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Receivership NEWS

Inside

3 Loyola V Slated for January 2013

6 Part II "Receiver's Sales"– Mirage and Major Hazard for Both Lenders and Receivers

7 Case Note Receiver Denied Recovery of his Compensation Directly From the Foreclosing Lender Under Health and Safety Code § 17980.7

10 Advising Unsecured Creditors in Complex Bankruptcies
How the Appointment of a Bankruptcy Examiner or Trustee Can Shed Some Light

12 Professional Profile Robert C. Greeley

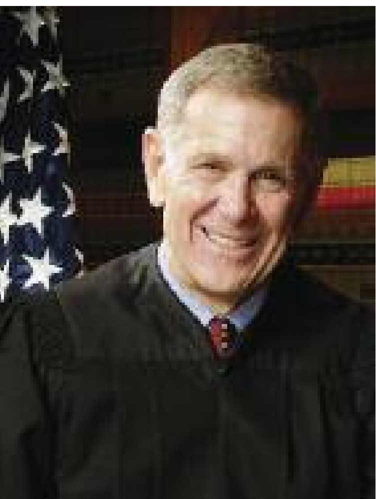
19 Ask the Receiver

20 Part I An Overview of Construction Bonds in Receivership

22 The List

23 Heard in the Halls

Judicial Profile: Judge David O. Carter – The Renaissance Man



The Honorable David O. Carter

By Publisher Robert P. Mosier and Courtney Carey

***Publisher's Note:** Judge David Carter serves as a Federal Judge in Central District of California in Santa Ana. In this capacity, he served on a distinguished panel at the CBF Insovlency Conference in Rancho Mirage in mid-May, 2012. His topic was the nationally renowned and somewhat sensational trial involving Anna Nicole Smith (and the resulting Supreme Court Decision in Stern vs. Marshall). Judge Carter also served as a panelist at Loyola IV in January 2011, a three-day educational forum dedicated to receiverships. Here Judge Carter demonstrated a keen understanding of his role as Judge in managing the receivers that he appoints. His comments at the CBF Conference combined with his participation in Loyola IV made Judge Carter an obvious candidate for this profile.*

This article not only deals with the "judge" aspect of David Carter, but an impressive list of other adventures and activities in which this distinguished American either has or is currently participating. We believe and submit that Judge Carter qualifies as a Renaissance man because of his wide range of interests and involvement in the law, life, and a lot of points in between -- all of which are aimed at making a difference. In addition to being a lawyer and a Judge, David Carter is a Marine who was decorated for heroism during the Vietnam War. As a judge he has handled some of the most challenging and difficult matters due to his willingness to take on the tough ones (that no one else wants). His outside interests these days are centered on the justice system in Afghanistan and Pakistan where a key focus, among others, is introducing women into the judiciary – not exactly a slam dunk in a Muslim society. With this brief intro, here is Judge Carter's most interesting story.

A good place to pick up **Judge David O. Carter**'s life's journey is at UCLA in 1967 where he graduated with a Bachelor's degree (cum laude). Immediately after graduation, David entered active duty as a United States Marine. Lt. Carter served on the front line in Vietnam, with C Company, 1st Battalion of the 9th Marines, also known as the "Walking Dead" due to its high number of casualties. The following is an account of Lt. Carter's activities on April 16, 1968, at Khe Sanh, one of the deadliest days in the Vietnam War as prepared by an historian from notes forty years after the event. The account reads in part:

On 16 April, Co A/1/9 was ordered to conduct a search and clear operation to the SW of Hill 689, the high ground from XD 793 399 to XD 788 404. The assumption was that there would be little or no enemy soldiers remaining in that area. As it turned out, this was to be the costliest day as far as friendly casualties of Khe Sanh.....Lt CARTER's platoon was taken under fire from NVA in spider traps, bunkers, and bomb craters, and Lt CARTER received a shattered forearm from enemy fire and shrapnel to his jaw, but continued to lead the assault.

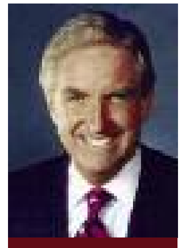
Post battle, the diagnosis for Lt. Carter was not favorable – probable loss of the use of his arm for life. After a year of rehabilitation in the hospital in Guam and a lot of determination, Judge Carter recovered from his wounds and retained the full use of his arm. In response to his heroism and bravery, Lt. Carter was awarded the Bronze Star and Purple Heart. Lt. Carter was discharged from the Marines as a 1st Lieutenant in 1969. Judge

Continued on page 4...

Publisher's Comments

By Robert P. Mosier, Publisher*

This issue of RN features a profile on Federal Judge David O. Carter who presides in the Central District of the California in Orange County. Judge Carter was a lot of fun to profile due to his varied and unique background that earned him the title of Renaissance Man! I forecast that you will enjoy this read. In terms of news articles, we have several. We are running the second half of yet another article on the controversial topic – Can a rents, issues and profits ("RIP") receiver sell real estate. Your publisher started this prolonged battle in the fall of 2011 with an article entitled the Ten Commandments, co-authored by one of our stalwart receivership academics, Edythe Bronston. The article took the position that a RIP Receiver cannot sell real estate. After months of debate, I perceive that an informed position is that a RIP Receiver can sell real estate in certain circumstances, and the extended (and even heated at times) discussion has no doubt been healthy in terms of heightening awareness as to the cautions and risks associated therewith. Hope springs eternal that we can get a panel of Superior Court Judges to weigh in on this seemingly controversial issue. Receivership attorney, Stacy Rubin (Mulvaney Barry Beatty Linn & Mayers, LLP, San Diego), provides interesting insight regarding steps that receivers should take to make sure they get paid. Our Regional Editor, Beverly McFarland, has co-authored a Bankruptcy article on the benefits of the appointment of an examiner or trustee in certain cases. Our profile, Sacramento Receiver Robert Greeley, provides some great insight into his diverse interests and background. A genuine thanks to our advertisers and the receivers who purchase the tombstones. These dollars keep RN in the black, and we are thankful for this support. Please enjoy the issue. RPM



Robert P. Mosier

**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.*

Editor's Comments

By Kathy Bazoian Phelps*

The RN readers continue to make my job as editor fun and interesting. Thank you to all of the contributors of articles and comments. In this issue, we are running Part II of an article on receivers' sales and do not necessarily expect the dialogue to end there. We continue to invite your comments, articles, and feedback on this and other issues of importance and relevance to receivers. Since much of our readership practices in the realm of federal equity receivers, we also encourage articles of interest relating to those types of receiverships. Along those lines, the National Association of Federal Equity Receivers is having its inaugural conference September 13 – 14 in Fort Worth Texas which should provide lots of discussion on points on issues of interest to equity receivers. So, for those of you in attendance, please think about future contributions to RN on these issues. As always, please email your letters, comments, and articles to me at kphelps@dgdk.com. Kathy

Kathy Bazoian Phelps

**Kathy Bazoian Phelps is a partner at Danning, Gill, Diamond & Kollitz, LLP, Los Angeles, and the co-author of The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes. She frequently represents receivers and trustees.*

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Loyola V Slated for January 2013

California Receivers Forum is pleased to announce that the Loyola V, Complex Case Symposium will be held January 18-19, 2013 at the Hilton Irvine/Orange County Airport.

"The Hilton Irvine, directly across the street from John Wayne Orange County Airport, provides easy access for statewide receivers to participate in this program. The meeting space suits the interactive format of the newly formatted Loyola program, while offering value-priced accommodations," commented **Nancy Hotchkiss**, CRF 2012 State President.

This Symposium will continue the California Receivers Forum's relationship with Loyola Law School of Los Angeles. Although the Symposium is no longer being held on campus, since the program has outgrown the Albert H. Girardi Advocacy Center, the Forum looks forward to the tradition of law school faculty involvement in the Symposium.

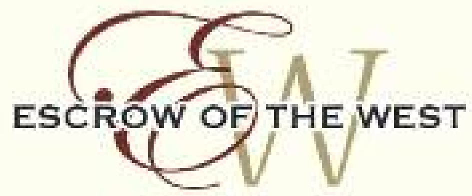
Recognizing that experts sit in the audience and on the stage, Loyola V has been redesigned from all panel presentations to a variety of formats that foster conversation and exploration of more complex receivership topics. Loyola V moves away from the overview of basics and focuses on topics such as the inner working of complex cases, often encountered pitfalls, multiple jurisdiction cases, intertwined ownerships and larger value cases.

The leadership team is headed by Chair Nancy Hotchkiss Esq., Trainer Fairbrook, Sacramento; Judicial Liaison Chair, **Robert Mosier**, Mosier & Company; Education Co-Chairs **Mia Blackler**, Esq., Buchalter Nemer, San Francisco and **Christopher Hawkins**, Esq., Sullivan Hill, San Diego; Education Materials Chair, **Ted Phelps**, PCG Consultants, Los Angeles; Sponsorship Co-Chairs **Kevin Singer**, Receivership Specialists, Los Angeles, and **Christopher Seymour**, Esq., Dowling Aaron Inc., Fresno. **Jeanne Sleeper** and **Toni Spangler**, JBS & Associates will provide meeting management services.

As the chairs begin planning Loyola V, they will reach out to professionals across the state to be session organizers, topic experts, table discussion facilitators and debaters. **Mike Essary**, Calsur Property Management, San Diego, was the first to answer the call and will be producing the luncheon program. If you are interested in getting involved, contact the Co-Chairs of your choice. Contact information is available on www.receivers.org membership directory tab.

Loyola V will continue the CRF tradition of diversity and leadership growth by involving members from across the state, from all the professions involved in receiverships, with a goal of opportunities for service by newer members, evolving leaders and long serving members.

Registration will open online by September at www.receivers.org.



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Carter remains active in, and loyal to, the Corps as Trustee of the November 10th Association, an organization that honors past and present Marines by celebrating the birthday of the U.S. Marine Corps each year at installations around the world.

Following Vietnam, David Carter's journey returned to familiar (and friendlier) ground – back to the University of California, Los Angeles where he received his law degree in 1972. If you are keeping score, this makes Judge Carter a "Double Bruin." Notably, most USC Law School Grads generally accept this note of distinction with admiration!

