



NEWS

*A Publication of the
California Receivers Forum*



The Honorable H. Jay Ford, III

The Honorable H. Jay Ford, III **SUPERIOR COURT JUDGE, SUPERIOR COURT OF CALIFORNIA SANTA MONICA DIVISION**

Receivership News is pleased to have the opportunity to interview the Honorable H. Jay Ford, III, Superior Court Judge sitting in Santa Monica. Special thanks to Receiver Steve Donell for making the arrangements for the interview and profile.

Judge Ford is a fifth generation, native Angelino. But a discussion of his life's story reveals that at a fairly young age, our future Judge and his family moved out of Los Angeles to the country. First to Driggs, Idaho and later to Highland, Utah. In fact, Judge Ford is graduate of the University of Utah for both his undergraduate and law school degrees. As an undergraduate, he graduated Magna Cum Laude in 1982. At the S. J. Quinney College of Law at University of Utah, Judge Ford was associate editor of the Journal of Contemporary Law and the Journal for Law and Policy. He graduated from

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Handling Probate within a Receivership

By ORIT GADISH*

As a court-appointed receiver, you may find yourself having to handle assets that are required to be probated, in which case, the probate court gets involved. If those assets happen to be real estate, it is important to secure the services of a real estate brokerage that specializes in probate real estate sales. The probate process is broken down into phases, then into steps within the phases, and can be documented in diagrams to make the information more digestible. First, the initial phase of the general probate process is

reviewed, followed by the full and limited authority probate processes.

This article is focused on the initial phase of the general probate process from a real estate perspective and is presented in the figure provided on page 10. The steps in this phase are precursors to both the full and limited authority paths of the probate process.

The procedure for selling real property in probate is governed by Probate Code 10300. The Personal Representative (PR) may be appointed with full or limited authority under the

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Publisher's Comments

BY ROBERT P. MOSIER*

Receivership News is pleased to profile **Judge H. Jay Ford, III**, Superior Court Judge from the Santa Monica courthouse. Judge Ford is not only experienced in appointing and managing receivers, he is a former law partner of stalwart receiver **David Pasternak** and is familiar with many of the top receivers in the So. Cal. area. It is an enlightening and interesting interview.

Also profiled in this issue is member **Michael W. Essary**, a receiver and resident of San Diego. Mike has been appointed a receiver in over 300 matters which makes him one of our more experienced receivers. Mike has been a So. Cal. resident for longer than 40 years. But for leisure, it is south to the Baja Norte where he and wife Cindy like to hang out. It is a fun read. Congratulations, Michael. Michael is a real estate broker by background.

And of course, there is the substantive Ask the Receiver column. Founder of *Receivership News* **Peter Davidson** does his usual fine job of peeling back the skins of the receivership onion with providing creditors with the current status of a case, and what happens if the Receiver is sued after dismissal? Your Publisher frequently researches Peter's many prior columns for insight into gnarly issues that confront a receiver and or his or her counsel from time to time.

Finally we welcome new administrators to the oversight and management of *Receivership News*. **Jeanne Sleeper** has retired, and she picked her replacement, **Olsen Management** which is stepping into the detail without hesitation. Welcome Olsen Management.



Robert P. Mosier



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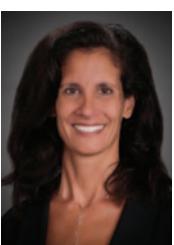
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Kathy Bazoian Phelps

***Kathy Bazoian Phelps** is Partner at Raines Feldman LLP, Los Angeles, and the co-author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*. She frequently represents receivers and trustees.

Receivers have to worry about practically everything. This issue of *Receivership News* contains substantive articles ranging from probate to cybersecurity. **Orit Gadish**'s article, "Handling Probate Within a Receivership," breaks down the phases of the probate process to make it more understandable for receivers. The threat of ransomware and the importance of cybersecurity are highlighted in **Jake Diiorio**'s article which raises eye-opening issues we all should consider.

In addition to those articles, be sure to read about the upcoming Loyola conference. CRF has been working hard on planning a fantastic conference for January 20-21, 2022 in Orange County. The plan is to be in person so be sure to place this on your calendar for early next year.

Finally, thank you to **Chad Coombs** for his TaxTalk column and **Michael Muse-Fisher** for Heard in the Halls. Our regular columns provide much needed substantive information along with information about our receivership community to help keep us all in the loop.

We are always looking for new ideas and articles, so please feel free to contact me at kphelps@raineslaw.com to run any ideas by me. Each case is unique and we would love to hear about new and different issues you are seeing in your practice.

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JUDGE FORD...

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law school in 1985. Another point of distinction: Judge Ford put himself through undergraduate working a full-time graveyard shift, and through law school by working part-time as a security guard with 12.5 hours shifts on the weekend. Remarkable.

After law school, it was back to his boyhood hometown, Los Angeles, where he studied for and passed the California State Bar Exam. His first job: Adams Duque & Hazeltine for two years. He was recruited out of law school. However, he found downtown LA in the mid-1980s to be unpleasant due to, among other things, rats that seemed to occupy Pershing Square (more recently, it has been the homeless that had a prominent presence in Pershing Square, but this has recently been remedied and pushed east). As a young lawyer, Judge Ford became active in the Barristers, the young lawyers' section of the Los Angeles County Bar where he admits to being a "do gooder" with the goal of helping folks understand and manipulate through our complex legal system. Judge Ford became President of the Barrister Section of the LA Bar. Here, his activities included



Judge Ford with wife enjoying Hawaii

taking groups of young lawyers to homeless shelters run by the Salvation Army in the City of Bell and downtown Los Angeles. The lawyers would help homeless individuals obtain lost legal documents and obtain referrals for assistance with pending legal issues. One of

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JUDGE FORD...

