equity and regulatory receiverships. What is your take on this? Will the economic woes in our state result in more real estate loan defaults? Will that lead to more receiverships? The statistics on loan defaults would seem to make this likely...

- From our Sacramento Chapter, we hear that Judge Thomas M. Cecil has replaced Judge Joe S. Gray, who has retired. Judge Cecil and Judge Loren E. McMaster are the two law and motion judges in the Sacramento Superior Court. Judge Cecil has heard a number of high profile cases, including the recent SLA criminal proceeding...

- We can introduce another new board member in LA/OC: Gary R. Holme, CPM, is the president of The Beaumont Co., a property management firm. Gary serves as a receiver, specializing in apartment buildings and commercial properties. He's been doing this for 38 years. Beaumont Co. also acts as property manager for other receivers. In addition, Gary has often been retained as an expert witness, particularly in cases with environmental issues...

Would you be interested in contributing to Heard in the Halls? All it takes is an email to me, with an item of interest as to appointments, rules or procedure issues, etc. Don't be shy...

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Alan M. Mirman

# ASK THE RECEIVER

By Peter A. Davidson

*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.*

*Q: I have concluded my work as receiver in a case and the parties have requested that I enter into a stipulation with them waiving my final account and report and discharging me as receiver, in order to avoid the cost of my preparing a final account and report and the hearing on same. I have done this in the past. Is this still good practice?*

*A:* No. Although in the past parties would often enter into stipulations with a receiver to waive his or her final account and report and stipulate to the receiver's discharge so as to avoid the costs involved, on January 2, 2002, Rule of Court 1908 was adopted, which changes the ability of parties to waive the receiver's final account and report or the hearing on the final account and report. Rule of Court 1908 provides: "A receiver must present a final account and report by noticed motion. If any allowance of compensation for the receiver or for an attorney employed by the receiver is claimed in the account, it must state in detail what services have been performed by the receiver or the attorney, and whether previous allowances have been to the receiver or the attorney and the amounts" [emphasis added]. As the Rule is written, the receiver must present his or her final account and report by noticed motion, it cannot be waived by stipulation. Further, while waiving the receiver's final account and report and the hearing on the account and report saves money it may not be in the receiver's best interest. By preparing a final account and report and detailing your activities as receiver, and your receipts and disbursements, and serving notice of the hearing on the final account and report and your request for discharge on all parties and all possible claimants, once the court approves your final account and report, that order insulates you from later liability based on your conduct as receiver during the receivership. Aviation Brake Systems, Ltd. v. Voorhis, 133 Cal. App. 3d 230 (1982). Without preparing a final account and report and setting it for hearing on notice to all parties that might have a claim, the receiver may be deprived of this important protection. Therefore, irrespective of the fact that the Rule 1908 requires the final account and report to be heard on noticed motion, it is good practice for a receiver to prepare and have heard, on noticed motion, his or her final account and report and request for discharge.



*Q: I have just been appointed receiver and counsel for the moving party has told me that the court waived the requirement that I post a bond. The order appointing me says nothing about a bond. Is this okay?*

*A:* No. California Code of Civil Procedure §567(b) provides: "The receiver shall give an undertaking to the State of California, in such sum as the court or the judge may direct, to the effect that the receiver will faithfully discharge the duties of receiver in the action and obey the orders of the court therein". While the court can waive the receiver's posting of a bond, the order of appointment needs to specifically state that. If the order is silent and does not indicate that the bond requirement has been waived, an argument can be made that the appointment is void. You should, therefore, have plaintiff's counsel submit an amended order, or file an ex parte motion to the have the order amended to specifically state that the bond requirement has been waived. ■


*Peter A. Davidson, with Rein Evans & Sestanovich LLP located in Los Angeles, is a receiver and an attorney who specializes in representing receivers in state and federal court.*


Peter A. Davidson

# Commissioner Bruce E. Mitchell

by Kirk Rense

Commissioner Bruce E. Mitchell — and fellow Commissioner Victor Greenberg — are the persons Los Angeles area secured lenders turn to for protection of their real property collateral interests during foreclosure proceedings. Commissioner Mitchell's Department 59 hears half of all the applications for appointment of rents, issues and profits receivers brought in downtown LA's Central Division Superior Court, in addition to hearing eminent domain and class action matters, making his a very busy court indeed.