With a law degree in hand, David Carter's legal career began as an Assistant District Attorney with the Orange County District Attorney's Office in 1972. While practicing in the office's homicide division, Carter filed charges and was the preliminary prosecutor in "The Freeway Killer" case, where the serial killer was the first to be executed by lethal injection in California. In 1981, Judge Carter joined the bench as a Municipal Court Judge in Orange County, California. Shortly thereafter, Judge Carter was elected to serve as an Orange County Superior Court Judge. While serving as the supervising judge of the Court's Criminal Division, attorneys began to refer to Judge Carter as "King David!" On June 25, 1998, Judge Carter was nominated to the United States District Court for the Central District of California by President Clinton.

Some of Judge Carter's notable cases include: The Aryan Brotherhood trials (the largest capital case filing ever), Anna Nicole Smith (In re Marshall), and Barnett v. Obama, in which Judge Carter dismissed the lawsuit in 2009 that questioned Barack Obama's eligibility for election and assumption of office due to claims that Obama was not a natural born citizen of the United States. Also, in Gay-Straight Alliance (Colin ex rel Colin v. Orange Unified School District), Judge Carter, through the Equal Access Act, ordered Orange County public school officials to allow on-campus student groups to meet and discuss the topic of homosexual tolerance. This specific case was the first ruling of its kind.

Judge Carter spent 2000 and 2001 presiding over the Mexican Mafia case (United States v Fernandez) that lasted a total of 18 months, making it the longest criminal trial in the history of the Central District of California. The case involved the prosecution of over 40 alleged members of the Mexican Mafia on charges of murder, attempted murder, conspiracy to murder, extortion, robbery, and a range of drug trafficking and firearm crimes. Judge Carter presided over all three Mexican mafia trials and set sentencing for those convicted. The highest-ranked gang member, Mariano "Chuy" Martinez, 43, was charged for orchestrating the Montebello murders and ordering 10 hits on others. Martinez was prosecuted under the federal Death Penalty Act, but was spared by the jury when they decided that he would serve with life in prison. During the Mexican Mafia trial, Judge Carter was accompanied by Federal Marshals 24/7 as a security measure.

Another point of distinction about Judge Carter is the way he manages his courtroom. There is no 9-5 in Judge Carter's world. Attorneys are frequently ordered to be in Court at 7:30 a.m. or 9:30 p.m. to accommodate the Judge's schedule as he works through his calendar. It is not uncommon for Judge Carter to place calls or respond to e-mails concerning scheduling matters throughout a weekend. Like his bodyguards during the Mexican Mafia trial, Judge Carter is 24/7. These unusual and even demanding appearances seem to have added to Judge Carter's mystique that is embodied in his nickname, King David.

Judge David Carter, sporting a required flak jacket, prepares to board a 1944 DC-3 for a flight from Kabul to Mazar-e Sharif, Afghanistan while on assignment for the U.S. State Department.

At the Loyola IV Conference in January 2011 (an educational program for receivers), Judge Carter was asked questions about his specific thoughts regarding the relationship between receivers and their appointing judge. Judge Carter made it clear that his number one rule about the relationship between receivers and their judge is the importance of having an ongoing personal, clear, and communicative relationship; Judge Carter stated "Questions should be asked," referring to the receiver-judge relationship. Judge Carter continued to affirm that receivers need to know their judge and they also need to know the inner workings of each court in which they appear. Although Judge Carter emphasizes a personal ongoing relationship with his receivers, he was clear that, "A general rule in most receivership courts is that we don't always want you to be in court." Judge Carter continued to convey that, although he wants his receivers to be open about questions and "getting his ear," he also does not want them in court every week. Judge Carter gave the example that, "Any sale of an asset over one million dollars, I want to know about. Any sale under one million dollars I don't need to know about. That's why a relationship with the Judge and Court is so necessary." Judge Carter continued to explain that a relationship with the receiver is crucial so that there are no unknowns and no misunderstandings during the receivership process. However, in other cases Judge Carter has also poured over disputes of even a few hundred dollars. As he stated, "The LA Times is not going to say my receiver messed up. They are going to say that I messed up." Judge Carter stated that if something goes wrong, he is the one to get blamed;

Continued on page 5...

Continued from page 4.

therefore, communication is valued and necessary. Judge Carter also describes the order of appointment as being, "the beginning of the receiver-judge relationship." He speculated that receivers want their appointing judge to be confident in them and the work that they are performing. Judge Carter made it clear that he supports and appreciates a conversational approach to receiverships. He further explained that, "the first day in court your thoughts about the receivership company and how to renew it or liquidate it should be stated."

Judge Carter is also well known for his support of a tattoo removal program in which ex-convicts could remove gang tattoos allowing them to start their life again without gang affiliation. In recent years, Judge Carter has been one of the driving forces behind the U.S. Department of State's Public-Private Partnership for Justice Reform in Afghanistan and Pakistan. Working alongside **Judge Stephen Larson**, Judge Carter (and other judges and lawyers in California and Washington D.C.) is working to create a more dependable and reformed Justice System. The main purpose of this program is to educate judges and lawyers from Afghanistan and Pakistan about the mechanisms of the American legal system and to support them to rebuild the justice systems in their own countries. The program consists of two week training for judges, prosecutors and lawyers. One of the main focuses of this program is to bring empowerment to women who risk their lives to work in their justice system. While at the program, many women opened up about not being allowed to be educated or employed. They explained that secret schools were created so that young women could be educated, although this was a major risk to their lives. Overall, Judge Carter is widely known for his courage and determination and his many years serving the justice system of the United States.

Well there you have it – the Honorable David O. Carter – a decorated war hero, a former DA, a Municipal, State, and now Federal Judge. But beyond the Courtroom, his activities and causes give the impression of boundless energy. The Renaissance Man.

Robert P. Mosier

****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.*

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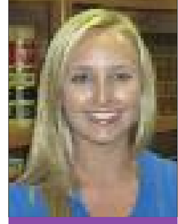
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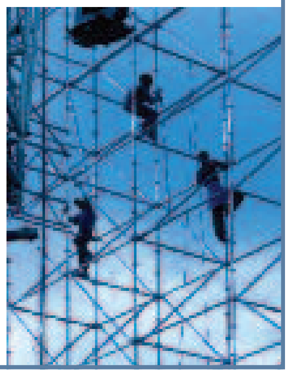

PART II

"Receiver's Sales"– Mirage and Major Hazard for Both Lenders and Receivers

BY CHARLES A. HANSEN AND KEVIN R. BRODEHL*

In the second half of this article, we address in greater detail the position that a "receiver's sale" flies in the face of California Code of Civil Procedure § 726—a key provision of California mortgage law for over a century and a half. Section 726 says, in pertinent part, that "…there can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property…" and that action shall be in accordance with Title 10, Chapter 1 of the Civil Code. Advocates of "receiver's sales" would graft onto this clear statutory language the codicil: "…well, except for this other form of judicial sale the mortgage statutes and the secured transactions case law forgot to mention."

Receiver's Sales: Violations of Code of Civil Procedure § 726 and the Consequences for the Secured Lender

Those pursuing receiver's sales as a form of ersatz foreclosure rarely offer to explain to the court just how, in the face of the clear and unambiguous language of § 726, they can use a judicial process and a civil action (as that term is defined in Code of Civil Procedure § 22) to effect a foreclosure-like sale of real property security on a defaulted mortgage or trust deed by a means other than judicial foreclosure as performed pursuant to California's elaborate foreclosure and execution sale statutes. A century and more of case law is absolutely to the contrary. Those at the back of the caravan being led toward the receiver's sale mirage should pay careful attention to this century plus of case and statutory law and ask whether or not it can be reconciled with the idea of foreclosure-like sales by rents and profits receivers.

It has been the clear and unambiguous law of California since 1872 (and actually before then prior to adoption of the Field Code) that there can be only one action and one form of action for the foreclosure of California real property. This rule is embodied in California Code of Civil Procedure § 726 (which originally contained "one action" wording that was amended during the Great Depression to read "one form of action"). Those who have tilled the mortgage vineyards for years know that § 726 is not only firmly established law, but that violations of § 726

Continued on page 8...

Case Note

Receiver Denied Recovery of his Compensation Directly From the Foreclosing Lender Under Health and Safety Code § 17980.7

By Stacy H. Rubin, Esq.*

The California Courts of Appeal, Fourth Appellate District (the "Fourth District Court"), recently held that a receiver was not entitled to compensation where he failed to record a lien on the real property on which a certain uninhabitable building was located.

In 2006, the borrower obtained a loan from World Savings Bank,[1] which was secured by a first priority deed of trust on a four-unit residential building in Chula Vista, California (the "Property"). The borrower defaulted on the loan and, thereafter, a notice of default was recorded in February 2008 by Wachovia. Subsequently, the City of Chula Vista ("Chula Vista") discovered numerous violations of the condition of the Property and sent notice to the borrower, but to no avail, as the borrower was incarcerated.

Shortly thereafter, Chula Vista filed a petition seeking to have a receiver appointed under California Health & Safety Code § 17980.7 (hereinafter, "Health and Safety Code") due to multiple violations concerning the Property. In December 2008, the lower court ordered the appointment of a receiver to immediately inspect and secure the Property and relocate the tenants who lived there. The order appointing the receiver specified it was not applicable to Wachovia.

After the receiver relocated the tenants, the receiver requested a receivership certificate superior to Wachovia's deed of trust. In response, the lower court authorized the receiver to file a secondary lien against the Property for the receiver's compensation. However, the lien was apparently never recorded by the receiver.

Thereafter, Wachovia acquired the Property through a trustee's sale and, thereafter, sold the Property to a third party purchaser.

Nearly two years after he was appointed, the receiver filed his final account and report initially requesting a receiver's certificate lien for approximately $41,545.72 against the Property. After discovering that Wachovia had sold the Property to a third party, the receiver modified his original request and sought reimbursement directly from Wachovia in the reduced amount of $37,541.72. The lower court denied the receiver's request and determined that it would be appropriate to only charge Wachovia for the receiver's expenses during the time in which Wachovia owned the Property – roughly four months. Those expenses totaled $408.33.