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the programs was to help graduates of the Salvation Army's drug and alcohol rehabilitation program clear outstanding tickets and warrants to help them return to a more normal life. Judge Ford is very proud of this program and his contribution, and it earned our future Judge an award from the Salvation Army - helping others.

After two years working in a big firm, Lawyer Ford was off to a small firm Tyre, Kamins, Katz and Granof Law Corporation, first as an associate lawyer and later shareholder. It was at this law firm that then lawyer Ford met a law partner and future receiver, David Pasternak (a name and stellar reputation familiar to nearly every receiver, receiver's counsel and most judges in the Southland). Judge Ford is also familiar with stalwart receiver, Edythe Bronston, through Bar Association work.



The Judge and Mrs. Ford cruising

During his corporate law career, he remembered and even yearned for his days as a lawyer doing good for society. This led to then Lawyer Ford being elected by the judges of the Los Angeles Superior Court to be a a Commissioner of the Los Angeles Superior Court. With the encouragement and support of now Justice Lee Smalley Edmon, Governor Jerry Brown appointed Commissioner Ford as a Superior Court Judge. It was here that Judge Ford was introduced to criminal law. During his distinguished career, Judge Ford has presided

over both criminal and civil cases in several different courthouses - San Fernando, Malibu, the Airport, and eventually settling in Santa Monica where he continues to preside over an Individual Calendar civil caseload. In his civil judge role, Judge Ford is proactive in encouraging settlement and aiding the litigants through the process where feasible. Being a judge is an opportunity to do the right thing versus being an advocate for your client. From a statistical perspective, less than 3% of the cases are resolved by trial - most are resolved by settlement. The Judge can have a significant influence on this process to help the litigants help themselves to resolve their problems/disputes. Judge Ford asks the rhetorical question: would you rather settle the dispute where you have some control over the process, or turn it over to a jury of twelve unknown people or a judge in the case of a bench trial who may never understand the facts of the dispute as good as you do?

When asked if Judge Ford sees the appointment of a receiver as an "extreme remedy," he responded yes, because the law says so. He goes on to say: receivers are like what some folks say about lawyers - they are good when you need one. But it is a powerful remedy and one not to be taken lightly. Taking away one's property or company and turning it over to a receiver is extreme and should only be used in specific cases that warrant such a remedy. Judge Ford comments on receivership fees: He uses David Pasternak as an example of an experienced receiver with a high hourly rate, but Judge Ford said a careful review of his time records demonstrated that he was working efficiently to get the job done quickly and well. As a result, he never had a reason to object to or reduce his fees. In addition to being solution minded, and not taking on an assignment that is more expensive than the cash likely to be generated by the project, receivers should be judicious and prudent in their conduct. The Judge offered a useful perception: think of the receiver's fees as coming out of the Judge's pocket and proceed accordingly.

On the personal side, Judge Ford is a family man; he and his wife have three nearly grown children but no lawyers in the group and no grandkids, yet. The interests of his children range from engineering to physics to

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JUDGE FORD...

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The couple enjoying Alaska

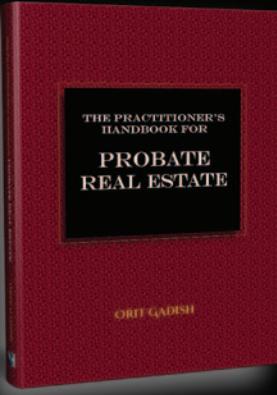
writing – time will tell. Judge Ford has a special spot in his heart for his wife who is a retired federal prosecutor, and he admits, the smartest person in the family. His hobbies include a passion in finding time to play computer games. He and his wife enjoy travel, and Hawaii/Kauai is a favorite destination. His forecast for the future: they will soon be empty nesters giving he and his wife more time for community minded projects, travel, and watching their children become parents. His most admired jurist: Justice Arthur Gilbert who sits in Ventura. At the Judicial College, Justice Gilbert teaches a course about judging and the power of exercising judicial discretion in a judicially prudent way to always do the right thing.

Receivership News has had the pleasure of interviewing many judges over the past three decades and is honored to profile Judge Ford. His keen interest in helping litigants through the process and consistently looking for solutions is admirable and impressive. Yet, if this more gentle approach fails, he is ready, willing, and able to apply the law and make tough decisions in any case. But he observes, the best solutions can originate with the litigants. *Receivership News* wishes Judge Ford continued success in all these endeavors.

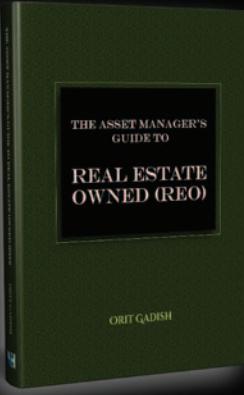
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Ransom! The Unfortunate New Normal: Cybersecurity Considerations for Fiduciaries

By JAKE DIORIO*

The Order was signed a week ago. When your team arrived onsite and turned on the controller's computer, they were greeted with a skull-and-crossbones themed message:

"Your files have been encrypted. You must pay a ransom of \$100,000 within 48 hours to regain access to your files. To restore your system email I-own-you@aol.com and include your new Account ID Aug2021_246 in the subject line. Payment instructions will be provided."

