A Publication of the California Receivers Forum

Winter 2003 • Issue 12

Inside

RECEIVERSHIP NEWS

In Custodia Legis

JUDICIAL CORNER

The Importance of Petitioning the Court for Instructions

BY COMMISSIONER BRUCE MITCHELL,
LOS ANGELES COUNTY SUPERIOR COURT*

One of the most valuable tools for a receiver is the petition to the court for instructions. See, Free Gold Mining Company v. Spiers (1901) 135 Cal. 130, 131:

> "It is eminently proper for a receiver to apply to the court by which he was appointed for instruction and authority from time to time as he may need it...."

By definition a receiver is in a conflicted situation: the receiver owes fiduciary duties to both sides in a lawsuit, and the parties will often disagree as to the action a receiver should take in a problem situation. A receiver may also lack the funds to immediately solve a problem, but may face liability if he or she doesn't promptly cure the situation.

Asking the court for instructions serves two purposes: first, the receiver does a better job for the litigating parties and for the court which appointed the receiver by setting a hearing when all sides can be heard and all worthy ideas can be considered. Second and equally important, obtaining a court order for a contemplated action protects the receiver from personal liability.

Take, for example, an apartment building that has a roof leak. Should the roof be patched, or should an entirely new roof be put on for considerably more money? The foreclosing lender may want a new roof. The lender will then be foreclosing on an improved property with the cost of the repair added to the borrower's debt. The borrower, on the other hand, may want the simplest and cheapest repair if he or she is gathering money to cure the default, but may be rendered unable to cure the default if the cost of a new roof is added.

Another illustration: a receiver may locate a prospective tenant for a commercial space, but the tenant wants a long-term lease at a low rate and $20,000 in new tenant build-out improvements. The building owner believes that better terms can be obtained, and that the owner will be damaged if he/she/it cures the loan default and is stuck with a bad lease. What choices should the receiver make in these hypothetical situations?

Continued on page 3...

Publisher's Editor's Comments: Exciting Year in 2004!

By Robert P. Mosier, Publisher

Happy New Year from the publisher and editor of the Receivership News. This is our fourth quarterly issue, and wraps up 2003 and the end of another holiday season. We wish you a healthy and prosperous new year, 2004.

Receivership News circulation continues to increase. Each issue now reaches:

— 1,201 State and Federal Judges (an increase from 780);

—350 receivers, attorneys, accountants and related staff;

—1,900 members of the California Bankruptcy Forum;

—1,200 banks and financial institutions throughout the country that are members of the Turnaround Management Association (via PDF/e-mail).

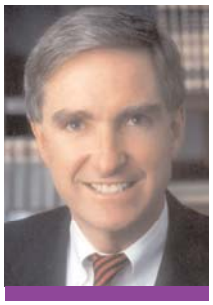
The big news in the receivership community is that the California Receiver's Forum is going to present a second Loyola Law School educational forum for receivers this Fall. The tentative timeframe is a two-day conference over a Friday and a Saturday in early October, 2004. Edythe L. Bronston, who coordinated the first Loyola Law School Receivership Conference in 2000 and has long worked with the State Bar in presenting educational programs for receivers, has agreed to Chair the event once again in 2004. She has put together a statewide committee to assist in this mammoth undertaking. Program faculty will include professors, judges, commissioners, and a number of experienced receivers, receivership accountants and receivership counsel. Stay tuned for details as program specifics take shape. This is an opportunity for each receiver in California to learn both the fundamentals of and latest additions to receivership law, and to earn the California Receivership Forum's certificate of completion of this comprehensive program, a qualification of increasing importance to those who nominate and select receivers. I guarantee that the program will improve both receivership skills and knowledge of the receivership professional community.

We are also delighted to welcome a new author for this issue, The Honorable Bruce E. Mitchell. Commissioner Mitchell sits on the Los Angeles County Superior Court, and is one of two Commissioners who oversee all of the Central District's rents and profits receiverships. Commissioner Mitchell writes about the importance of a receiver's using petitions for instruction—a subject he has firm opinions on. This is an important article for receivers who are interested in limiting their personal liability in receivership actions. We hope Commissioner Mitchell will become a regular Receivership News contributor.

This issue also contains a must-read piece on the new court rules affecting receiverships, written by David Pasternak.

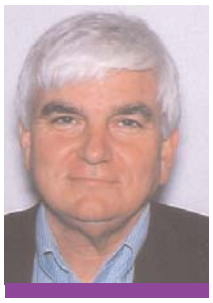
On a closing note, Kirk Rense, Receivership News editor, and I urge you to fully consider the services and products offered by Receivership News advertisers. These persons and companies support the Receivership News and the California Receivers Forum. It is important to show financial support for these advertisers that, in significant part, make our organization and publication possible.

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



Robert P. Mosier

MR. RENSE is a lawyer specializing in insolvency and in representing court-appointed fiduciaries, with more than 20 years' experience. He was a journalist before attending law school at the University of Southern California Law Center. Kirk is a California Receivers Forum, LA/OC Chapter Board Member.



Kirk Rense

In Custodia Legis

Receivership News
Published by
California Receivers Forum
954 La Mirada St.
Laguna Beach, CA 92651
949.497.3673 x 200

Publisher
Robert P. Mosier
Rmosier@Mosierco.com

Editor
Kirk S. Rense
KRense@renselaw.com

Associate Publishers
Peter Ito
Kenton Johnson
Beverly McFarland
Ron Oliner
Rob Warren, III

Contributing Columnists
Alan Mirman
Heard in the Halls
Peter Davidson
Ask the Receiver
Charles F. Rosen
Taxes and the Receiver

Officers
Kyle Everett, President
Edythe L. Bronston, Chair Elect
James Lowe, Treasurer
Marilyn R. Bessey, Secretary
Martin Goldberg Project Manager

Receivership News is published quarterly by the California Receivers Forum, a not-for-profit association. Articles in this publication express the opinions of their authors and do not necessarily reflect the views of the directors, officers or members of the California Receivers Forum. Articles are intended as a source of general information and should not be construed as specific advice without further inquiry and/or consultation with professional counsel.

Continued from page 1..