On appeal, the receiver argued that Wachovia was unjustly enriched by the receiver's work and thus, should be directly responsible for the receiver's total expenses. However, the Fourth District Court determined that Wachovia should not bear the costs of the receiver's expenses, primarily because Chula Vista initiated the proceedings, not Wachovia. The Fourth District Court also took into account that Wachovia only owned the Property for approximately four months out of the two-year long receivership. Based on the record, the Fourth District Court did not find a monetary benefit that the receivership conferred directly on Wachovia.[2]

The Fourth District Court went on to discuss Health and Safety Code. Section 17980.7(c) specifically authorizes a court to appoint a receiver over a substandard property if the property owner has failed to comply with a notice or order to repair issued by a local agency. The Health and Safety Code permits a receiver to borrow funds to pay for relocation benefits and necessary repairs cited in the violation notice, and with court approval, secure that debt by recording a lien on the subject property for the amount owed. Health and Safety Code § 17980.7(c)(4)(G). Essentially, the receiver borrows funds by issuing "receiver's certificates." Once approved by the court, the certificates act to secure repayment of the funds and, when recorded, become liens on the subject property.

The Fourth District Court analyzed § 17980.7 and its legislative history and concluded that the statute does not in and of itself impose direct liability on a foreclosing lender for a receiver's expenses; rather recovery should be through a lien on the subject property. The Fourth District Court explicitly emphasized that the lower court granted the receiver the right to a lien on the Property – but it was not perfected.

The moral is clear: Dot your i's and cross your t's or compensation may not follow. You should not take the fees or the solvency of a receivership estate for granted.

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[1]World Savings Bank ultimately became Wachovia Mortgage ("Wachovia").

[2]The Fourth District Court specifically chose not to address whether the receiver could have recovered his fees and costs from Chula Vista instead of Wachovia.

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Stacy H. Rubin

Continued from page 6.

can result in extremely harsh sanctions imposed against creditors who violate the statute. *See e.g., Security Pacific National Bank v. Wozab*, 51 Cal.3d 991 (1990); *Walker v. Community Bank*, 10 Cal.3d 729 (1974); *Pacific Valley Bank v. Schwenke*, 189 Cal. App. 3d 134 (1987); **Aplanalp v. Forte,** 225 Cal.App.3d 609 (1990); *Shin v. Superior Court*, 26 Cal. App. 4th 542 (1994); *O'Neil v. General Security Corp.* (1992) 4 Cal. App. 4th 587; *In re Pajaro Dunes Rental Agency, Inc.*, 142 B.R. 383 (Bankr. N.D. Cal. 1992).

What may be less well known is that the concept of a real property sale by a "rents and profits" receiver was held in 1991 to violate § 726. In *Great American First Savings Bank v. Bayside Developers*, originally published at 232 Cal. App. 3d 1546, the court observed that "rents and profits" referred to "the income derived from the property," but "not to the property itself or to its proceeds on sale," and held that the rents and profits receiver's sale of townhomes on the property "was beyond the authority of the receiver, and beyond the power of the court to authorize." *Id.* at 1555-1557. Further, the bank's application of the proceeds from the sale to the secured debt violated § 726. Id. at 1558-1559. While a petition for rehearing was pending before the Court of Appeal in *Bayside*, the case was removed to federal court under the "removal at any time" provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), and as a result the *Bayside* decision was ordered de-published by the California Supreme Court in 1992 (1992 Cal.LEXIS 1265), and can no longer be cited as precedent. Nevertheless, the reasoning in Bayside has been discussed extensively in California mortgage law treatises, and that reasoning is a now well-entrenched among practitioners. Moreover, the federal courts that took over the case paid lip service to the "security first" aspect of § 726, but inexplicably and improperly ignored the express "one **form** of action" language of that statute. See *Resolution Trust Corp. v. Bayside Developers*, 817 F. Supp. 822 (N.D. Cal. 1993); *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230 (9th Cir. 1994).

Under California Code of Civil Procedure § 564(d) and recently amended California Civil Code Section 2938(e)(2)-(3), the mere appointment and conventional functioning of a rents and profits receiver is not a violation of § 726, but rather a legitimate interlocutory measure to collect and preserve rents and the security pending foreclosure. But the notion that a rents and profits receiver could be authorized to sell the security as an alternative to judicial foreclosure or trustee's sale can be found nowhere in the statutory scheme. If the Legislature intended to repeal the time-honored "one form of action" provisions of § 726 and provide a new type of foreclosure, one would think that it might have said so.

Two salient features of § 726 sanction cases are: first, that the conduct triggering the sanction need not be intrinsically improper; and, second, the fact that a court has blessed or even assisted in the conduct does not insulate the creditor from the resulting sanction. *See e.g., Walker, supra*, 10 Cal.3d 729; *O'Neil, supra*, 4 Cal. App. 4th 587; **Aplanalp, supra**, 225 Cal. App. 3d 609; *Shin, supra*, 26 Cal. App. 4th 542; *Pajaro Dunes, supra*, 142 B.R. 383. After the California Supreme Court's decision in *Wozab*, it is clear that the sanction incurred under § 726 may include not only loss of the security but—if the lender has been cautioned against the conduct and goes forward despite the warning—loss of the debt as well. *Wozab*, *supra,* 51 Cal.3d at 1006. Thus, borrowers and juniors who are facing a receiver's sale and who are not able to persuade the lender to desist (or the court to withdraw an ostensible grant of authority) should consider a *Wozab* warning letter challenging the propriety of the "receiver's sale" and cautioning the secured lender of the dramatically negative consequences under the sanction aspect of § 726 if the sale goes forward.

Negative Consequences for the Receiver

Receivers and attorneys whose practice focuses on representing receivers may respond that a § 726 sanction is the lender's problem and of no concern to them. However, it is clear that the receiver, as a neutral agent and appointee of the court, must be fair and even-handed to all interested parties, including the lender, borrower, and junior lienholders. *See, e.g., Cal. Rules of Ct.*, Rule 3.1179(a); *Sec. Pac. Nat'l Bank v. Geernaert*, 199 Cal. App. 3d 1425, 1431-1432 (1988). This fact alone should give the receiver pause and induce a reluctance to fail to honor the mortgagor's and junior secured creditors' express rights under § 726 and the other foreclosure statutes.

Receivers and their counsel need to make an independent and self-protective analysis of any lender request that they sell the security. The receiver, after all, is expected to be a neutral agent of the court. A claim by a rents and profits receiver that pursuit of such a sale was the lender's idea and that the receiver was merely implementing a remedy selected by the lender could quite plausibly be viewed as an admission of a lack of independence. And a receiver's sale later found to be ultra vires might subject the receiver and the receiver's bond to potential liability both to the borrower and to the purchaser. After all, such a sale, if found to be contrary to law, would have resulted in an unauthorized sale of someone else's property. Further, and as discussed above, the receiver is purporting to sell property to a buyer who reasonably expects to receive good title in a valid and authorized transaction, and who can be expected to be very unhappy and in a litigious mood when the title resulting from the sale turns out to be questionable, unmarketable, and uninsurable.

Serious questions are also presented by a receiver's sale with regard to potential prejudice to and exoneration of guarantors of the secured debt. While full development of this issue is beyond the scope of this article, it is absolutely clear that guarantors have rights of reimbursement and subrogation to the secured lender's position when they make good on their guaranties. *See* Cal. Civ. Code §§ 2847-2848. A secured lender's election of remedies can prejudice those rights, and such prejudice has caused secured lenders no end of grief under cases like *Union Bank v. Gradsky*, 265 Cal. App. 2d 40 (1968). While *Gradsky* waivers are permitted under Civil Code § 2856, the validity of the waiver turns on the language and wording of the waiver. Few, if any, "*Gradsky*" or "2856" waivers in existing guaranties contain language contemplating "receiver's sales," or waiving the potentially prejudicial consequences of those sales for the guarantor. Thus, the risk of compromising or exonerating guarantors and their guaranties needs to be added to the litany of problems that may result from "receiver's sales."

Lenders and their attorneys know—or at least should know—that their every move in foreclosing on a defaulted loan will be scrutinized closely by the borrower, guarantors, and their attorneys. There are, in short, some highly-motivated and very serious people just waiting out in

Continued on page 9...

Summer Lunch Series Continues

On June 21, 2012, the Los Angeles/Orange County Chapter of the California Receivers Forum continued its Summer Lunch Series, presenting a program entitled Divorce California Style. The program focused on Family Law Receiverships and dealt with the complexities and nuances of those types of receiverships. The program was hosted and sponsored by the law firm of Buchalter Nemer at their Los Angeles Office. The panel consisted of **Honorable Holly J. Fujie** from the Los Angeles Superior Court, **Christopher Celentino** and **Mikel R. Bistrow** from the law office of Foley & Lardner, LLP, and **William Miller** from Buchalter Nemer PC.

"Receiver's Sales"...

Continued from page 8.

the open desert for the caravan to head for the receiver's sale mirage. Lenders, receivers, and their attorneys who insist on pursuing "receiver's sales" because of the real or perceived benefits of such sales—such as avoiding the addition or more "REO" to a bank's inventory and directly channeling foreclosed property to preferred third party buyers—should pay heed to those who may well be waiting for them out there in the desert with less than friendly intent. If lenders and receivers listen closely, they will realize that well-informed borrowers and their attorneys might be whispering "…come on, come on, lovely shade and sweet water is waiting for you just here at the mirage…er, oasis."