This article summarizes why the threat of ransomware has become commonplace, the serious impacts of deficient IT security, and emerging best practices to protect a company from falling victim.

The New Normal for Fiduciaries

According to securitymagazine.com, global losses from cybercrime exceeded \$1 trillion in 2020, of which ransom demands amounted to over \$1.4 billion. The average cost for a company to rectify damage caused by a ransomware attack approached \$1.5 million during the year. It is generally expected that these numbers will increase in 2021, and YTD events indicate this is an accurate prediction. In just 32 days:

- May 1, 2021: San Diego-based Scripps Health's network was attacked. It took weeks to rectify, during which time prescriptions could not be filled and health records were unavailable to doctors. 150,000 patient records were mysteriously "lost" just before the ransomware attack. In addition to the millions of dollars Scripps had to spend remedying the data breach, it now is facing class action lawsuits valued at \$600 million along with a tarnished reputation.
- May 7, 2021: Colonial Pipeline, one of the nation's largest oil pipeline systems, was hit by a ransomware attack affecting computerized equipment managing the pipeline. Colonial was forced to pause its pipeline operations and, with the FBI's help, paid \$4.4 million in bitcoin to restore its network.
- June 2, 2021: JBS USA, one of the nation's largest meat suppliers, was hit by a ransomware attack that forced it to temporarily cease cattle-slaughtering operations at 13 meat processing plants. The company

was able to avoid extreme damage to its workflow by implementing its Cybersecurity Plan, then reportedly paid an \$11 million ransom after most of its facilities were back online.

While high-profile cybersecurity attacks like these make the headlines, most attacks hit small, private companies. In fact, small businesses comprise 71% of ransomware attacks¹. Most are privately-held companies like those we take over and represent as receivers and attorneys. Afterall, investing in state-of-the-art IT security is unlikely when a business is in financial distress. Hence, it is imperative for fiduciaries to know the leading indicators of risk for cybersecurity threats and how to respond.

Cryptocurrency: The Fuel Behind Ransomware Attacks

Nefarious people worldwide have been hacking into computers for decades. The advent of cryptocurrency elevated hacking to a whole new level. This as-yet untraceable currency enables thieves to receive ransom without payment tracking and - more importantly - prosecution for their criminal acts. You can't control the existence of cryptocurrency, but you can assess the doorways thieves are using to gain access to systems.

Your onboarding processes for new engagements should include assessments of:

- **Digital Infrastructures:** Cloud-based software and storage, websites, inventory systems and any other business methods requiring a login name and password.
- **Remote Desktops and VPNs:** Thanks to the global pandemic, remote desktops and VPNs are ubiquitous. Many are poorly installed, providing an easy point of entry for hackers.
- **Email:** Protocols and software tools to identify phishing and other questionable inbound emails and spoofed email addresses.

According to a recent Kroll study², almost half of ransomware attacks are the result of exposure from a remote desktop protocol (RDP), or remote connection to a private network, with other main exposures being phishing emails

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RANSOM!...

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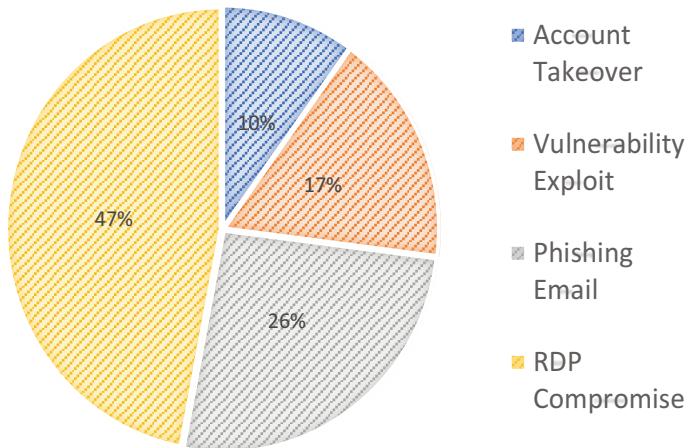
and hacking directly into an account, like in the JBS ransomware attack.

According to MalwareBytes, the largest of these categories – RDP Compromise – saw a 500% increase during the start of the COVID-19 pandemic, from 200,000 attacks per day to over 1.2 million attacks per day.

Ransomware top industry targets:

- Professional services (small to medium size)
- Healthcare/Medical
 - Data
- Education organizations
 - IP from campus research
 - Personal info/data
- Energy/Utilities
- Banking/Financial

WHAT PRECEDES A RANSOMWARE EVENT?



Data from a recent Kroll study, as reported by securitymagazine.com^{2}

The True Cost of an Attack

In addition to the ransom, the costs of a cybersecurity attack include lost revenue in the form of lost customers and new leads, and from the business being offline. The company will face extraordinary costs to hire expert IT consultants to assess the damage and remedy the IT infrastructure. Even a modest, 10-employee business could experience a six-figure ransom demand. A \$100,000 ransom payment or \$50,000 in lost business could be the difference between making payroll to carry the company through a going-concern sale process and ceasing operations due to lack of cash flow.

Action Plan

Your first step must be assessing your own company's risk of a cyberattack. Reassess your IT protocols to protect your business. A cybersecurity threat will directly impact the outcomes of your engagements and could bring them to an abrupt halt, damaging your wallet and your reputation. Also, make sure you have adequate cyber insurance.