A receiver cannot be held personally liable for damages if the receiver follows a court order. The court has judicial immunity for its rulings, and that protection extends to the court's agent when the agent is following an express order: See Chiesur v. Superior Court (1946) 76 Cal.App.2d 198, 202:

> "A receiver is not liable in his individual capacity as a tort-feasor for any act within the scope of his duties as receiver and done under an express order of court which is not in excess of jurisdiction, the liability incurred being chargeable upon the property."

See also, Binney v. San Dimas Lemon Association (1927) 81 Cal.App. 213, 220:

> "When a receiver holds a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. . . .
>
> But when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court; the wrong is in the order of the court, not in the receiver's transgression of the order. In such case, it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action. . . . "

This assumes, of course, that the receiver has fully investigated and then informed the court of the relevant facts, and that the receiver has faithfully carried out the instructions which the court issued.

Thus, if the court ordered only a spot repair on a roof (rather than a new roof), and heavy rains then occur which caused serious water damage to tenants' belongings, only the receivership estate would be liable. Take another example: if a building has serious health and safety violations, but it is physically and financially impossible for the receiver to complete all of the required repairs immediately, and if the receiver obtains court approval of a prioritized work schedule to be completed over time the receiver should not be personally liable for damages if there is a personal injury caused by a condition the receiver has not yet had time to remedy.

Conversely, a receiver can be held personally liable—surcharged—for damage done which could have been avoided by a petition for instructions. See Aviation Brake Systems, Ltd. v. Voorhis II (1982) 133 Cal.App.3d 230, 235 (noting that "upon the receiver's final report and account the receiver in his personal capacity may be surcharged for losses to the receivership estate based upon his misconduct or mismanagement.")

There is one important caveat, however. A receiver may still be found criminally liable for not complying with governmental orders to fix a deficient property, even if the receiver was complying with a work-priority order issued by a civil department of the court. That is because the court, part of the judicial branch of government, cannot interfere with the lawful regulatory functions of the other branches of government, including the executive branch. See Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 144-45:

> "The separation of powers doctrine requires judicial restraint in enjoining criminal investigations or prosecutions. . . . The discretionary authority vested in the district attorney to investigate and prosecute criminal conduct is considered too vital to the interest of public order to be subjected to prior restraint by courts except under extraordinary circumstances. [Citations.] The balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility. [Citation omitted.]"

The practical effect of this rule is that any enforcement agencies that have cited a building should be included by the receiver in the development of a court-ordered work schedule for repairs.

A receiver should not be embarrassed to seek instructions from the court, and is in fact encouraged to do so. Seeking instructions does not reveal a receiver's lack of expertise, but instead demonstrates the receiver's wisdom and experience. Some of the worst problems in receiverships arise when a receiver is faced with a difficult situation involving high financial stakes but fails to seek court instructions. Receivers who are not themselves lawyers may feel that if they seek court instructions, the court will conclude the receiver does not know his or her business. This is not the case. Sophisticated attorney-receivers realize the importance of seeking and obtaining court instructions.

Petitions for instructions can be brought on the regular statutory notice period, which is 21 days plus added days if service is made by mail. Code of Civil Procedure § 1005[b]. Petitions can also be initiated by ex parte application, which requires that notice of the application be given to the affected parties by 10:00 am the day prior to the ex parte hearing. California Rules of Court § 379[b]. If the ex parte matter is simple or uncontested, the court may resolve the petition at the ex parte hearing. Alternatively, the court may choose to set a fully-noticed hearing with a briefing schedule, and may make interim orders it considers necessary until the hearing can be conducted.

A receiver is entitled to hire an attorney to present his or her petition for instructions. This is a legitimate cost of a receiver's doing business. If there is any question about the need for hiring a lawyer to present a petition, the receiver should prepare a simple pro per application to the court asking for permission to retain counsel, and proposing the name of an attorney and that attorney's hourly rate. Such a pro per petition can be heard on ex parte notice.

To sum up, petitions for instructions are a "win-win" tool: they result in the best actions being taken for the benefit of the interested parties, and they protect the receiver from potential liability.

Bruce E. Mitchell

**The HONORABLE BRUCE E. MITCHELL joined the Los Angeles County Superior Court in 1990, and currently sits in Central District, Department 59, where he hears real property receivership applications and related suits, in addition to other duties. Commissioner Mitchell's Professional Profile was featured in the Summer, 2003 issue of Receivership News.*

New Year's New Requirements for Undertakings and Final Reports

By David J. Pasternak, Esq.*

The California Judicial Council has adopted two statewide rule changes pertaining to receivership practice, effective January 1, 2004.

Newly adopted California Rule of Court 1902.5 requires that the applicant for appointment of a receiver at either the noticed or ex parte hearing propose and state the reasons for a specific amount for the undertaking (i.e., bond) to be required from the applicant and the receiver. The Rule states that other parties also may propose and state the reasons for the specific amounts of such undertakings at the same time.

California Rule of Court 1908, concerned with the receiver's final account and report, has been significantly amended. Rule 1908(a) now requires a receiver to present a final account and report by either noticed motion or stipulation of all parties, and requires that the final report include requests for discharge and for exoneration of the receiver's surety.

New Rule 1908(b) specifies that a receiver's final account and report is one of the few motions that may be filed without any supporting memorandum of points and authorities, unless the court orders otherwise.

The most significant change is newly adopted Rule 1908(c) which requires the receiver to give notice of the final report and account, whether brought by either noticed motion or stipulation, "to every person or entity known to the receiver to have a substantial, unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to the action or has appeared in it."

As originally proposed, newly adopted Rule 1908(c) would have had a draconian effect on receivers by requiring receivers to give such notice to every person or entity who might have any claim against the receivership. It now requires such notice only to persons who have "substantial, unsatisfied" claims. While the term "substantial" is undefined, it is expected that it will vary from case to case. In some cases, a $100 claim may be substantial, while in a case involving larger dollar amounts or greater numbers of unsatisfied claimants, a

Continued on page 5...

Continued from page 4.

claim of less than $1,000 might not be substantial. While this lack of specificity could be a cause of concern for some receivers, it is preferable to a fixed dollar amount that would be applicable to all cases and could result in the necessity to notify thousands of people with claims in insubstantial amounts in some receivership cases.

Rule 1908(c) as originally proposed also did not include the limiting language "known to the receiver." Without that language, the notice requirement could have opened a Pandora's box for potential receiver reliability because a receiver could have been held liable for a subsequent claim from a previously unknown receivership claimant who, understandably, was not notified of the receiver's final report and account.