The *Receivership News* spent part of a recent sunny afternoon chatting with Commissioner Mitchell about his "pleasure and honor" in serving as a judicial officer, some knotty receivership issues of broad interest to Forum members (see the Q & A sidebar), and Commissioner Mitchell's life away from the rigors of one of the busiest courts in Los Angeles.

But first the vital statistics. Commissioner Mitchell joined the Los Angeles County Superior Court in 1990 after spending six years in his own private civil practice in Beverly Hills, then three years handling business litigation matters with a Glendale law firm. He earned a bachelor's degree in psychology from USC in 1973, and his Juris Doctorate from Stanford University Law School in 1978. He has been hearing real property receivership applications and related suits, in addition to other matters, since approximately 1998. He is also a former arbitrator for the Superior Court.

Commissioner Mitchell is a native Southern Californian, born in Santa Monica. As a youth he worked at times on his parents' avocado ranch in La Habra Heights, and he and his two brothers assisted in managing several Los Angeles rental properties in connection with his father's real estate business.

Commissioner Mitchell said his son, Chase, who is going on 11, hasn't yet expressed a desire to follow in his dad's footsteps.

"He's playing catcher on his baseball team, is active in Boy Scouts, and is heavily into video games," Commissioner Mitchell said. "I asked Chase the other day what he wants to become when he grows up and he said he plans to be an inventor, having already progressed through policeman and fireman. We'll see," he added.

When not adjudicating matters or spending time with his son, Commissioner Mitchell finds time to participate in legal education programs and seminars. He has been a featured speaker and panelist for several California Receivers Forum programs in recent months, and is a strong supporter of the organization.

"The Receivers Forum is an excellent organization with strong teaching programs. It brings together receivers from Northern and Southern California, and was much needed. I think it has elevated professionalism among receivers, and I commend those who organized it and see to its continuing success," Commissioner Mitchell said.

What about the Commissioner's professional and personal aspirations?

"It is a pleasure and an honor to serve as a judicial officer," he said, "and to have people trust you to help in solving their disputes. I enjoy the work very much, and find it extremely rewarding. Of course, it would be nice if the Governor would appoint me as a judge one of these days," he added. "I also want to keep spending as much time with my son as I can, and watch him create his own life."

What about that novel he was working on ten years ago? Has he finished it?

"No, there is no time now. I may have to wait until retirement. These days are just too busy, " Commissioner Mitchell said. ■

Commissioner Bruce E. Mitchell

## Commissioner Mitchell Q & A

*Commissioner Mitchell candidly expressed firm opinions on several questions central to receiver operations in the Central District:*

Q: What is your attitude toward the receivers you have appointed? Do you feel that they are an extension of the bench and act for you in the things they do? Or do they sometimes act as a tool of the plaintiff?

A: A receivership arises in the context of a dispute between two or more parties. Of course the court appoints the receiver, who acts as an agent of the court. But more broadly, the appointing court is trying to help the parties resolve their dispute. The receiver is a fiduciary for all the parties and must act accordingly. There is a built-in conflict, in that the plaintiff usually nominates the receiver, and the receiver's actions primarily benefit the plaintiff. We see some instances where the receiver is too closely allied with or shows too much deference to the plaintiff/secured creditor, and stop it. It's inappropriate for plaintiff or plaintiff's counsel to prepare motions for the receiver or prepare the receiver's final account and report, for example. The receiver must remember that he is a fiduciary for both sides.

*Continued on page 13 ...*

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Q: How much independence do you wish your receivers to exhibit? Do you wish them to apply for instructions only where a highly significant issue is involved?