When it comes to the organizations you oversee, they need to be secure enough to discourage hackers. Develop relationships with IT consultants with cybersecurity expertise. Get a roadmap from them for your new engagement onboarding assessment and bring them in when you expose potential risks.

What are your immediate priorities?

1. Identify and secure all cash and limit banking access to key people
2. Identify and secure all assets/collateral of the receivership estate
3. Lock-down the IT environment and stress-test the system using a qualified IT professional to identify any weaknesses in the firewalls, etc.
4. Identify insurance coverages and assess adequacy of coverage

The first two action items are second nature for most of us, but the third and fourth are a bit murkier, potentially requiring a comprehensive understanding of the business and its customers, employee/customer/vendor access to its VPN – and more.

Example: In a recent receivership matter, our team performed a complete IT lockdown of a business after securing all access points to the IT infrastructure, including blocking access by former employees and third parties. We then addressed three critical IT tasks:

1. Obtained “3-2-1” backups of all data (3 backups, 2 different devices, 1 being offsite)
2. Established a firewall with monitoring of all traffic
3. Reviewed the need for monitoring of all computers and servers with Advanced Antivirus (AV) and Remote Monitoring & Management (RMM) tools

We also discovered, in reviewing the business' insurance coverages, that its cyber insurance was limited to a \$10,000

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RANSOM!...

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rider to its GL policy. If the company was hacked, insurance coverage would be inconsequential. A ransomware or cyber incident would have frozen operations. Instead, implementing the three tasks above substantially reduced the risk of a ransomware attack or other cybersecurity breach. Risk of a costly business interruption event was substantially reduced, allowing us to complete a successful engagement.

Summary

The key considerations for protecting against ransomware attacks and their financial impact in the receivership environment are:

1. Careful configuration of remote working arrangements. According to securitymagazine.com, hackers prey on remote work environments and human error to steal corporate data.
2. Assess cyber insurance coverage. Some businesses may believe they are covered, but they simply have a \$5,000 or \$10,000 rider to their GL policy.

3. Assess the IT infrastructure, including personnel training, software and hardware. Is it sufficiently robust for the business?

Your New Normal

The new normal is here, but how will it play out? Will fiduciaries like us have cybersecurity experts on staff in the foreseeable future? Will the government intervene? Is the cryptocurrency market creating an artificially vulnerable security environment for the short term, or is it here to stay?

¹ <https://www.techtimes.com/articles/245791/20191022/71-of-ransomware-attacks-target-small-businesses-are-you-ready.htm>

² <https://www.securitymagazine.com/blogs/14-security-blog/post/93936-the-year-in-ransomware-key-targets-extortion-tactics-and-what-to-do>



Jake Diiorio

**Jake Diiorio is a Managing Director of Stapleton Group, a full-service turnaround consulting firm serving the Western U.S. Jake specializes in complex receiverships as well as bankruptcy and interim C-Suite matters. Jake and his team have resolved over \$2 billion in troubled assets during his 11 years with the firm.*

A collage of real estate images. It includes aerial views of a large industrial or office building under construction, a dirt lot, and a completed building. Text overlays include "JUST SOLD \$16.7 million", "72% Over Appraised Price", "BANKRUPTCY SALE", and "Appraised \$9.47 million". At the bottom left is the website "WWW.FIDUCIARYREALESTATESERVICES.COM".



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Loyola IX Symposium

On The Road Again: California Receiverships In A Shifting Landscape

We are very excited to announce that the Loyola IX Symposium will be held January 20-21, 2022, at the Hyatt Regency John Wayne Airport in Orange County. The theme of the Symposium this year is *On The Road Again: California Receiverships In A Shifting Landscape* and was chosen to describe our focus on the impact of COVID-19 on the receivership industry and recent developments and case law impacting receiverships in California.

Chris Thornberg, founder of Beacon Economics, will once again be the Keynote Speaker following the Welcome Dinner on Thursday, January 20. Chris is an expert in economic and revenue forecasting, regional economics, economic policy, and labor and real estate markets. He became nationally known for forecasting the subprime mortgage market crash that began in 2007 and was one of the few economists on record to predict the global economic recession that followed. It's appropriate for him to return now to talk about how the economic implications of COVID-19 are expected to affect our industry moving forward.

We are honored to have Houston attorney **Zack Clement**, who has led numerous financial restructuring transactions and insolvency litigation matters during his 40

years of law practice at Sidley, Weil and Fulbright as the Friday, January 21 Keynote Speaker. Two titans in the receivership industry, **Doug Wilson** and **Joel Weinberg**, will also be discussing their analysis of receiverships as a result of COVID-19, where they see the industry headed, and what areas are likely to see the most impact and increase on the need for receiverships as a result of COVID-19.

Other programs will include, among other things, a discussion on cannabis-related receiverships, partnership disputes and partition actions, post-judgment and family law receiverships, receiverships in the hospitality industry, and restructuring debt and equity receiverships. For those new to the industry or looking for a refresher, we are also including a Receiverships 101 session, going over basics that all receivers need to know.

The Symposium will also feature more than ten sponsored luncheon table discussions on a variety of contemporary topics for newer or veteran receivers and their counsel.

Be sure to reserve the dates of January 20-21, 2022 and join us at the Loyola IX Symposium! For more information and registration, visit receivers.org.