As adopted, Rule 1908(c) will not change the practice of experienced receivers, who already give notice of their final report and account to all persons or entities known to the receiver to have substantial, unsatisfied claims in order to eliminate potential future liability to such persons. Now all California receivers have specific statutory responsibility to do so, and should thoroughly review their files to identify all such persons and entities before making service of their final accounts and reports. ■

*MR. PASTERNAK, *a member of Pasternak, Pasternak & Patton, a Century City law firm, is a founding Co-Chair of the L.A./Orange County chapter of the California Receivers Forum.*

Mr. Pasternak is the Forum's Legislative Co-Chair and one of the four attorney members of the California Judicial Council. He serves as a receiver, provisional director and partition referee, and represents the same as counsel.

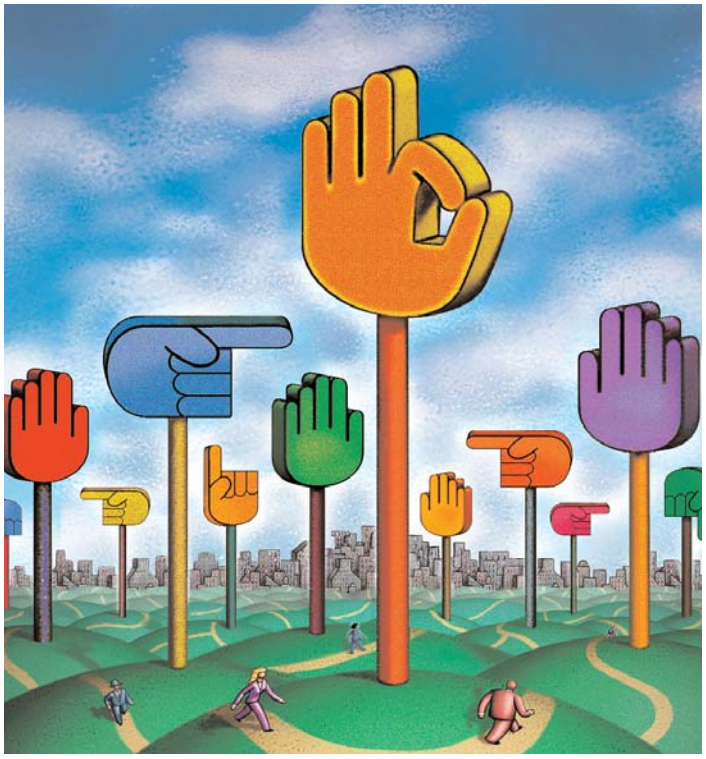
David J. Pasternak

The most significant change is newly adopted Rule 1908(c) . . .

ASK THE RECEIVER

By Peter A. Davidson, Esq.

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



Q: After a receiver is appointed to enforce a settlement, can the defendant, a California corporation, appeal the judgment and order appointing the receiver, or is the receiver the only party that has the right to appeal?

A: Your question is unclear as to whether the receiver was appointed for the corporation or its assets. Generally, if a receiver is appointed for a corporation, the receiver replaces the board of directors and, hence, is the only one with the power and right to govern and direct litigation the corporation is involved in. See, SEC v. Spence & Green, 612 F.2d 896, 903 (5th Cir. 1980); First Sav. & Loan Ass'n. v. First Federal Sav. & Loan, 531 F. Supp. 251, 255 (D. Hawaii 1981). See also, CFTC v. FITC, Inc., 52 B.R. (N.D. Cal. 1985 [Once receiver is appointed for corporation only the receiver has the power to put the corporation into bankruptcy].

If the receiver is appointed for the corporation's assets, or to collect or enforce a judgment against the corporation, rather than for the corporation itself, then the old board of directors continues and it has the power to direct litigation the corporation is involved in and, hence, appeal. NOTE: C.C.P. §917.5 provides the perfecting of an appeal of an order or judgment appointing a receiver does not stay enforcement of the judgment or order unless an undertaking is filed in a sum fixed by the trial court to cover any damages that might result by reason of a stay of enforcement of the order or judgment.

Q: I have a buyer for a piece of real property at a very good price. The title report shows an old deed of trust, which I have been told was paid off, and a deed of trust to the defendant's mother that was recorded just prior to the lawsuit I was appointed receiver in. Can I, like a bankruptcy trustee, sell the property free and clear of the disputed liens and work out later who is to get the proceeds from the sale?

A: Yes. The ability of a bankruptcy trustee to sell property free and clear of liens under 11 U.S.C. §363(f) is modeled after the old equity practice in which counts of equity often authorized the sale of property under their control free and clear of existing liens. Speckles v. Spreckles Sugar Corp., 79 F. 2d 332 (2nd. Cir. 1935) where the court points out that courts of equity have had the power to sell property free and clear of liens, including taxes, from the earliest times. The Supreme Court has held this power "must be implied from the general equity powers of the court". Van Huffel v. Harkelrode, 284 U.S. 225 (1931).

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

Peter A. Davidson

The IRS Empire Strikes Back

By Charles F. Rosen, Esq.*

(In Part 1 in the last issue of Receivership News Mr. Rosen discussed the creation of the federal tax lien, and tips for investigating and resolving attendant issues. In his conclusion, Mr. Rosen addresses dealing with a recalcitrant IRS, and the basis for potential personal liability for a receiver who doesn't honor a proper government lien.)

What If The IRS Is Uncooperative?

If all else fails because a lien discharge or subordination cannot be secured from the Service and the sale will not fully pay the tax lien, the receiver may have to resort to a civil suit in order to remove the tax lien from the property. This is most easily done with a suit to quiet title. Such suit is best filed in the local U.S. District Court since the United States of America is an indispensable party where the I.R.S. has a tax lien. Permission to file the suit in district court should first be secured from the state court judge assigned to the receivership. Though such suit could be filed in state court, the U.S. Judicial Code (Title 28 U.S.C.) permits the government to remove the case to Federal court, in most instances, where the Federal government is a party. The Office of the United States Attorney probably will remove such an action since it is most familiar with - and comfortable in - the district court, and believes Federal judges generally have a better understanding of Federal law.

How Does Potential Personal Liability of the Receiver Arise?