A: The number one area where receivers get themselves into trouble is where they do not seek instruction from the court. The best receivers come to court on a petition for instructions whenever a significant event occurs. This has a couple of benefits. All parties have an opportunity to address the issue. And once the court orders a course of action, my personal belief is that the receiver is not personally liable for following the court's instructions. I find that non-lawyers and newer receivers are reluctant to ask the court for instructions, even embarrassed to do so. This leads to unfortunate events in some circumstances. The best receivers come to court often.

Q: Do you encourage receivers to seek instructions on shortened notice?

A: It depends on what the matter is. Today a receiver sought to sell a $2.8 million property on shortened notice, which would usually be inappropriate, but the receiver had all the parties' concurrence. If the receiver thinks it appropriate, it is best that he/she bring the matter ex parte and ask if a fully-noticed motion is appropriate. The receiver should file at a minimum a declaration of ex parte notice to all parties, a written statement of the issues the court is requested to address, the receiver's evidentiary declaration under penalty of perjury as to the principal facts and a proposed order for the court's review. Some judges have no problem with a receiver calling directly to chambers to discuss an issue in the case. I do not encourage this. My personal feeling is that whatever the court hears the parties should hear.

Q: Do you encourage your receivers to retain counsel?

A: Usually not. Counsel is retained by the receiver in only approximately five percent — or fewer — of the cases I hear. In routine cases the receiver is essentially a property manager, with his own staff. He knows how to handle matters. But where the parties are taking very different positions and there is significant liability for the receiver is where we would expect counsel to be sought. I find that lenders and their counsel are quite sophisticated and know when counsel for the receiver is appropriate. For example, in lien disputes - what are and are not valid liens to be paid? The most experienced lawyer-receivers are the ones who will come to court and seek counsel — they know the risks. On the other hand, the receiver's retaining independent counsel becomes a significant cost to the estate.

*Continued on page 14 ...*

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Q: Has there been an increase in the number of receivership applications recently?

A: The number of applications has been going down for some time. I think it was three or four years ago when the economy was in a sort of recession, and I understand there used to be lines to get into Departments 85 and 86. The situation can and will change again, but it doesn't look like it is going to change soon, given the availability and money at low interest rates.

Q: Do you have a problem with a receiver staying on as property manager after completion of a foreclosure?

A: Historically there was a problem with lenders shopping for receivers to appoint or nominate and asking the receiver to agree to certain provisions about how the receiver was going to manage the property. Obviously that was a problem. I would be concerned if there were an agreement that the receiver would stay on as a manager. We require a statement from the receiver that no such agreements exist. In the event that the receiver and the lender enter into a new agreement after foreclosure because the receiver did a god job, I would not be offended by that.

Q: Under what circumstances may a receiver seek to issue a receiver's certificate senior to existing secured debt?

A: This was the topic of a February Receivership Forum panel discussion in which I participated. California Health and Safety Code Section 17980.7 authorizes issuance of receiver's certificates in connection with preserving substandard properties. The code says nothing about the priority of such certificates, however. The standard for granting priority was enunciated by the California Supreme Court in the 1915 decision Title Insurance and Trust Company v. California Development Company, which authorized granting of priority where the funds raised by the certificate were to be used for the care and preservation of the affected property. The court's rationale was, I believe, that all parties - including existing secured parties whose collateral interests would become junior to the new debt - would benefit from such preservation. Some very qualified receivers and attorneys argue that this case is too old to be of much precedential value. I disagree. It is good law, with a basis in fact. But the court and the receiver must be sure the funds are used only for repairs that are reasonable and necessary. If not, there is the risk the order authorizing priority for the funds might be overturned on appeal, creating substantial problems for the receiver and, possibly, existing secured lenders. ■

*Mr. Rense is a lawyer specializing in insolvency and in representing court-appointed fiduciaries, with more than twenty years of experience. He was a journalist 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.*

Kirk Rense

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

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