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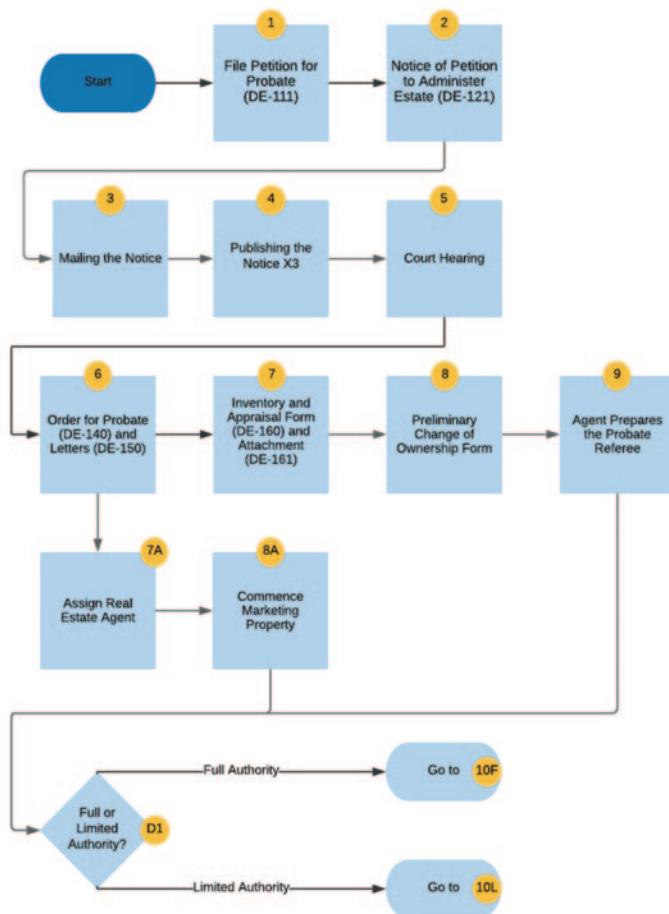
HANDLING PROBATE...

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Independent Administration of Estates Act (IAEA). Per Probate Code 10400, if the PR is appointed with limited authority, court supervision is required to sell, exchange, or grant an option to purchase the estate's real property. The PR appointed with full authority may elect to have the sale confirmed by the court but is not required to.

The following diagram showcases the steps of the initial phase of the probate process (see Figure 1).

Figure - The Initial Phase of the Probate Process



Step 1: Petition for Probate (Form DE-111)

Filing the Petition for Probate with the court officially launches the probate process. If there is a will, a copy is required to be attached to the petition. Once the filing is made, the court assigns a case number and the initial court hearing date. The petition requests that the judge grant either full or limited authority to the Petitioner. Once the court appoints the Petitioner, they become the Personal Representative (PR) of the estate, required to be appointed to administer the estate. If the decedent died without a will, the PR is referred to as the administrator, and if the decedent died with a will, the PR is referred to as the executor.

Step 2: Notice of Petition to Administer Estate (Form DE-121)

Once the petition for probate has been filed, the next step is to provide proper notice to everyone interested in the estate. The Notice of Petition to Administer Estate is completed, and it includes the location and the date and time of the hearing.

Step 3: Mailing the Notice

The Notice must be mailed to all heirs listed in the petition no less than 15 days before the hearing date. A copy of the Petition for Probate should be included with the Notice of Petition to Administer Estate. It should be sent to everyone entitled to the Notice, anyone who is named in the will. All heirs at law must be served the notice and must be included. This includes the spouse, children, parents, brothers, and sisters. The Notice should be filed with the court, notifying the court that action has been taken. This is proof that everyone received proper notice, which must be done before the hearing.

Step 4: Publishing the Notice

The notice must also be published in a newspaper of general circulation, in the city where the decedent resided at the time of death, or, in the city or county where the property is located. The notice must be published three times before the date of the court hearing, and the first publication must be made 15 days before the date of the hearing.

Step 5: The First Court Hearing

The first court hearing date is usually scheduled 30 days from the date the Petition for Probate is filed. The purpose of the hearing is to have the judge grant what has been requested in the petition – to appoint the Personal Representative and determine whether limited or full authority is granted. The heirs may appear in court objecting to the Petition for Probate or requesting to serve as the Personal Representative.

Step 6: Order for Probate (Form DE-140) and Letters (Form DE-150)

The Order for Probate should be drawn up when preparing the Petition for Probate. Some courts require these forms to be submitted when submitting the Petition for Probate, others allow for the order to be submitted at or after the hearing. Once the judge decides to move forward with the petition, the order is signed. Once the judge signs the order, and it is filed, the order is in place, and the process

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HANDLING PROBATE...

Continued from page 10.

proceeds with the execution of the letters (described below). The letters are signed and issued by the court clerk.

The Order for Probate and the Letters allow the Personal Representative to act on behalf of the decedent to handle the real property. This includes permission to sign the listing agreement, purchase agreement, and escrow documents. The letters allow your real estate agent to proceed with the sale of real property.

The types of Letters include:

1. Letters of Testamentary: If the decedent had a will.
2. Letters of Administration: If the decedent didn't have a will.
3. Letters of Administration with Will Annexed: If the decedent had a will, but the named executor isn't available to act.
4. Letters for Special Administration: If there's a sensitive matter such as a foreclosure on a property and the PR hasn't been appointed yet, an "ex-parte petition" is filed, and the probate attorney will appear in court on an emergency basis, and a request is made to the judge to appoint the PR temporarily so the PR can communicate with the lender and also request a temporary restraining order to stop the sale. The court will issue an "Order Appointing Special Administrator" and the Letters for Special Administration which identifies the specific limited powers being granted to the PR.