**Charles Hansen is a partner at Wendel, Rosen, Black & Dean in Oakland whose core practice is devoted to lending, mortgages, trust deeds, escrows, title insurance, real estate developments, guaranties, and secured transactions litigation. Since 1985, he has also taught advanced real estate courses to law and MBA students at UC Berkeley's Boalt Hall.*

Charles Hansen

Kevin Brodehl

**Kevin Brodehl is a partner at Wendel, Rosen, Black & Dean in Oakland specializing in secured transactions litigation, as well as other litigation involving real estate, business, and intellectual property.*

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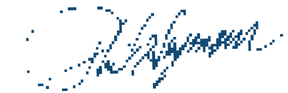

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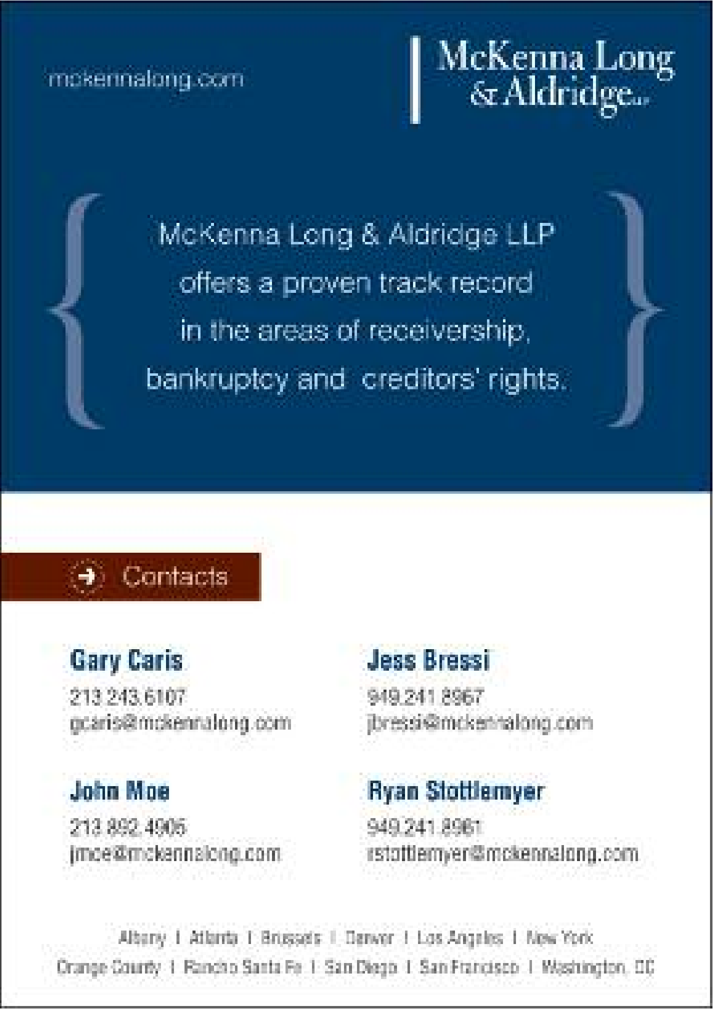
California Receivers Forum &
California Bankruptcy Forum

*Advising Unsecured Creditors in Complex Bankruptcies
How the Appointment of a Bankruptcy Examiner or Trustee Can Shed Some Light

By Robb C. Adkins and Beverly N. McFarland

A perfect storm has developed in the need for increased use of fiduciaries for examination and management of debtors. As a result of being over-leveraged, companies have engaged in complex financial transactions that have impaired creditors' rights. At the same time, in the wake of the economic crisis, there have been increased reports of fraud and mismanagement. A decade ago, a number of unprecedented corporate scandals rocked the nation — Enron, WorldCom, and Tyco are the leading examples. The recent financial crisis, epitomized by the fall of Lehman Brothers, the collapse of the Madoff funds and a record number of bank failures, has led to a new wave of investigations into whether fraudulent or actionable conduct lies at the heart of recent institutional failures.



It is important to recognize that individual creditors, even those with significant stakes, seldom have much ability to influence the bankruptcy process. When complex entities and financial transactions are involved, the chapter 11 filing and the events to follow are often understood only by the creditors with the most at stake who are close to the action, well informed and highly motivated. Often some of these creditors may be appointed to the creditors' committee. In those situations, a creditors' committee, although representative to a degree, may not be able to provide timely and meaningful information and assistance to creditors outside the active inner circle.

This Article explores the roles of examiners and trustees in chapter 11 cases and focuses on how corporate counsel can best protect a client's position as a single unsecured creditor or party in interest, beyond filing a proof of claim or seeking relief from the stay. For the reasons explained below, in today's economic environment, when indications of corporate mismanagement or complex undisclosed transactions surface, corporate counsel should be armed with an understanding of when and how to protect their clients' interests by supporting the appointment of a qualified chapter 11 examiner or trustee.

2005 Bankruptcy Code Reform — BAPCPA

In the face of demands that companies in reorganization require better oversight of management and that parties in interest should be provided transparency, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Pub. L. No. 109-8, 119 Stat. 23 (2005).

One of the reforms of BAPCPA was the addition of Bankruptcy Code Section 1102(b)(3), which is intended to provide improved access to information to *all* creditors. It imposes upon the official creditors' committee an obligation to grant unsecured creditors increased access to the committee that represents their interests.

However, Section 1102(b)(3) does not provide any practical guidance as to what kind of "information" a creditors' committee should provide to the unsecured creditor, when, and in what form. There is no requirement of a formal report. The information provided by the creditors' committee is presumably request driven, which can lead to particularized communications to only a few creditors with the rest left to sift inefficiently through the docket for nuggets of relevant and comprehensive information. If the creditors in a large case deluged the committee with requests for information, it is debatable whether the typical committee and its counsel would be able to provide the relevant assistance outside of instituting a reporting regime.

Continued on page 11...

Continued from page 10.

Congress Intended that the Appointment of Chapter 11 Examiners and Trustees Should Increase After BAPCPA

Prior to the enactment of BAPCPA, proponents in favor of appointing a trustee faced a heavy burden, even in cases where there was substantial evidence of fraud and mismanagement. The heavy burden that was imposed occurred despite the facial application of the statute requiring appointment of a trustee on request of parties in interest or the United States Trustee, the federal office charged with monitoring bankruptcies nationwide. BAPCPA was amended in committee shortly before its final passage to reflect these congressional concerns about management abuses in chapter 11. *Clifford J. White III & Walter W. Theus, Jr., Chapter 11 Trustees And Examiners After BAPCPA*, 80 AM. BANKR. L.J. 289, 312-313 (2006).

One amendment to BAPCPA, which reflects Congress' priority towards addressing corporate mismanagement, was a pointed directive to the U.S. Trustee to ratchet up the use of appointed trustees in the form of §1104(e), which provides:

> The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial accounting.

11 U.S.C. §1104(e).

Although BAPCPA did not expressly alter the Bankruptcy Code with respect to examiners, any motion for appointment of a trustee includes the less intrusive remedy of an examiner, so the congressional intent of requiring oversight of the chapter 11 process points to a reevaluation of the role of chapter 11 examiners. The need for a policy shift is part of the focus of an article co-authored by Clifford White, Director of the Executive Office for U.S. Trustees in Washington, D.C., the top national official of the United States Trustee Program. White & Theus, *Chapter 11 Trustees And Examiners After BAPCPA*, 80 AM. BANKR. L.J., at 321. Many courts will find that appointment of an examiner is mandatory under § 1104(c)(2) (based on $5 million of unsecured public debt), and discretionary where a party in interest requests the appointment and is able to cite to evidence of fraud or misconduct. However, "[a] review of dockets from 576 of the largest chapter 11 cases commenced between 1991 and 2007 indicates that examiners were requested in only eighty-seven cases, or about 15% of the sample." Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 4 (2010). And of those requests, only thirty-nine motions were granted; it is clear that examiners are neither regularly sought, nor automatically appointed in complex chapter 11 cases. *Id.*

In viewing BAPCPA as a comprehensive bankruptcy reform to correct "imbalances" in chapter 11 cases which favored incumbent management, Director White makes the case for why trustees and examiners can serve the interests of all stakeholders and the public by "promoting the efficiency, effectiveness, and transparency of complex chapter 11 cases." White & Theus, Chapter 11 Trustees And Examiners After BAPCPA, 80 AM. BANKR. L.J., at 289. It is up to the parties to these cases to decide whether support for these measures is in their interest and to take appropriate action, either by supporting such motions or directing requests to the local U.S. Trustee.

Dynegy: Examiner Appointment a Sign of More to Come?

An examiner was recently appointed in Dynegy Holdings, LLC. Dynegy and four affiliated companies filed chapter 11 petitions in the Southern District of New York on November 7, 2011. *In re Dynegy Holdings, LLC*, No. 11-38111 (Bankr. S.D.N.Y.). Shortly thereafter, the U.S. Bank National Association, as successor indenture trustee and also an appointed member of the three-member creditors' committee, submitted a motion to appoint an examiner to investigate certain of Dynegy's complex pre-petition transactions that the Bank contended may have impacted Dynegy's creditors and other parties in interest. The Bank's motion alleged

Continued on page 16...

Professional Profile

Robert C. Greeley

Marketing Skills & Baseball Perspectives for Successful Receivership

Bob Greeley describes his Sacramento distress management consulting boutique as follows: "I don't create the train wreck. I put the engine back on the track, rescue survivors, and salvage the pieces." Greeley, Lindsay Consulting Group is Bob and four consultants who assist distressed companies by managing the restructure, sale or liquidation of the business.

Bob notes that most engagements today are liquidation or sale because the economy is not growing. "Equity Receiverships and turnaround management are both like being behind in the ninth inning of a baseball game—every time at bat you need to get on base--hits or walks. If everybody gets a hit or a walk--eventually you win. Any one player doing too little or failing by trying to do too much, makes it harder. You play until you win--or you lose and go home."

Greeley is a finance professional that differentiates his work with a heavy emphasis on marketing. "The best business plans are about marketing. Think about it. In a distressed business, if it is a viable company, we will be marketing their products. If the combined business is not viable, we will sell the viable pieces. And if nothing is viable, we will be selling the assets and intangibles. It is all about marketing and positioning for a sale and then making it happen. We can all do cash forecasts, but doing the marketing that generates the cash to make the forecast real–that's hard work."

Bob worked 13 years for Wells Fargo Bank and led a commercial loan team before starting his business in 1983. That same year he augmented his undergraduate finance degree with an MBA from Golden Gate University–where he later taught as an adjunct finance professor for 18 years.

In further discussing his philosophy about his business, Bob believes that not all businesses can or should be saved. "The receiver stands in the middle of a conflict and works for the judge. I see my job as maintaining the assets and improving value, because if assets are not increasing in value, then the value is decreasing. Value is seldom static. The tools available to a receiver are limited, and there is no place for entrepreneurial risk. So for me to add significant value in a receivership, there needs to be a business problem to be addressed, a plan to implement, the parties have to understand the value to be obtained, and we all have to cooperate and explain it to the judge who is the person directing the receiver's actions and scope of authority."