Aside from the issue of a filed and perfected Notice of Federal Tax Lien, the receiver should be aware of the following. Where a taxpayer is determined to be insolvent, a burden may fall on a receiver if he does not honor and pay Federal claims in the proper manner. This arises from a statute not found in the Internal Revenue Code but rather a statute whose ancestors date from 1789. This potential liability of a receivership estate or receiver stems from 31 United States Code Section 3713 – Priority of Government Claims (commonly referred to as the "Insolvency Statute"), which states:

> (a)(1) A claim of the United States Government shall be paid first when -
>
> (A) a person indebted to the Government is insolvent and -
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or
>
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.
>
> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

Payments by a person in control of a corporation – including a receiver – or in control of and administering assets of an individual are encompassed by this statute. See, Lakeshore Apartments, Inc. v. U.S., 351 F2d 349 (9th Circuit, 1965); U.S. v. Spitzer, 261 F.Supp. 754 (S.D.N.Y. 1966).

A divestiture of the insolvent taxpayer's property in a legal proceeding is required to create this priority. U.S. v. Oklahoma, 361 US 253 (1923). However, A Federal tax lien may be subordinate to a perfected judgment lien creditor on certain (real) property. U.S. v. Estate of Romani, 523 US 517 (1998). This case resolved an apparent conflict between 31 USC sec. 3713(a) and IRC sec. 6323(a) and the case would appear to protect a receiver from personal liability where the receiver has paid senior perfected lien creditors.

The statute is keyed to the insolvency of the debtor. A debtor usually falls into insolvency when its liabilities exceed its assets. See Lakeshore Apartments, Inc., v. U.S., 351 F2d 349, 353 (9th Cir 1965). The government may exercise this statutorily created priority even though taxes have not yet been assessed . . . let alone a tax lien created. The claim for taxes constitutes the "debt." U.S. v. Moore, 423 US 77, 96 SCt 310 (1975); Viles v. Commissioner, 233 F2d 376 (6th Cir 1956).

There is personal liability to those in control of a corporation's affairs at a time when preferential payments are made and the corporation is insolvent. See Lakeshore Apartments, Inc. v. U.S., 351 F2d 349 (9th Cir 1965). (This can include officers, directors, or shareholders [or a receiver or cases involving individuals rather than a corporation].) In U.S. v. Spitzer, 261 F.Supp 754 (DC SD NY 1966), the court held liable officers, directors and stockholders who either directed or controlled wrongful payments, or know of the payments from the corporation and failed to stop them. The court also stated that no statute of limitations applied to a claim under § 3713. This could just as likely be applied to a receiver who made such payments absent a court order and absent notice, including adequate and complete notice and information - to the United States and the I.R.S.

---

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

Charles Rosen, Esq.

Robb Evans

Robb Evans & Associates LLC
Tel: 818-768-8100
rea@robbevans.com

is pleased to announce his appointment as Trustee for the

U.S. interests of the
Indonesian Bank Restructuring Agency

Robb Evans

Robb Evans & Associates LLC
Tel: 818-768-8100
rea@robbevans.com

is pleased to announce the completion of the liquidation of

P.T. Bank Dagang Nasional Indonesia
Special Deputy Commissioner and Chief Liquidator
for the California Department of Financial Institutions

Douglas B. Davidson

Hospitality Ventures
Tel: 949-775-8305
dbdmotel@aol.com

is pleased to announce his appointment as Receiver for

The Claremont Inn,
a rents & profits receivership

Superior Court
County of Los Angeles

John M. Wolfe

John M. Wolfe, CPA
Tel: 949-476-2696

is pleased to announce his completion of duties as Receiver for

Berkeley Products, Inc.
A personal property, inventory, accounts receivable and fixed asset liquidation

Superior Court
County of Los Angeles

Beverly N. McFarland And Kevin J. Whelan

The Beverly Group, Inc.
Tel: 916-408-3755
beverlygroup@att.net

are pleased to announce the appointment of The Beverly Group, Inc. as Receiver for

Diamond Radio, Inc.
Dba 103.5 FM – "The Bomb"

Superior Court
County of Sacramento

Robert P. Mosier

Mosier & Company, Inc.
Tel: 714-432-0800
ramosier@mosierco.com

is pleased to announce the completion of his duties as Receiver for

Great China Industries,
an operating company

Superior Court
County of Los Angeles

Robert P. Mosier

Mosier & Company, Inc.
Tel: 714-432-0800
ramosier@mosierco.com

is pleased to announce his appointment as Receiver for

Coyote Enterprises, Inc.
an operating company

Superior Court
County of Orange

Theodore G. Phelps

Audigators
Tel: 714-734-0479
tphelps@audigators.com

is please to announce his appointment as Receiver for

Marriage of Nekovie,
a family law receivership

Superior Court
County of Orange

David L. Ray

Saltzburg, Ray & Bergman, LLP
Tel: 310-481-6700
DLR@srblaw.com

is pleased to announce his appointment as Receiver for

MIA & Lizzie, Ltd.,
a corporate dissolution

Superior Court
County of Los Angeles

Robert C. Warren III

Investors' Property Services
Tel: 714-708-0180
rob@investorshq.com

is pleased to announce his appointment as Receiver for

SPANN,
a rents and profits receivership

Superior Court
County of Los Angeles

Douglas P. Wilson

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

is pleased to announce the completion of his duties as Receiver for

Citrus Finance, LLC
an operating company

Superior Court
Kern County

Douglas P. Wilson

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

is pleased to announce the completion of his duties as Receiver for

Morimoto Almond Farms
an operating company

Superior Court
Merced County

Douglas P. Wilson

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

is pleased to announce the completion of his duties as Receiver for

Marine Marketing, Inc.
an operating company

Superior Court
County of Los Angeles

IT IS COMING IN OCTOBER 2004

LOYOLA II

A comprehensive, two-day instructional seminar on all aspects of Receivership

Where: On the Campus of Loyola Law School, near downtown Los Angeles.

When: Exact date pending; planned for the first or second weekend of October 2004. It will be a two-day event starting on Friday morning and ending Saturday afternoon, followed by a reception with the faculty.

Who Should Attend: Every receiver, receiver's counsel, receiver's accountant, receiver's administrative aid, agents of receivers – in short, anyone involved in the receivership process. Judges, commissioners and courtroom staff are also invited to attend.