Assign the real estate agent (Step 7A) and have your agent commence the subject property's marketing (Step 8A).

Step 7: Inventory and Appraisal Form (Form DE-160) and Attachment (Form DE-161)

Per Probate Code 8800, the PR must file with the court clerk an inventory of property to be administered in the decedent's estate together with an appraisal of the property in the inventory, using the Inventory and Appraisal Form. This form is used in conservatorship and guardianship cases as well.

This form must be filed within four months after letters are first issued to the PR. There's an option for the PR to file a partial inventory and appraisal, depending on the estate's complexity. Some assets take longer to appraise than others, so it is possible to break up the requests for appraisal by specifying that it is a partial.

The Inventory and Appraisal form identifies all of the decedent's assets that existed as of the date of death and their respective fair market values at the date of death. The court appoints a California Probate Referee, a neutral third-party

professional who evaluates the assets identified on the form, including the real property.

Form DE-161, the Inventory and Appraisal Attachment, is attached and referenced by both the personal representative and the probate referee. For real property that needs to be appraised, the PR lists the address(es), and the probate referee will specify the value in the field next to the address, sign the form, and mail it back to the PR. Once the values are specified, the PR can go back to form DE-160 and specify those assets' value.

Completing the Inventory and Appraisal form is a team effort. The PR completes a portion of the form and then mails it to the probate referee for completion. The Inventory and Appraisal form is then filed with the court to establish the date of death value of the estate assets.

The probate referee must act promptly, per Probate Code 8940(a), and with reasonable diligence appraise the property and shall, no later than 60 days after receipt of the form should either: (1) return the completed appraisal to the PR, or (2) report on the status of the appraisal and specify the reason why

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HANDLING PROBATE...

Continued from page 11.

the property hasn't been appraised along with an estimate of time required to complete the appraisal. This report should be delivered to the PR and then filed with the court.

This form helps the IRS and state taxing authorities determine estate taxes and any applicable capital gain taxes once the real property is sold. The appraisal generated by the probate referee expires after one year.

Step 8: Preliminary Change of Ownership Form

The PR must also file a certification that the requirements of Section 480 of the Revenue and Taxation Code are either not applicable, because the decedent did not own real property in California at the time of death, or, it has been satisfied by filing a change in ownership statement with the county recorder or assessor of each county in California in which the decedent owned property at the time of death that is subject to probate proceedings.

Step 9: Your Agent Prepares the Probate Referee

The probate referee conducts a drive-by evaluation of the property, which does not result in accurate pricing without considering its condition.

Since the probate referee does not enter the property, and therefore does not conduct a valuation based on the property's interior condition, your agent should provide you with interior photos and a repair list with estimated costs for repair so that it can be provided to the probate referee for more accurate pricing.

Full or Limited Authority? (Decision Point D1)

The Independent Administration of Estates Act (IAEA) issues either full or limited authority to the PR of the decedent's estate. Unless the decedent's will states otherwise, PRs have full authority to act under IAEA. The selling or exchanging of real property is one of the many actions that require issuing a Notice of Proposed Action (NOPA), when the PR has full authority and there is no court-supervised hearing. The PR gives notice to the beneficiaries that some actions will be taken and to either agree and consent to it, or give their written objections. This allows for any objections to be made known before the sale, which can be addressed. If the PR doesn't issue a NOPA and sells a home, a beneficiary can later file a lawsuit.

If the decedent's will states that the PR has limited or specific authority, court approval is required before the PR can take action. The PR may decide that they want a court-supervised process due to contentious beneficiaries or heirs or other reasons, and Probate Code 10404 allows for that. PRs

who have limited authority may not sell or exchange real property without first obtaining the court's approval.

Other Considerations

Aside from the probate process, a court-appointed receiver handling the sale of real estate should consider a wide range of topics that will result in the highest possible return while mitigating risk. They include: setting proper expectations with your probate agent, pre-marketing strategies, getting the property vacant either via CFK/voluntary buyout agreement or eviction process, getting the probate property ready for market, valuations, real estate disclosures, marketing, probate specific terms in purchase agreements, offer management, as well as insurance and tax implications.



* Orit Gadish is the author of "The Practitioner's Handbook for Probate Real Estate" which provides an in depth look at the probate process and a real estate agent's role within it.

Orit Gadish

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PROFESSIONAL PROFILE: Michael W. Essary

BY HOLLIE GRIMALDI FLORES



Mike at San Diego Bay with the Midway in the background.

Mike Essary has been a resident of Southern California for over 40 years. He is a long-standing member of the California Receiver's Forum, and a founder, as well as a director of, the San Diego Chapter. He has also served as past Chair for the state board of directors.

What prompted you to become a receiver?

I was involved in real estate as a young lad with my father and later went to work for a bank working in asset management. I began appointing receivers and realized I liked what they did. When I left the banking industry and got into real estate property management, I kept all my attorney contacts and some of my banking contacts and began developing a reputation as a qualified receiver.

What do you feel is the best part of being a receiver?

I get to be involved in legal work without having a law degree or being a lawyer! I really enjoy that environment because law is very logical and even though it can sometimes be construed differently, I like working with the courts. I complete an assignment and so when I have completed it, it means I have done what the court wanted me to do.

What is the most difficult part?