Bob believes that the receiver needs to build as much cooperation as is possible while respecting the adversary positions. When there is conflict, everyone loses. Bob finds that, often by the end of the day in his receiverships, the defendant is cooperating, because increasing value is in the defendant's best interest.

Robert Greeley on a family reunion cruise to Alaska - the Mendenhall Glacier is in the background.

Bob has completed condo and residential construction projects, leased up shopping centers, sold cattle, sold HVAC manufacturers, and restructured financing for a health food pill distributors–all in receivership. He notes that, while they can do rents and profits engagements, they are much better suited to operating a business where there is serious business problem and a value in the continued operation.

There is a sign in Bob's office that reads, "Respect your adversary–They are the ones who give purpose to your toil." On that point, Bob states, "I have been blessed with great counsel over the years which have included Steve Felderstein, Judge Jane McKeag, Judge Whitney Rimel, Judge Bob Bardwil, Don Fitzgerald, Mark Serlin, and Bob Mirkin. Each has taught me more about the receiver's role, the law, and a great deal about patience, preparation, legal positioning, and building constituencies."

Bob's first major receivership was in 1991. By stipulation, he was appointed to operate a wholesale nursery employing more than 600 people at sites in Oregon and California. Bob generated cash from operations while he ran the nursery for nine months before liquidating the California site and selling the Oregon site as a going concern. Due to Oregon's strict land laws and the nursery's two separate major revenue streams, the Oregon operations were sold to two separate entities which formed a joint venture to buy the land. Key to that transaction was that the land was owned by the insolvent nursery's two principals. Their agreement for the sale was accomplished after Bob negotiated the bank's release of their personal guaranty subject to closing the sale.

Continued on page 13...

Robert C. Greeley...

Continued from page 12.

Recently Bob was receiver in a case involving a metal fabrication and construction company that was building food processing plants all over California, rebuilding the diesel snow-blowers for the S-P railroad, and making huge lights for a new bridge in Redding. Insolvent, the firm suffered from ill-conceived investments, but was known for its quality products and on-time delivery. Shutting down would have defaulted huge contracts and forgone millions in retentions. Going forward required the bank to lend money to the insolvent debtor. As a receiver and old banker, Bob structured a weekly cash forecast and reporting system to justify a working capital line of credit. With the receiver's certificate line in place, he negotiated a week-to-week standstill agreement with the two unions that controlled the 35 to 40 on-site workers and then convinced the bank to allow collections to be used in the operations similar to a cash collateral agreement. With the owner and foremen, the receiver then rescheduled projects to minimize cash requirements.

Luck and cooperation allowed the receivership to self-fund completion of the 23 contracts without borrowing. The owner agreed to a sale of its equipment and to a new operator, which issue Judge Shelleyanne Chang graciously heard on shortened notice in a courtroom filled with constituents and parties in interest. She even took testimony to have a complete record so a sale order could be entered that day. Now, two years later, Bob reports that all contracts were completed, over 90% of the contract receivables and retentions were collected, the bank received the entire principal of its loan (over $2.5 million), the owner's guaranty was released, 33 of the 35 employees now work for the new business, as does the former owner. Bob says, "The credit for that turnaround goes to the judge who took the extra time to listen and understand the business time constraints, the buyers, the seller, the workers, bankers and customers who all provided the flexibility and cooperation to pull a turnaround out of an insolvent train wreck."

Bob likes baseball analogies and loves to play softball in what he affectionately refers to as "The Old Men's League." Their Rotary team has won more than its share of league championships and Bob, in typical receiver style, is the team's catcher. "I love a play at the plate or to win in the last inning."(Don't ask him about his homerun in a fast pitch softball game on his 41st birthday unless you have an hour and love softball).

Bob and **Celeste**, his wife of 32 years, live in Carmichael, California. Celeste is active in an Order of Discalced Carmelites. She recently received recognition from the Royal School of Needlework when her needlework was exhibited at Hampton Court in London as an example of the work done at the RSN's San Francisco Certificate Program.

Bob has been writing creatively since high school. After losing a hotly contested manufacturing turnaround position to a respected competitor, Bob wrote the poem, "Mount the Galloping Horse" depicting the emotions of the initial interviews or Beauty Contests that are the first step in getting a turnaround management assignment.

Bob has been a member of the California State University Sacramento Football team's chain crew for the last 5 years.

Bob is a member of the California Receiver's Forum State and Sacramento Boards and has served on the local and State Boards of both the Bankruptcy Forum and the California Receivers Forum. He has chaired or spoken at numerous events on receivership, insolvency, and credit. Bob is a member of the Board of Directors of the Northern California Turnaround Management Association and the Risk Managers Association of Sacramento in addition to holding memberships in various other business and professional organizations.

Robb Evans & Associates LLC

Tel: 818-768-8100
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is pleased to announce
its appointment as

Receiver of all Entity Assets
in the matter of
Cathay Bank v.
EE Tronics Design Inc.
Designer of computer circuit boards

Superior Court of California
County of Santa Clara

Robb Evans & Associates LLC

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is pleased to announce
its appointment as

Receiver in the matter of
Federal Trade Commission v.
North America Marketing and
Associates, LLC, et al.

A Federal Regulatory Receivership

United States District Court
District of Arizona

Robb Evans & Associates LLC

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is pleased to announce
its appointment as

Liquidator of Arizona real property
in the matter of
Federal Trade Commission v.
Central Coast Neutraceuticals, Inc.

A Federal Regulatory Action

U.S. District Court
Northern District of Illinois

Richard Munro

Invenz, Inc.
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richard@invenz.com

is pleased to announce
his appointment as

Receiver for
Pacific Breast Care
Medical Group, Inc.,
a specialized medical practice

Superior Court of California
County of Orange

E3 Advisors

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kfreitag@ethreeadvisors.com

is pleased to announce
its appointment as

Rents & Property Receiver for
Tri County Mall in Cincinnati, OH

Court of Common Pleas
Hamilton County, Ohio

E3 Advisors

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kfreitag@ethreeadvisors.com

is pleased to announce
its appointment as

Rents & Property Receiver for
Legends Outlets in Kansas City, KS

U.S. District Court
District of Kansas

Kimberly A. Cole

The Cole Law Group
Tel: 805-845-7071
kim@kimberlycolelaw.com

is pleased to announce
her appointment as

Family Law Receiver for
In re Marriage of Boyd

Superior Court of California
County of Santa Barbara

Kimberly A. Cole

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is pleased to announce
her appointment as

Judgment Receiver for
Wyland Ranch, LLC

Superior Court of California
County of Santa Barbara

Patrick Galentine

Coreland Companies
Tel: 714-573-7780
pgalentine@coreland.com

is pleased to announce
his appointment as

Rents & Profits Receiver for
U.S. Bank vs. 11850 Del Pueblo, LLC

Superior Court of California
County of Los Angeles

Josh M. Hodeda, CPA
Ingenious Asset Group, Inc
Tel: 310-331-8552
Joshhodeda@ingeniousassetgroup.com

is pleased to announce
his appointment as

Rents & Profits Receiver for Pacific Pines Apartments
162 unit apartment complex
with a total of 54 buildings
Wells Fargo Bank, N.A. v. Wide West Services, LLC et. al.

Superior Court of California
County of Kern

David Wald
Wald Realty Advisors
Tel: 310-230-3400
DWald@waldrealtyadvisors.com

is pleased to announce
his appointment as

State Court Receiver
Sold Southside Villas Condominiums
Including Entitlement Restructuring
and
Bulk Sale of Standing Inventory
and Finished Lots

Superior Court of California
County of San Luis Obispo

David Wald
Wald Realty Advisors
Tel: 310-230-3400
DWald@waldrealtyadvisors.com

is pleased to announce
his appointment as

State Court Receiver
Sold The Hideaway at Beach House
and The Bungalows at Beach House
Including Entitlement Restructuring,
Construction and Retail &
Bulk Sale of Standing Inventory
and Finished Lots

Superior Court of California
County of Ventura

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

is pleased to announce
his appointment as

Receiver for
Sawtelle Partners LLC
A cross over family law and rents
and profits matter located
in West LA

Superior Court of California
County of Los Angeles

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

is pleased to announce
his appointment as

An equity Receiver
for PJ Elite
A Chain of Pappa John Pizza
Franchises in the
San Fernando Valley

Superior Court of California
County of Orange

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

is pleased to announce
his appointment as

a Limited Scope Receiver for
Eden Manor
An Assisted Living Facility in
Oakland, CA

Superior Court of California
County of Alameda

National Franchise Sales
Tel: 949-428-0483
AG@NationalFranchiseSales.com

is pleased to announce
the completion of

The sales and advisory services
for the estate of Mi Pollo, Inc.
& Pollo West Group

United State Bankruptcy Court
Central District of California
San Fernando Valley Division

Robert C. Warren III
Investors' Property Services
Tel: 949-900-6161
Robert.Warren@investorshq.com

is pleased to announce
his appointment as

Rents and Profits Receiver
for Pickett Family Trust

Superior Court of California
County of Orange

Robert C. Warren III
Investors' Property Services
Tel: 949-900-6161
Robert.Warren@investorshq.com

is pleased to announce
his appointment as

Rents and Profits Receiver
for Bear Valley and
Hesperia Partners, LLC

Superior Court of California
County of San Bernardino

Continued from page 11.

that a number of transactions were potentially actionable depending on the facts.

On December 29, 2011, United States Bankruptcy Judge **Cecelia G. Morris** ordered the appointment of an examiner to conduct an "unfettered investigation" of the Debtors' conduct in connection with the pre-petition 2011 restructuring and reorganization of the Debtors and their non-Debtor affiliates, and whether there were any possible fraudulent conveyances. Whether as a nod to efficiency or independence, Judge Morris ordered the examiner to conduct an independent investigation where the "Creditors' Committee cannot 'tag along.'"

This recent appointment of an examiner raises the question of whether the appointment of examiners will continue on an upward trend.

Why An Examiner?