Who Will Teach the Course: A panel of judges, commissioners, and experienced and highly qualified receivers.

What is the Benefit: Each attendee will dramatically increase his/her knowledge of the law and procedures involved in acting as a receiver, as a receiver's agent, or in representing a receiver. Attendees will earn the California Receivership Forum's Certificate of Completion of this comprehensive program, a qualification of increasing importance to those who nominate and select receivers.MCLE and CPE credit will be provided.

Will the Materials be Made Available?: An important part of the program is the personal exchange of information and ideas that takes place between the panelists and the class. Extensive written materials will be prepared and provided, but only to seminar attendees.

Details: price of the seminar, specific dates, local lodging and other program details will be announced in the March 2004 issue of the Receivership News.

The Organizing Committee: Edythe Bronston, Esq. Chair; David Ray, Esq., Robert Mosier, Beverly McFarland, James Lowe, Martin Goldberg, Marilyn Bessey, and Shawn Christianson, Esq.

Lions and Tigers and Bears?

Receivers in Bankruptcy: Strangers in a Strange Land

By Ron Oliner, Esq.*

What happens when you are holding and operating a 20-unit apartment building as receiver and the owner of the building files a bankruptcy petition? Do you have to relinquish control? If so, to whom? Can you retain possession under some circumstances? And, most important perhaps, how are you to be paid for the services you have provided (and are providing)?

Let's start with a hypothetical. Plaintiff Bank sues in state court to judicially foreclose on a deed of trust and has a receiver (you) appointed over the Bank's collateral securing its lien — a 20-unit apartment building. The lien extends to rents, issues and profits. You take over management of the property.

Defendant/owner of the property files a Chapter 11 bankruptcy petition in order to pull the rug out from under the Bank and frustrate its foreclosure action, and immediately demands that you turn over the property and disgorge all collected rents. The demand letter is nasty and describes, among other things, the ramifications of any continuing violation of the automatic stay found in Bankruptcy Code § 362. The letter states that since Section 541 of the Bankruptcy Code defines "property of the estate" to include "property, wherever located and by whomever held," the apartment building is surely included. It also points out that Section 543 of the Bankruptcy Code requires that a "custodian" of property of the estate deliver the property and related proceeds, rents and the like to Defendant, now a debtor in possession under the Bankruptcy Code. ("Custodian" is defined elsewhere in the Bankruptcy Code to include "a receiver or trustee.")

Your failure to do so, states the letter, violates the Section 362 automatic stay and may subject you to substantial litigation risks and sanctions.

The last thing you want to do is run afoul of the Bankruptcy Code or needlessly expose yourself to the ire of the bankruptcy judge. But neither do you wish to fail in your duties set by the appointing state court judge. What to do?

Continued on page 11...

CRF Panel Will Contrast Roles of Receivers and Provisional Directors at January 21st Program

"The Gamesmanship Of Corporate Control: Receivers Versus Provisional Directors" will be discussed January 21, 2004 at the Receivership Forum's Los Angeles/Orange County Chapter's evening educational seminar at the Olympic Collection at 11301 Olympic Boulevard (near Olympic and Pico Boulevards) near downtown Los Angeles.

Judge Dzintra Janavs, Presiding Judge of the Los Angeles County Superior Court Writs and Receivers Department, will join Michael Wachtell, David Ray, and Edythe Bronston as panelists to probe the subtle and not-so-subtle distinctions in authority and liability between operating as receiver for a company with conflicted management and joining a warring corporate board as provisional director. Robert Mosier will moderate the program. Written materials will be provided. 1.5 hours of MCLE or CPE credit is authorized for attendees.

Registration and networking starting at 5:45 will be followed by a buffet dinner from 6:30 to 7:00 p.m. when the 90-minute program will commence. Mailed reservation ($50.00 for CRF members, $70.00 for non-members, $25.00 for government employees) must be received by January 12, 2003 by JBS & Associates, 954 La Mirada, Laguna Beach, CA 92651. Reservations by fax at (949) 497-2623 will be accepted after that date only if mailed reservation will not reach JBS & Associates by January 12, 2004.

Continued from page 10.

A closer look at Bankruptcy Code Section 543 is in order. The Bankruptcy Code provides that a custodian with knowledge of the commencement of a case under the Bankruptcy Code concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents or profits of such property, or property of the estate, in possession, custody, or control of such custodian, except such action as is necessary to preserve such property (more on this below).

Section 543 further provides that a custodian shall deliver to the trustee (or debtor) any property of the debtor held or transferred to such custodian, or proceeds, product, offspring, rents or profits of this property, that is in such custodial possession, custody or control on the date that the custodian acquires knowledge of the bankruptcy case. The custodian must also file an accounting of any property, including rents, issues and profits, within a timeframe prescribed by the Bankruptcy Court.

Finally and perhaps most importantly, Section 543 provides a mechanism by which a custodian — you — can remain in control of the property in spite of the bankruptcy filing. The court may so order if it finds that it is in the interests of creditors to allow a custodian to retain possession. This is the tool a good Plaintiff's lawyer will use to keep a receiver in control of real property during the bankruptcy. This job is easiest where Plaintiff's counsel can marshall compelling reasons to "preserve the status quo."

In this author's experience, to the extent Plaintiff's counsel can prove (a) the receiver's good management of the property and impartiality, (b) Defendant's previous poor management, (c) an eve of foreclosure bankruptcy filing, (d) an incomplete set of bankruptcy schedules, and (e) other facts otherwise demonstrate that Defendant merely wants to wrest control of the property back in order to continue to collect rents without any exit strategy, a properly written motion should result in the Bankruptcy Court directing a previously appointed receiver to remain in custody.

What are possible "other facts" that may justify keeping a receiver in possession? Defendant may have allowed the property to become so run down that orders of abatement have issued, may have allowed property taxes to go unpaid, or may have deferred maintenance to the point where there is a clear danger to tenants. Plaintiff may have been required to force-place property insurance where Defendant allowed its policy to lapse. Maybe there is a good deal of police activity at the property. These aren't good facts for creditors, tenants or the property, but are facts that can make a Section 543 motion winnable.