Amazingly enough, some of the legal issues! Fighting people on silly legal issues on what should be a logical business decision and watching the waste of money when people argue without compromising or settling. Receivership can help with that, sometimes but also it's

difficult. I am a logical thinker who wants to come up with a solution. I give a little, you give a little, but that doesn't always happen in court.

What makes a person a good Receiver?

A receiver is experienced in the subject or asset of a case who has the ability to remain neutral and focus on what the court wants done and also to be able to point out when it is not going to work. So, you need to control your own emotions- it's not your money, it's not your asset—but you are in charge of it. You have to be able to distance yourself a little.

With over 300 appointments under your belt, do you have a case that stands out?

Most cases move through the courts pretty quickly, but I'm still receiver on multiple assets here in San Diego in state court on litigation between two parties. One is suing the other and the other is suing back – in July it was three years – I was appointed receiver over multiple cannabis



At the beach house in Bahia de Los Angeles, Baja Norte with his daughter Ashley and wife Cindy.

operations/assets. That is the first time I've had to deal with that intricacy – the combination of legalized marijuana and laws that were just put in place and the people that are breaking those laws even though it is legal to sell it. It's dealing with the legal side of the drug industry that was illegal for so many years. It's a neat perspective.

Why are you involved in the CRF?

It is critical to have the organization. They help new receivers and I really appreciate the work they do in trying to standardize a very unique business.

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HANDLING PROBATE...

Continued from page 14.



On a gray whale tour with his pangero Tito in Guerrero Negro.

When you are not working as a Receiver, how are you spending your time?

I have a real estate brokerage with several employees who handle the office. Since the Covid outbreak, I have been working out of the house. I am a laptop-cell phone-portable scanner-printer guy and I travel quite a bit. I spend quite a

bit of time in Mexico and Baja. I have had a house down there for over 20 years. I also have a side company – I have been running a Baja Touring Company. I take people down to see the gray whales and eco type trips. Baja Custom Tours – you can look it up!



Mike and family at their beach house in Bahia de Los Angeles, Baja Norte.

The collage consists of three portrait photographs of men in suits and ties, each with a name below it: Byron Moldo, Blake Albrook, and Peter Davidson. To the left of the portraits is a dark blue triangle containing the letters "ECJ". To the right of the portraits is a large blue triangle containing the text "Bankruptcy, Receivership & Creditors' Rights".

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Ask The Receiver

BY PETER A. DAVIDSON*

QI am a creditor of an entity that is now in receivership. I have contacted the receiver, and her attorney, a number of times requesting information about what is going on, especially the proposed sale of the entity's assets. The receiver and her attorney have stated they don't have to provide me with information and the receiver's duty is only to the court and the parties in the case giving rise to the receivership. Is this correct? I want to make sure any sale is on the up and up so I get paid, as I don't trust the owners of the entity, one of which sought the receiver's appointment.

AThe receiver and her attorney are wrong. A receiver owes a fiduciary duty not only to the court which appointed him or her, and the parties to the litigation, but to anyone who may have a claim against the entity in receivership or its assets, such as creditors. This long-standing duty is even embodied in California Rule of Court 3.1179 (a) (2) which states a receiver "Acts for the benefit of all who may have an interest in the receivership property." The rule embodies a long line of cases so holding.

See e.g., *Chiesur v. Superior Court*, 76 Cal. App. 2d 198, 200-201 (1946) ("receiver, held the property as representative of, and under the control of the court, but for the benefit of the owners, their creditors and others in whose favor claims might exist or arise against the entity in receivership."); *Shannon v Superior Court*, 217 Cal. App. 3d 986, 992 (1990) ("A receiver is not an agent of any party to the action, but instead is a fiduciary who...acts for the benefit of all persons interested in the property."). Given this duty, the receiver should be responsive to your reasonable requests for information.

This is not to say, however, that you, as a creditor, are entitled to be served with the receiver's reports or motions, at least in Superior Court. This is because C.C.P. § 1005, which deals with service, refers only to "parties." There are at least three exceptions: (1) the receiver's final account and report, [California Rule of Court 3.1184 (c): "Notice of the motion...must be given to every person or entity known to the receiver to have substantial unsatisfied claim...whether or not the person or entity is a party to the action..."]; (2) the receiver's monthly reports, if you are a non-party lien holder and so request [California Rule of Court 3.1182 (a)]; and (3) if the



court lets you intervene in the case [C.C.P. §387]. All is not lost, however. Because pleadings are now filed electronically, they are generally available (sometimes for a cost) from the court's web site; although there may be some delay in the posting and assuming they were not filed under seal, which should be rare. See generally, California Rule of Court 2.550 et.seq. and specifically Rule 2.550 (c) ("Unless confidentiality is required by law, court records are presumed to be open.").

The rule is different in federal court. In the Central District of California, Local Rule 66-7 states a receiver is to give notice by mail to all parties and "to all known creditors of the defendant" for certain specified motions, including: petitions to confirm the sale of real or personal property, reports of the receiver, applications for instructions, fee applications, and motions to discharge the receiver. See also, Southern District of California, Local Rule 66.1 (Notice is to be given to "all interested parties") and Northern District of California, Local Rule 66-6 (Notice is to be given to "all interested parties"). Also, Central District Local Rule 66-8 states that except as otherwise ordered by the Court, a receiver is to administer the estate "as nearly as possible in accordance with the practice in the administration of estates in bankruptcy." So you may be able to file a request for special notice as you can in a bankruptcy case and get notice that way.