Although an unsecured creditor may suspect mismanagement to be at the root of a company's chapter 11 filing, it can be difficult to evaluate whether anything can be done and the nature of its substantive rights without a complete picture. A single comprehensive and independent report may be more accessible to an unsecured creditor whose stake may not warrant an independent investigation, even where a creditors' committee is in a position to provide the necessary information. As illustrated by the Dynegy case, a member of the creditors' committee filed the motion presumably in recognition of the usefulness of such a report and the limitations on what a committee might accomplish.

Under the Bankruptcy Code, courts have the power to appoint an independent examiner for the purpose of investigating matters related to the debtor's estate, "including an investigation of any allegations of fraud, dishonesty, or gross mismanagement…" 11 U.S.C. § 1104(c). At the conclusion of such investigation, the appointed examiner must submit his or her report to the court and to all parties in interest. The examiner's report is filed and must include "any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate." 11 U.S.C. § 1106(a)(4). The benefit of appointing an examiner is that he or she will "act as an objective nonadversarial party who will review the pertinent transactions and documents, thereby allowing the parties to make an informed determination as to their substantive rights." *In re Fibermark, Inc.*, 339 B.R. 321, 325 (Bankr. D. Vt. 2006). In contrast to the intermittent information an unsecured creditor would otherwise receive upon relying solely on the creditors' committee. The public report if the examiner helps to promote transparency of complex chapter 11 cases.

Unlike other court-appointed officers, an examiner is completely disinterested and answers solely to the court. Thus, requesting the appointment of an examiner helps to create a level playing field to ensure that all parties, not just those on the creditors' committee, are privy to information that is obtained without bias.

Enron Scandal: A Case Study in Examiner Value-Add

One of the co-authors of this article served as a member of the Enron Task Force, and conducted the criminal investigation and trial of former CEOs Ken Lay and Jeff Skilling. As has been well documented, in December 2001, Enron collapsed in what was then the largest bankruptcy in U.S. history. In the wake of the collapse, allegations surfaced against Enron management and entities with which Enron transacted, involving securities fraud, accounting improprieties, energy market manipulation, misleading financial statements, insider trading, excessive compensation, and ERISA violations. The losses to shareholders and creditors were in the billions, and the task of investigating, assessing, and explaining the accounting and transactions at the core of the Enron scandal presented a daunting task.

Continued on page 17...

Beverly N. McFarland
The Beverly Group, Inc.
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beverlygroup@att.net

is pleased to announce
the completion of her duties as

Chapter 11 Trustee for
Food Service Management, Inc.,
Kobra Associates, Inc.,
Central Valley Food Services, Inc.,
Sierra Valley Restaurants, Inc.
(owners of 70 Jack in the Box Stores)

United States Bankruptcy Court
Eastern District of California

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

is pleased to announce
his appointment as

Post-Judgment Receiver in the
matter of Wells Fargo, National
Association v. City of Stockton,
a California municipal corporation
and chartered city

Superior Court of California
County of San Joaquin

J. Benjamin McGrew
J. Benjamin McGrew, Receiver
Tel: 916-482-5100 ext15
jbmcgrew@receivertrustee.com

is pleased to announce
his appointment as

Motel Health & Safety Code Section
17980 Receiver for City of Point
Arena v. Kenneth LaBoube, et al

Superior Court of California
County of Mendocino

Continued from page 16.

In response, pursuant to 11 U.S.C. § 1104(c), the bankruptcy court approved the appointment of an examiner to probe the transactions and accounting at issue, to assess the role of management, directors, and others, and to report on any claims against those entities. The examination that ensued was one of the most complex of its kind and still today demonstrates the benefits of examiners in complex fraud and mismanagement matters. After an 18-month investigation, the examiner issued a series of reports detailing the complex accounting and financial structures at issue, the role of hundreds of individuals and entities, the application of these facts in the bankruptcy process, and the potential claims against officers, directors, and others to recoup losses. In all, the examiner's reports identified more than $10 billion in potential claims for the bankruptcy estate.

In addition, the Enron aftermath is a good example of the type of complex enforcement terrain that often must be traversed in chapter 11 bankruptcies, and demonstrates a further benefit of a qualified examiner. The Enron collapse spurred several class action lawsuits on behalf of shareholders and employees, and a variety of enforcement responses, including investigation by the Department of Justice, the Securities and Exchange Commission, the Internal Revenue Service, and numerous other agencies, as well as probes by congressional committees and investigative reporters. Parallel investigations and stake-holders are typical in relatively large chapter 11 filings, and a competent examiner, with experience dealing with enforcement authorities, can serve as a central and efficient fact-gatherer, while navigating the legal, procedural, and practical difficulties potentially created by such overlapping investigative efforts. For this reason, "it is generally important that the examiner or someone on the examiner's staff be experienced in working with law enforcement authorities on the criminal matters." White & Theus, Chapter 11 Trustees And Examiners After BAPCPA, 80 AM. BANKR. L.J., at 325.

Why A Trustee?

A chapter 11 trustee, is an agent of the court but not an officer of the debtor. Similar to an appointed examiner, a trustee has a direct reporting obligation to the court but also has a fiduciary duty for his or her performance to the U. S. Trustee, the creditors and others with interests in the estate. But the appointment of a trustee is an extraordinary remedy as the trustee completely divests the debtor's management of all control over the debtor's estate. The trustee takes over the assets and operation of the debtor's business, which can be a tall order in a complex case. But, as indicated earlier, BAPCPA added §1104(e) to require the U.S. Trustee to seek appointment of a trustee where there is "reasonable grounds to suspect" misconduct in the debtor's management. However, upon the request of *any* party in interest, and after notice and hearing, a court shall order the appointment of a trustee —

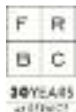
(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a).

Clearly, appointment of a trustee in an operating business requires careful selection of a qualified individual. Even then, parties that oppose the appointment of a trustee often point to the additional costs incurred. However, in today's chapter 11 legal environment, the debtor often retains a Chief Restructuring Officer (CRO) immediately prior to filing. This raises the concern that the officer's legal duty is to the directors, which may not provide enough "distance" from past acts or assurances to all constituencies of his or her independence. Also, a CRO managing a debtor in possession does not have statutory investigative duties, as does both an examiner and a trustee, nor does management necessarily give up control of the company and restructuring process if that is the selected strategy. A trustee, by contrast, must answer to the creditors and all those with interests in the estate. Moreover, a

Continued on page 18...



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Continued from page 17.

chapter 11 trustee often replaces a senior officer of the debtor, and, thus, the cost of the trustee should be balanced against the compensation of that officer. White & Theus, Chapter 11 Trustees And Examiners After BAPCPA, 80 AM. BANKR. L.J., at 318. And if the senior officer is the recently-appointed CRO, then the comparative learning curve for the trustee would entail minimal duplication.

A Case Study in Trustee Value-Add

One of the co-authors of this article was appointed as the operating chapter 11 trustee of a large 70-restaurant franchisee of casual food restaurants in California. The principal of the debtors had diverted massive funds from the operation of the profitable restaurants to a related real estate development empire that had collapsed. Prebankruptcy efforts by secured lenders and others to enforce rights and require sound management were ineffective and would have continued if the debtor had been left in possession.

The trustee had hands on experience in managing multi-site restaurant businesses, which meant quickly evaluating and replacing ineffective management, and reestablishing confidence in vendors, employees, lenders, taxing authorities and the critical franchisor. A detailed analysis for a potential restructure of the business was performed and determined to be not feasible. The situation urgently required a sale of the business in order for it to survive long term and provide any value to the creditors. The trustee also recognized that it was important to increase the cash flow prior to a sale by making emergency repairs to facilities, retraining personnel in customer service along with other management ideas implemented that maximized the market appeal of the restaurants to buyers in a difficult economy. Unlike the debtor, the trustee was able to credibly convince the relevant parties to align their support behind a robust strategy that paid off in sale proceeds far exceeded predicted returns.

In order to confirm a plan and close the case, the trustee had to respond to Department of Labor as well as state and federal criminal investigations, and to satisfy constituents and the court that a full investigation had identified feasible courses of action. Without such intervention, the case would have spiraled into a no-asset liquidation with all of the business-critical franchise rights forfeited.

What Corporate Advisors Can Do

As legal counsel for unsecured creditors, who may otherwise be left feeling helpless and out of the loop in a complex chapter 11 case, it is logical to consider motions to appoint an examiner or trustee, which have in the past been under-utilized in the face of increasing bankruptcy fraud and corporate scandals.

Congress has assisted by providing the statutory tools to help practitioners ensure that their clients can participate in a bankruptcy process that is fair, transparent, and accessible by all parties in interest. The Director of the Executive Office for U.S. Trustees has urged the increased use of examiners and trustees to protect the integrity of the bankruptcy process. It remains to be seen whether, in this current economic downturn, there will be an upward trend of motions to appoint an examiner or trustee, and whether courts will find that such appointments are necessary. Nevertheless, in today's economic environment, corporate counsel should be aware of the powerful tools that examiners and trustees bring to bear in protecting unsecured creditors and others in the chapter 11 process.

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Ask The Receiver

By Peter A. Davidson*

Q I am a receiver for a partnership. A creditor with a judgment has threatened to levy on funds I have collected. Can she do that?

A No. Remember you are the court's agent and property you hold as receiver is actually in the custody of the court–sometimes referred to as "in custodia legis." As a result, the property in your possession cannot be levied on, garnished, or attached without the consent of the receivership court. *Robbins v. Bueno*, 262 Cal.App.2d 79 (1968) ("Property in the custody of a receiver is generally not subject to garnishment or attachment without the court's consent. Because the receiver is appointed by the court, he becomes an officer of the court; thus his custody is actually the custody of the court. (citations omitted)"); *City of Los Angeles v. Knapp*, 22 Cal.App.2d 211, 212 (1937) ("The general rule is the property *in custodia legis* is not subject to garnishment."). The one exception is, if a person is entitled to a definitive distributive share of the fund being held, one of his creditors may garnish it after the court has ordered the receiver to pay. *Knapp* at 212 ("If a party has a right to a certain distributive share of a fund *in custodia legis*, the officer having custody of the fund may be effectively garnished by a creditor of the party entitled to such fund").