What about the practical aspects of the situation? In our hypothetical the receiver is looking squarely at a lawyer's threatening letter that describes the horribles that will befall the receiver if she does not immediately hand over the keys to the property. Ignoring the demand letter is not the answer, and may have dire consequences. Rather, immediately upon learning of the bankruptcy filing the receiver should contact Plaintiff's counsel and

Continued on page 14....

Douglas P. Wilson and The Douglas Wilson Companies

(As is the case with many members of the California Receivers Forum, Doug Wilson's career path to receivership work was indirect and unpredictable, the confluence of personal interests, changing economic conditions and the needs of the business community around him. He is the subject of this issue's Professional Profile. Here is his biographical sketch, in his own words.)

Douglas P. Wilson

Douglas P. Wilson, founder and chief executive officer of the Douglas Wilson Companies, a diversified real estate and business services firm providing workouts and problem resolution, asset and property management, consulting business planning, receiverships, and similar services throughout the Western United States. The company is headquartered in San Diego with regional offices in San Francisco and Denver.

In some ways, it was the good times and the great building boom of Denver, Colorado in the 1970's that paved the way for me to eventually specialize in the business of helping property and business owners who have fallen on bad times.

I moved from my home in the Chicago suburb of Glen Ellen, Illinois, where I was raised, to Denver in the late 1960s to attend the University of Denver. My mother had attended Colorado College and was an expert skier; we had spent many family vacations skiing in the Rockies as a result. When it came time for me to decide where to attend college — Notre Dame, Cornell or the University of Denver – my choice was entirely predictable.

While attending I also worked in several retail and sales jobs, all the while taking a pre-law curriculum (I had wanted to become an attorney) that emphasized English literature, history and other heady topics. However, after graduating and spending some time reflecting further on what I then wanted to do, I took a position with the Cannel & Chaffin Commercial Interiors firm's Denver office, where I spent five years, eventually becoming a regional vice president in charge of a staff of 33 design professionals. We designed and built out spaces in commercial projects for financial institutions, law firms, accounting firms, clubs and created public spaces.

That position taught me many things. Among others, it was my first exposure to providing specialized services to attorneys, accountants and major businesses. That experience later became invaluable in preparing me to offer the different – but still highly specialized – sort of services I provide to such clients today.

I was fascinated with all the construction taking place in Denver in those days. There were 19 construction cranes in that city's downtown area alone at one time. As I watched the many buildings and projects being constructed, I realized that I wanted to be involved in that kind of work – wanted to learn how to secure the land, to arrange financing, to design a project, and to manage the construction and marketing efforts. My eventual mastering of these functions became important resources for the work I now do for troubled properties and companies.

I left Cannel & Chafin to become president of French & Company and, later, a partner in The Tower Development Group. In 1979, while at another firm, Wagstaff & Raynd, I represented the Petro-Lewis Corporation in its commitment to lease 573,000 square feet in a 50-story high-rise building in Denver.

IT WAS THE SINGLE LARGEST OFFICE LEASE NEGOTIATED IN THE STATE UP TO THAT TIME.

In 1980 I joined Raynd Ventures, a joint venture with a London-based property company that represented European investors in the U.S. and provided comprehensive development and management services. That brought me to San Diego three years later. Denver had fallen on hard times at that point and there was considerably more development opportunity in Southern California. Our firm had acquired a major site in San Diego's slowly emerging downtown – a full 60,000-square-foot block on which there were several run-down buildings and an historic Fox Theatre. We cleared the block except for the theatre, which was to be restored to become the new home of the San Diego Symphony. We made that restoration possible by building a 1.1-million-square-foot, two-tower hotel and office complex with a connecting multi-level garage that spans the existing theatre. Today, more than a decade and a half later, our Symphony Towers complex remains the largest privately financed mixed-used project in downtown San Diego.

It was during the construction of Symphony Towers that many of San Diego's savings and loan associations and banks were becoming overwhelmed with troubled assets. Also during the mid-1980s I was getting my initial experience with workouts for troubled properties located back in Denver. It was abundantly clear to me that there was nobody providing these work-out, debt adjustment services on any kind of a regional basis. I quickly saw that with the coming economic downturn there would be a need for workout and receivership services not only in San Diego but other locales throughout California and elsewhere.

After our company sold Symphony Towers in 1989 I founded my present company with the primary goal of providing a diverse range of services in any economic

Continued on page 13...

Continued from page 12.

cycle – and to be able to do so throughout the state. The recession provided my new company with an ample supply of high-quality real estate and accounting professionals along with a dependable book of business.

Our initial assignments were troubled real estate assets: office buildings, hotels, medical buildings, and retail properties in particular. That list has expanded over the years to include larger and more complex properties as well as golf courses and agricultural properties – and has even extended beyond real estate. More and more frequently we are being asked to work at the operational level to disentangle troubled operating companies. We take over and manage their inventories, employees, and their daily operations in order to stabilize them and return value to the enterprise.

The providing of these and other types of services has taken us far beyond the traditional duties of a receiver. Acting as a court-appointed or judicial fiduciary is a better description of what we now do.

WHAT EXCITES ME ABOUT OUR WORK IS ITS HIGH LEVEL OF DIVERSITY.

No two assignments are even remotely similar. There are different problems and challenges every day even within one project, requiring very thoughtful analytic, management, and communications skills.

Our company has expanded the notion of diversity even further, however. In keeping with our mission to cover our bases and prosper in all economic cycles, we have a full-fledged real estate development division operating alongside the work we do for operating companies and distressed real estate.

In October of last year we completed the $60 million Parkloft condominium loft complex in downtown San Diego's East Village neighborhood, a block away from the new Petco Park where the San Diego Padres will play beginning spring, 2004. By fall, 2002, we had sold all 111 lofts on the first nine floors and were selling the nine luxury penthouses on the 10th and 11th floors.

This spring we are breaking ground on The Mark, a $120 million, 32-story condominium tower on a full city block across the street from Parkloft.

Our company's diversity in scope requires our 35 employees to operate as a fully integrated team of asset managers, development, financial, and marketing professionals – all with a "take charge" attitude. This depth of knowledge and flexibility has allowed me to be active in a variety of civic and professional organizations, including the Receivers Forum, Bankruptcy Forum, the National Association of Industrial and Office Properties, Urban Land Institute, the Lambda Alpha national real estate fraternity, the Downtown San Diego Partnership (of which I was vice chair last year), and our city's University Club, where I serve as chairman of the board. San Diego Mayor Dick Murphy also has appointed me to the Downtown San Diego Community Plan Update Committee.