Q As receiver, I sued a third party to collect funds owed to the entity in receivership. I have settled the lawsuit. The defendant's attorney insists that I get court approval of the settlement. What a pain. Am I required to get court approval of the deal I cut? If so, which court needs to approve the settlement and what do I have to establish to get the settlement approved?

A Sorry, but yes, you do need to get court approval of the settlement unless the court previously gave you authority to settle litigation without subsequent court approval. The court that has to approve the settlement is the court that appointed you. California Code of Civil Procedure §568 specifically provides that "the receiver has, under the control of the court, power to bring and defend actions in his own name as receiver;...to compound for and compromise the same,...and to generally do such acts respecting the property as the court may authorize." Because the statute indicates the powers granted to the receiver to bring and defend actions and to compromise them are "under the control of the court", court approval is necessary. Section 568 was enacted in 1872, and there do not appear to be any reported California cases specifically discussing the standards the court should use in determining whether to approve a settlement proposed by a receiver. However, *Clark on Receivers* states that the standard should be whether the settlement is in the "best interest" of the receivership. "The court appointing a receiver must use its discretion in determining whether it is for the best interest of the estate that the receiver be authorized to

compromise a claim, when the appointing court has not abused its discretion in giving instructions to the receiver, its orders will not be disturbed or reviewed in the appellate court." 3 *Clark on Receivers* §770. Unless the receiver is seeking a good faith determination, as that term is used in Cal. Code Civ. P. §877.6, the court need not determine whether the settlement is "so far out of the ballpark...as to be inconsistent with the equitable objectives of the statute." *Tech-Bilt v. Woodard Clyde & Assoc.*, 38 Cal.3rd 488, 499 (1985). The test to approve a settlement, absent seeking of a good faith finding, is a lower standard. The court need merely find the settlement is in the "best interest" of the estate.

Receiverships in federal court generally follow a similar standard. The district court must find the settlement is "fair, adequate and reasonable." *See Sterling v. Stewart*, 158 F.3rd 1199, 1204 (11th Cir. 1998). In determining whether the settlement is fair, district courts look at the following factors, which will sound familiar to bankruptcy lawyers because they are similar to the factors used by bankruptcy courts in the 9th Circuit, as set forth in *In re A & C Properties*, 784 F.2d 1377 (9th Cir. 1986). They include: (1) the likelihood of success; (2) the means of possible recovery; (3) the point on or below the range of recovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of the litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings which settlement is achieved. *Sterling v. Stewart, supra.* 1204 n. 6 (citing *Bennett v. Behring Corp*., 737 F.2d 982 (11 Cir. 1984)).

Therefore, when you file your motion seeking court approval of a settlement, be sure to provide the court with evidence -- at least the declaration of the receiver and possibly his counsel -- showing why the settlement is in the best interest of the receivership estate and is fair, adequate, and reasonable under the circumstances.

****Peter A. Davidson** is a Partner of Ervin Cohen & Jessup LLP a Beverly Hills Law Firm. His practice includes representing Receivers and acting as a Receiver in State and Federal Court.*

Peter A. Davidson

Part I

An Overview of Construction Bonds in Receivership

By Jeffrey A. Sykes, B. Scott Douglass & Eric C. Tausend

With the economy continuing to stagnate, more construction projects are faltering, ultimately ending up in receivership. When these distressed properties wind up in receivership, it is crucial to be aware of an important asset potentially available to a receiver: the surety bond.

As discussed below, there are several types of surety bonds that may be in effect on a given construction project. Enforcing these bonds can add value to the property, ensure completion of the project, and protect the project from claims. In some circumstances, receivers may be able to directly enforce surety bonds.[1] In other circumstances, receivers may be able to cause others to enforce them. Either way, enforcing surety bonds may ultimately add value to the property, thereby enhancing returns on the completed project.

In the first part of this article, we will discuss the basic types of surety bonds and some elemental aspects of suretyship. In the second part of this article, we will address the surety's obligations and rights.

1. Types of Bonds

Surety bonds generally fall into one of two categories: statutory bonds and common law bonds. Bonds issued pursuant to a statute, typically in the context of public work projects, are statutory bonds. The provisions of the statute requiring the bond's issuance are generally read into a statutory bond. In contrast, common law bonds are not issued pursuant to a statute. Because common law bonds are not issued pursuant to a statute, there is often more room to negotiate the specific terms of the bond. Within both the statutory and common law categories of bonds, there are, in turn, several types of construction surety bonds, including performance bonds, payment bonds, and subdivision-related bonds.

(a) Performance Bonds

Performance bonds, as their name suggests, ensure performance of the construction contract. They incorporate the underlying construction contract by reference, and are designed to protect the project owner from losses arising from the default of the contractor in completing the construction contract. A construction lender frequently will be added to the performance bond as a dual obligee, entitling the lender to the same protections of the bond. In some instances, a general contractor can be the beneficiary of a performance bond, if the bond was obtained by a key subcontractor or supplier.

(b) Payment Bonds

Payment bonds are designed to ensure that the contractor fulfills its payment obligations to those subcontractors and suppliers who furnish labor and materials in connection with the project. They generally guarantee that the contractor will pay the proper and valid contract claims of those entities furnishing labor, materials, and/or equipment in connection with the project. Payment bonds are useful in resolving mechanic's liens that are oftentimes recorded once a project becomes distressed. The terms of the bond govern who may make claims against the payment bond, though generally, payment bond claimants encompass the same project participants who can pursue lien rights under California's mechanic's lien laws.

(c) Subdivision-Related Bonds

Traditional subdivision bonds, similar to performance bonds, assure the completion of the improvements that accompany a subdivision. These bonds are typically required by the public entity approving the subdivision and are furnished by the subdivision's developer.[2] The bonded improvements often include the subdivision's streets, sidewalks, sewers, and storm drains. Generally, subdivision bonds are issued to public entities, but in some circumstances they are issued to homeowners associations, or similar entities. Other subdivision-related bonds ensure that a developer performs its obligations to subsidize a homeowners association or a time share association, by paying its portion of dues or assessments until all units are sold.[3]

2. Suretyship

Construction sureties issue bonds for a particular construction project. These bonds are referred to as tripartite contracts because they involve three parties: the surety, the obligee (who is typically the owner under a performance bond, or a subcontractor/supplier under a payment bond), and the principal (who is typically the general contractor under either a performance bond or payment bond). The bond is a contract whereby the surety guarantees to the obligee that the principal will perform its underlying contractual obligations or that the surety will either perform or pay damages resulting from the principal's lack of performance.[4] Where a principal defaults, the surety's liability is normally capped in the bond to the specific dollar amount of the bond, which usually is equivalent to the original contract amount set forth in the underlying construction contract between the owner-obligee and contractor-principal. This cap is commonly referred to as the penal sum of the bond.

Surety bonds often contain confusing, archaic language regarding the obligations of the surety. Such language, referred to as defeasance language, typically provides that if the contractor performs its obligations under the contract, then the surety's obligations under the bond shall be null and void, otherwise the surety's obligations remain in full force and effect.[5] Disputes about the meaning of this awkward language often arise, generally requiring courts to interpret the meaning of the bonds and the obligations they impose.[6]

The importance of suretyship cannot be overstated. In the public construction context, surety bonds are a public works contractor's lifeblood because bonds are normally required for public works projects. And on private projects, bonds serve to protect an assortment of project participants with financial interests in the work. For instance, a private owner's lending institution may require that payment and performance bonds be procured as a condition for extending project financing. Similarly, the private owner may require a payment bond because it has an immediate need to sell the property after the project is completed and cannot risk the recordation of mechanic's liens by unpaid subcontractors or suppliers, which would cloud the property's title and hinder the subsequent sale. Alternatively, a general contractor may need a surety bond guaranteeing the performance of a subcontractor or supplier to protect against the risk of the general contractor's own default should the subcontractor or supplier on the project not perform. Thus, suretyship protects valuable financial interests and can be used by a receiver in connection with a distressed project for a variety of reasons.

It is important to note that suretyship is not the same as insurance. While suretyship involves a tripartite arrangement between the obligee, principal, and surety, contracts of insurance involve only the insured and the insurer.[7] Other important differences include the fact that surety bonds incorporate the underlying contract, and unlike insurance contracts that are typically offered by insurers on a take-it-or-leave-it

Continued on page 21...

Continued from page 20.

basis, surety bonds are often negotiable and not considered contracts of adhesion. Furthermore, in an insurance context, the insurer indemnifies the insured, and no one indemnifies the insurer. In contrast, within the suretyship context, the surety is answering for the debt or default of the principal, and as will be discussed in the second part of this article, the principal is usually required to indemnify the surety for any sums expended by the surety in response to an obligee's claim.

The surety's liability is often referred to as secondary because the principal (the contractor or developer) has primary liability. Because the surety's liability is secondary, a surety is only liable upon the principal's default or failure to perform. What constitutes a default will vary depending on the underlying contract, but typically, a material breach of the principal's obligations is required.[8] Following such default, the obligee must then provide notice to the surety that its principal is in default and demand the surety's performance on behalf of its principal under the operative bond.[9] Determining whether a default has occurred requires a case-by-case analysis of the particular facts at issue. Whether a default has occurred is often a crucial issue to all of the parties involved. Because the surety has no liability unless the principal has defaulted, the surety may argue that there has not been a default, and therefore that it is not liable on the bond. Similarly, unless a principal is insolvent, it may well contest the obligee's assertion that the principal is in default. If the principal succeeds in showing that it is not in default, then the surety's performance in response to a declared default, if any, will be deemed to have been voluntary, and the principal is under no obligation to indemnify or reimburse the surety.[10]

Receivers should also be aware that a performance bond surety's potential liability may extend to post-completion claims, such as warranty and defect claims, when the principal cannot or will not respond to such claims.[11] For a surety to be liable for a post-completion claim, the bond principal must either have remaining obligations under its contract with the obligee or, under certain circumstances, the post-completion claim must be for latent defects in the work. To determine a surety's potential liability for post-completion claims, careful attention must be paid to the bond language, the language in the underlying contract, and the facts giving rise to the claim. Post-completion claims may still be limited based on the language in the bond, or by an applicable statute of limitations or statute of repose.

3. Conclusion

In Part II of this article, we will discuss the performance options available to the surety after the principal has defaulted, indemnification of the surety by the principal, and common defenses available to the surety. Although this article has provided an introduction to surety bonds, it is not intended to be, and should not be considered, legal advice. Receivers should proceed cautiously when seeking to enforce surety bonds. Receivers also should be careful to follow proper procedures in enforcing the bonds. Doing so will permit the receiver and the estate to obtain the maximum benefit from the bonds.

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[1]Though the scope of a receiver's authority will vary depending on the terms of the appointment order, generally included in the receiver's authority is the power to exercise contractual rights of the owner, including those arising from a surety bond.

[2]*See e.g.* Cal. Gov't Code § 66499(1).

[3]Cal. Code Regs. Tit. 10, § 2792.9 – 2792.10 (2012); Cal. Bus. & Prof. Code § 11241. California's Department of Real Estate also frequently requires a Common Interest Completion Bond for condominium projects. These bonds typically ensure that the developer will complete construction of the condominium project's common interest areas and facilities.

[4]The Restatement of Security defines "suretyship" as follows: "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." Restatement of Security § 82 (1941); *see also* Cal. Civ. Code § 2787 ("A surety . . . is one who promises to answer for the debt, default, or miscarriage of another . . .."); *Am. Contractors Indem. Co. v. Saladino*, 115 Cal. App. 4th 1262, 1268 (2004) ("A surety bond is a written instrument executed by the principal and surety in which the surety agrees to answer for the debt, default, or miscarriage of the principal.") (internal quotes omitted).

[5]*See e.g., Pac. Employers Ins. Co. v. City of Berkeley*, 158 Cal. App. 3d 145, 148 (1984).

[6]*See e.g., Jacobs Assocs. v. Argonaut Ins. Co.*, 282 Or. 551, 554, 580 P.2d 529, 530 (Or. 1978) ("The difficulty is caused by the archaic form which continues to be used in surety bonds."); *Liberty Mut. Ins. Co. v. Greenwich Ins. Co.*, 417 F.3d 193, 195 (1st Cir. 2005) ("In the archaic form sometimes used for surety bonds, the bond read that it would be void if [the principal] carried out its obligations under its agreement with [the obligee] but 'otherwise' [the principal and surety] were each jointly and severally liable in the amount of the bond.").

[7]*See e.g., Cates Constr., Inc. v. Talbot Partners*, 21 Cal.4th 28 (1999) (discussing the differences between insurance and suretyship); *Meyer v. Building & Realty Servs. Co.*, 196 N.E. 250, 253-54 (1935) (same).

[8]*See e.g., L & A Contracting Co. v. Southern Concrete Servs., Inc.*, 17 F.3d 106, 110 (5th Cir. 1994).

[9]An obligee is not required to default terminate the principal under the underlying contract, unless required to do so under the express terms of the bond.

[10]*See e.g,. Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp 2d 1248, 1269 (M.D. Fla 2002); *Seaboard Sur. Co. v Dale Construction Co.*, 230 F.2d 625, 630 (1st Cir. 1956).

[12]Although post-completion warranty claims may be covered by a performance bond, separate "warranty" or "maintenance" bonds also may be available to a receiver to cover these claims.

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- • This symbol 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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- ♒ This symbol indicates those who facilitated the January 2009 Loyola Law School course.
- ⌘ This symbol indicated those who completed up to 20 hours of receivership law and practice, Loyola IV Symposium, at the LA Convention Center in January 2011.
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Heard in the Halls

Notes, Observations, and Gossip Relayed

By Alan M. Mirman*

Welcome to the latest edition of *Heard in the Halls*. Please provide your snippits of news, questions or comments about receivership issues or the professional community by telephone, mail, fax, or email to: Alan M. Mirman, Mirman, Bubman & Nahmias, LLP. 21860 Burbank Blvd, Suite 360, Woodland Hills, CA 91367. Phone: (818) 451-4600; Fax: (888) 451-7624; email: amirman@mbnlawyers.com

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

- **Loyola V** is approaching. Dates selected are January 18 and 19, 2013. There will be a couple of significant changes from prior Loyola conferences. First, the focus will be "The Complex Case Symposium." Second, the venue this time will be the Hilton Irvine at the Orange County Airport. Those interested in becoming sponsors, please contact **Kevin Singer** or **Chris Seymour**. Note: members who travel from the Bay Area, Sacramento, and Central California Chapters will get up to a $100 travel discount on Symposium registration.
- **Richard Ormond** of the Buchalter firm received the following note from **Judge Barbara Meiers** of the Los Angeles Superior Court: *Just a word of thanks to the receivership committee for inviting me to be actively involved and informed since my assignment to Department 12 as a receivership court. As I understand it, and as you are probably aware, as of June 1, 2012, "assignment of rent" receiverships will be going to Departments 85 and 86 (according to the odd or even case number) along with other receivership matters. Although Department 12 will become a general jurisdiction trial court on that date, which is an interesting assignment, I am very sorry to see the end of Department 12 as a special proceedings court. I have never enjoyed an assignment more in all my years on the bench, and this is in very large part because of the quality and conduct of the attorneys appearing before me in this specialized area. They seem always to be on top of things, knowledgeable about the law, courteous to other counsel and certainly to the court. I have no way, generally speaking, to convey my thanks and appreciation to all those in the "receivership bar" who have contributed to making this assignment so enjoyable, but if you happen to have an avenue through which you might be able to let others know of my appreciation it would be very welcome. Thank you, Judge Barbara Meiers*
- **Mia Blackler** of the Bay Area Chapter advises of an interesting and, I believe, unprecedented program presented by that Chapter on "Living Receiverships" program on August 1, 2012. The program focused on medical licensing and leasing aspects of receiverships involving skilled nursing facilities, hospitals, and medical marijuana dispensaries. The Chapter also welcomes new board members **Eugene Chang** (Stein & Lubin), **Edward Dean** (DSI), **Ivo Keller** (Buchalter Nemer), and **Greg Smith** (Luther Burbank Savings).
- Hypothetical: Rents & Profits Receiver is appointed upon application by the holder of the 2nd TD. If the Receiver requests permission to make payments on the 1st TD on receivership property, will/should the Judge agree to modify the Judicial Council form Order to so provide? At least one Judge faced with this request refused to do so, stating that the Form Order already provides for a receiver to pay mortgages, in the paragraph which provides that the Receiver shall preserve the property, etc. Any input on this issue?
- LA/Orange County Chapter members **Ben King, Richard Ormond**, and I, along with **Kyle Everett** of the Bay Area Chapter, spoke on Receivership panels at the 4th Annual TMA Western Regional Conference in July in Santa Barbara. The presentations covered a variety of topics, such as a case study on operating receiverships, interplay with bankruptcy issues and, of course, the ongoing hot button topic of receivership sales of real property. This was the second consecutive time that CRF has presented at TMA's Regional Conference. The panels were well-received, prompting some interesting questions and follow-up discussions.

**Alan M. Mirman is a partner in the Woodland Hills law firm of Mirman, Bubman & Nahmias, LLP, and specializes in creditor's rights. His practice includes provisional remedies, representation of receivers, litigation, loan and lease documentation, and the like.*

Alan M. Mirman

First NAFER Conference to be Held This Fall

By Ira Bodenstein*

The National Association of Federal Equity Receivers (NAFER) will hold its inaugural conference this fall in Fort Worth, Texas. The conference will run Thursday, September 13, and Friday, September 14, 2012, at the Omni Hotel.

Formed in 2010, NAFER serves as a forum for federal equity receivers to share solutions, develop best practices, and improve quality, standardization, and expertise in the receivership field.

The conference will be held in conjunction with the 36th Annual Southwest Securities Conference presented by the Texas Securities Board, Financial Industry Regulatory Authority, and Fort Worth regional office of the Securities and Exchange Commission. Regulatory officials from across the country will also be in attendance. This will be a good chance for receivers and their counsel to discuss common issues and concerns with the officials of the regulatory agencies they interact with on a daily basis.

Registration is open to all interested parties. For more information about the conference or membership in NAFER, go to the NAFER website at naferforum.org.

**Ira Bodenstein of the law firm of Shaw, Gussis, Fishman, Glantz, Wolfson and Towbin LLC is a founding member of NAFER and one of the conference planners.*

Ira Bodenstein

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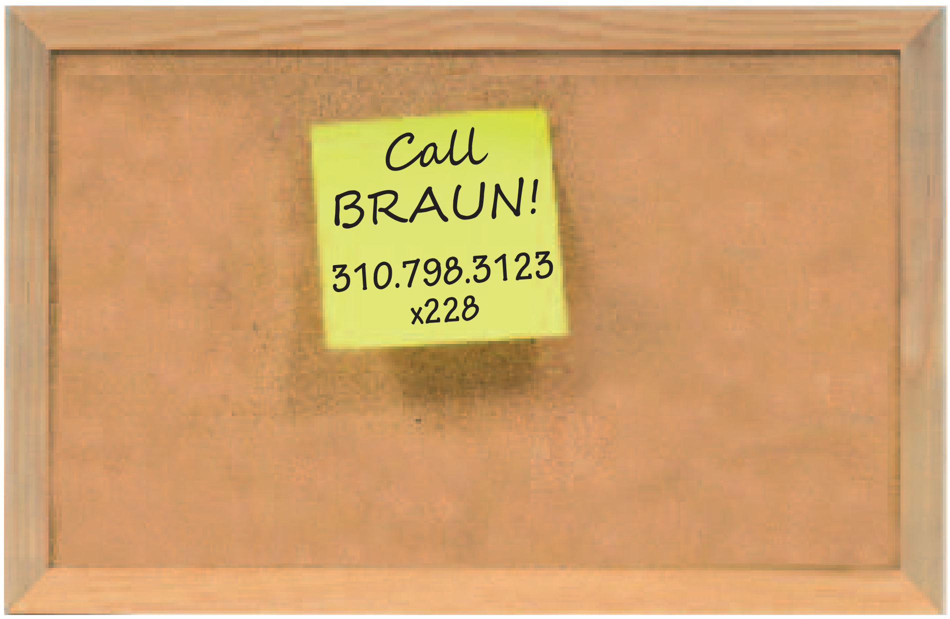

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