It has also allowed me to spend quality time with my wife of 26 years, Kathleen, and our three sons. Our youngest son, Michael, 13, is in middle school in Solana Beach where we live and our older two, Nick, 20, and Alex, 18, are attending college in –- of all places – Colorado.

As we look to the future, it's clear that the only thing that never changes is change itself. We and others in our line of work will need to continually adapt to the myriad changes in our clients' operating businesses and properties. Soaring energy costs and shortages, a nervous stock market, operational and financial mismanagement, political campaigns, fraudulent business practices, the Middle East situation, and the continuing threat of international terrorism are factors that affect our clients. There is a continuing need to develop full-service capabilities in managing and marketing specialized classes of assets – golf courses, hotels, for-sale residential and agricultural properties – to name but a few.

I, for one, remain optimistic. There will be continued demand for our diverse range of problem resolution and management services. It is our continuing charge to be positioned to support our clients' needs whenever and wherever they may be. ■

Continued from page 11.

advise him/her of the pending bankruptcy case (and any demand letter). The receiver should advise Plaintiff's counsel that she will comply with the turnover requirements of the Bankruptcy Code unless a motion to excuse turnover is immediately brought, on shortened time if possible.

In the interim, the receiver should probably do nothing other than to hold the rents she had collected to date, collect additional rents which may come due during this very short interim period, and preserve the property (including paying necessaries like utilities). Unless a motion to excuse turnover is promptly brought and there is a resolution in very short order, the receiver may have no alternative but to hand over the keys and rents to the debtor in possession as required by the Bankruptcy Code.

What about payment to the receiver for her services, and to those persons and entities (a property manager, perhaps counsel, and for other payment obligations incurred post-receivership and prior to the filing of bankruptcy case) to whom and for which the receiver has become obligated? The answer is found in Bankruptcy Code § 543, Subsection (c), which provides that the court, after notice and a hearing, shall "protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents or profits of such property; and provide for payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian."

These receivership obligations cannot be paid without an approving order of the Bankruptcy Court, however, regardless of whether the receiver winds up turning over the property to the debtor or is directed to remain in control, there is clear statutory and case authority by which the Bankruptcy Court can (and should) authorize these payments to be made out of the receivership estate assets.

Perhaps the most important point to be made is that Receivers should be able to fully protect themselves when a bankruptcy case interrupts an ongoing receivership if they keep calm and are generally familiar with these fundamentals of bankruptcy practice and with local practice requirements in the district where the bankruptcy case is pending.

Ron Oliner

**RON OLINER is a shareholder with Buchalter, Nemer, Fields & Younger, resident in its San Francisco office, where he has been practicing for over ten years. Ron focuses on bankruptcy and creditors' rights, and has handled many receiverships throughout Northern California, representing receivers and financial institutions. He is also a court-appointed trustee in bankruptcy and the immediate past president of the California Receivers Forum, Bay Area Chapter.*

THE LIST

While there is no court-approved list of Receivers, the following is a partial list of Receivers who are members of the California Receivers Forum and have contributed to this publication.

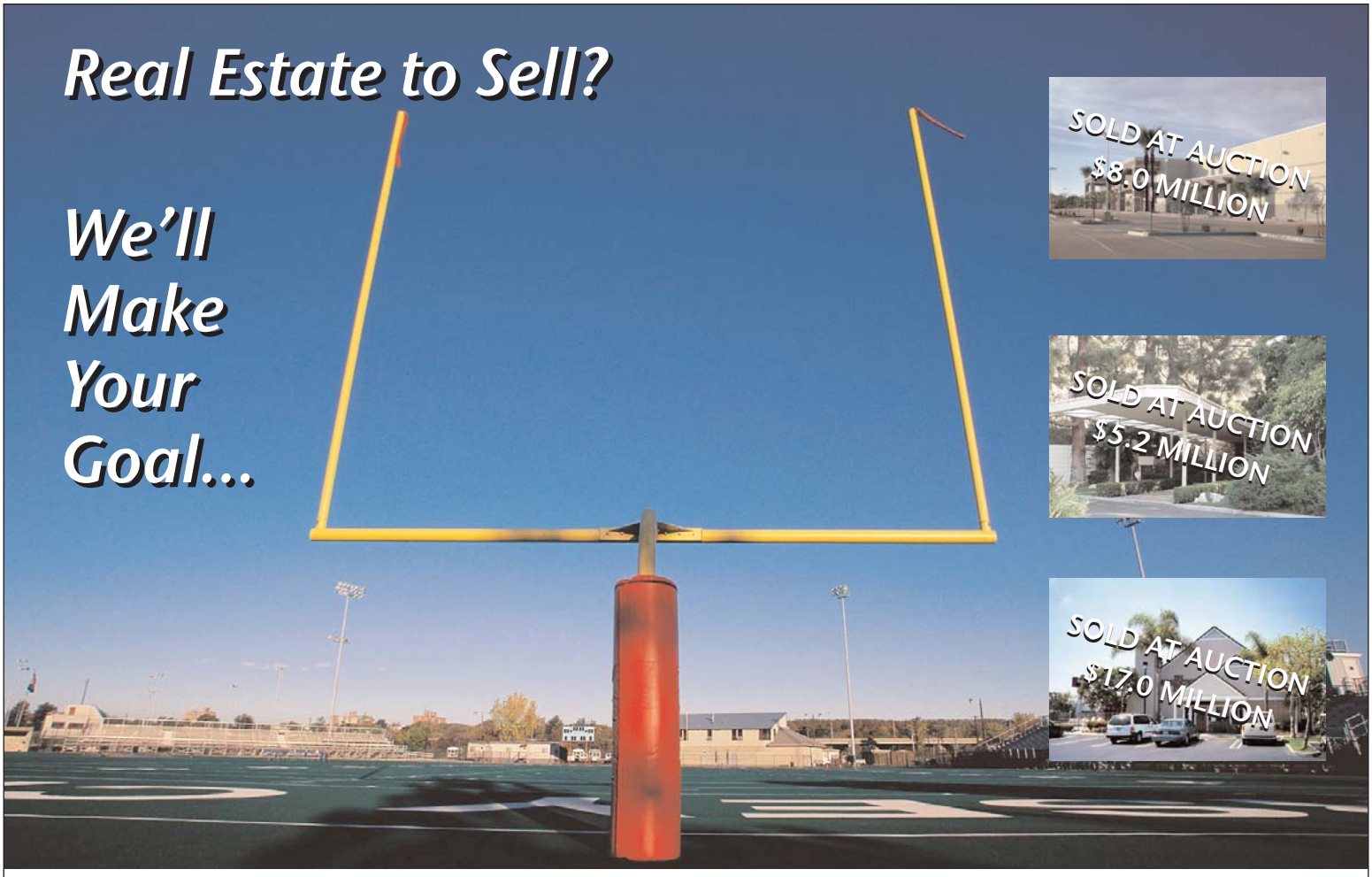
AREA	PHONE	E-MAIL
Bay Area		
Dennis P. Gemberling	415-431-0135	dpg@perrygroup.com
David A. Summers	925-933-2875	Davidsummers8@aol.com
Robert M. Rouse	650-802-1629	brouse@wres.com
* Donald G. Savage	510-547-2247	donald.savage@worldnet.att.net
Sacramento Valley		
* Beverly N. McFarland	(916) 408-3755	beverlygroup@att.net
Kevin J. Whelan	(916) 408-3755	beverlygroup@att.net
Fresno Area		
Clifford E. Bressler	559-298-1089	cliffordbressler@earthlink.net
* Steve Franson	559-930-8119	steve@stevefranson.com
James S. Lowe III	559-924-4214	jslowe@lemoorenet.com
* Hal Kissler	559-435-1756	hkissler@mancoabbott.com
Los Angeles/Orange County		
* Edythe L. Bronston	818-528-2893	ebronston@bronstonlaw.com
* Weldon L. Brown	909-682-5454	weldon@weldonbrown.com
* Weldon "Bud" Brown	909-682-5454	bud@weldonbrown.com
Robert Crane	949-515-5840	r.crane@sbcglobal.net
Douglas B. Davidson	949-725-8305	dbdmotel@aol.com
Richard Dennis	818-990-7733	rick@carrick.com
Richard K. Diamond	310-277-0077	rkd@dgdk.com
James H. Donell	310-207-8481	james.donell@jalmar.com
Steve Donell	310-207-8481	steve.donell@jalmar.com
Howard M. Ehrenberg	213-626-2311	hehrenberg@skbr.com
Robb Evans & Associates	818-768-8100	robb_evans@robbevans.com
Burdette "Bud" Garvin	909-387-0901	awlbudgarvin@aol.com
* David A. Gill	310-277-0077	dag@dgdk.com
* Gary Haddock	310-306-6789	garyhaddock@playavistausa.com
* Nigel W. Hamer	818-382-7500	nigel@thehamergroup.com
Gary R. Holme	323-466-9761	garyholme@usa.net
Mary Keshishian	818-990-7733	mary@carick.com
* Timothy Kuhn	818-990-3700	timothykuhn@cs.com
* Randal James Lee	"323-930-2671, ext. 11"	rjlee@ccim.net
Everet Miller	818-979-0010	everetmiller_jmkenv@hotmail.com

AREA	PHONE	E-MAIL
Los Angeles/Orange County		
* George R. Monte	626-930-0083	montegr@aol.com
* Douglas C. Morehead	949-852-0900	doug@optimaasset.com
* Robert P. Mosier	714-432-0800	rmosier@mosierco.com
* Leon J. Owens	310-826-9838	leonjowens@aol.com
* David J. Pasternak	310-553-1500	djp@paslaw.com
* James L. Peerson	323-954-7575	jim@peergroupcorp.com
Theodore G. Phelps	714-734-0479	tphelps@audigators.com
Gary A. Plotkin	818-906-1600	gplotkin@prnlaw.com
* David L. Ray	310-481-6700	dlr@srblaw.com
* Les Rodin	818-788-5800	lr@rodincompany.com
Victor Sampson	818-725-2500	sampson@lycos.com
Thomas A. Seaman	949-222-0551	tom@thomasseaman.com
Eric Shaw	310-827-0076	eric@nycreditinc.com
* Steven M. Speier	949-809-3184	sspeier@squarmilner.com
* William E. Turner	714-228-9153	wturner145@aol.com
David D. Wald	310-979-3850	dwald@waldrealtyadvisors.com
* Robert C. Warren III	714-708-0180	rob@investorsHQ.com
* Richard Weissman	818-226-5434	rweissman@rwreceiver.com
J. Scott Williams	949-263-2600	jswilliams@bbklaw.com
John M. "Jack" Wolfe	949-476-2696	jackwolfe@aol.com
* Adrian Young	909-945-4586	adrian@delmar1.com
Andrew R. Zimbaldi	714-751-7858	azimbaldi@aldenmanagement.com
San Diego Area		
M. Daniel Close	858-792-6800	dclose@cts.com
* Mike Essary	858-560-1178	calsur@aol.com
* Martin Goldberg	858-560-7515	marty@cni4you.com
William J. Hoffman	858-720-6700	bill.hoffman@trigild.com
* Richard M. Kipperman	619-668-4500	rmk@corpmgt.com
* Thad L. Meyer	858-713-9345	tmeyer@allianceturnaround.com
Douglas P. Wilson	619-641-1141	dwilson@douglaswilson.com

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

Real Estate to Sell?

We'll Make Your Goal...



Register your property NOW for:
Tranzon's upcoming 1st Quarter 2004 Multi-Property Auction

tranzon
REO AUCTION Q1 2004
Multi-Property Real Estate Opportunity

Tranzon's Real Estate Auctions provide our clients with:

- Accelerated Sale Strategies -
- National Marketing Exposure -
- Competitive Bidding -
- Market Value Results -
- Non-Contingent Transactions -

REALTOR®

Orange County
Mike Walters, CAI, ASA
949-727-9011

tranzon
ASSET STRATEGIES

Los Angeles
Jeff Tanenbaum, CAI
818-879-8180

NAA Auctioneer

888.314.1314 • www.tranzon.com

Tranzon is the nation's leading real estate auction specialist, with 16 regional offices and a team of professionals to accommodate all asset types, including: commercial, residential and investment real estate, as well as complete businesses, business assets, inventories and intellectual property.