QI was discharged as receiver a number of years ago. One of the defendants in the case has now sued me and my former attorney, contending we violated his civil rights when I sold some of his assets and that we conspired with the plaintiff to injure him. The former defendant did not obtain leave from the court that appointed me to sue me and my former attorney. Even though I was discharged and the case is closed, isn't court permission to sue me still required?

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ASK THE RECEIVER

Continued from page 16.

AI assume that since you were sued for civil rights violations, the new lawsuit is in federal court. If the case is in First, Seventh, Ninth or Tenth Circuits, yes, pursuant to the *Barton Doctrine* (*Barton v. Barbour*, 104 U.S. 126 (1881)), receivership court permission to sue you is still required, despite the fact that you have been discharged and the case is over. In *Barton*, the Supreme Court stated the “general rule that before suit is brought against a receiver[,] leave of court by which he was appointed must be obtained.” *Id.* at 128. The basis for the rule is a fundamental principle of *in rem* jurisdiction: the court that first exercises jurisdiction over certain property may exclude other courts from exercising jurisdiction over it. Absent the rule, multiple courts could attempt to control the same property, at the same time, and this would result in, as the Supreme Court has said, “unseemly conflict.” *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 135 (1941).

The Ninth and other Circuits have held the *Barton Doctrine* applies, for policy reasons, even after a receiver is discharged. Absent its application they say it would be a “more irksome duty, and so it would be harder to find competent people to appoint.” *In re Crown Vantage, Inc.*, 421 F.3d 963, 974 (9th Cir. 2005). In addition, the receiver might be continually looking over his or her shoulder to see whether the parties or others were disappointed with his or her actions and “his work for the court would be impeded.” *Id.* Or, they may “have to pay higher malpractice premiums.” *Matter of Linton*, 136 F.3d 544, 545 (7th Cir. 1998).

In a new case, the Eleventh Circuit disagreed. *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021). There, a receiver was sued two years after he was discharged. The Circuit examined the basis for the *Barton Doctrine*, discussed above, and held that once the case is over, the receivership court’s *in rem* jurisdiction ends and therefore “there is no longer a potential conflict in the exercise of jurisdiction...” *Id.* at 954, and *Barton* no longer applies. It also disagreed with the policy concerns advanced by the other Circuits; but for a good reason. It felt use of the *Barton Doctrine* to protect receivers was unnecessary because court-appointed receivers enjoy judicial immunity for acts taken within the scope of their authority. *Id.* at 955 (citations omitted). “That immunity applies even if his acts were ‘in error, malicious, or...in excess of [the appointing court’s] jurisdiction. And it extends to his counsel as well.’” *Id.* (citations omitted).

What the Eleventh Circuit failed to appreciate is that, even though a receiver may have judicial immunity, the *Barton Doctrine* provides additional protections to receivers, by requiring proposed plaintiffs to seek receivership court permission to sue the receiver. Once the case is over, if a proposed plaintiff can just sue, without seeking court permission, the former receiver has to deal with the new litigation on his or her own dime, as there are no longer any receivership assets to pay such costs. The receiver will have to hire counsel and file a motion to dismiss, likely before a judge who may know nothing about receivership law or what went on in the case, or, worse, have to prepare and file a summary judgment motion, arguing judicial immunity. This costly exercise can be avoided, to a large extent, if the *Barton Doctrine* applies, especially in federal court, where a proposed plaintiff must prove it has a *prima facie* case, before permission to sue is allowed. See generally, *Anderson v. U.S.*, 520 F2d. 1027,1029 (5th Cir. 1975); *In re Kashani*, 190 B.R. 875, 885 (9th Cir. BAP 1995) (suing trustee).

The *prima facie* requirement is not applied in California state court. The *Barton Doctrine* should still apply however, and if the case is over, and the receiver has been discharged, leave to sue the receiver should be difficult to get because: “As a general proposition a receiver has no official duties and is not a proper party to any action after being discharged by the court. The discharge order operates as *res judicata* as to any claims of liability against the receiver in her official capacity.” *Vitug v. Griffin*, 214 Cal. App.3d 488, 494 (1989); see also, *Brockway Land & Water Co. v. Placer County*, 124 Cal. App. 2d 371, 375 (1954).

Because the bar on suing a former receiver is based on *res judicata*, it is important that notice of the receiver’s final account and report and motion to be discharged not only be given to anyone who appeared in the case but also, as California Rules of Court 3.1184 states, to anyone “known to the receiver to have a substantial unsatisfied claim that will be affected by the order...” That way, once the receiver is discharged, suit against the former receiver will be inappropriate, and a *Barton* motion to sue the receiver should be denied.



*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



California SALT Cap Workaround

BY CHAD C. COOMBS*

Ever since a \$10,000 cap was placed on the amount of state and local taxes (SALT) individuals may deduct on their federal income tax returns, states have been looking for ways around this limit. This \$10,000 federal cap on SALT deductions, enacted as part of the Tax Cut and Jobs Act of 2017, has especially hurt individuals in high tax states such as California and New York. California has now joined a growing number of states which have passed laws allowing individuals to avoid application of the \$10,000 federal cap to state taxes on their partnership or S corporation income.

On July 16, 2021, California Governor Gavin Newsom

signed into law California Assembly Bill 150 under which applicable partnerships and S corporations – although generally tax flow-through entities – can nevertheless elect to pay a 9.3% California income tax on the share of the income of the eligible partners or shareholders who consent to the tax. Partnerships and S corporations may fully deduct this entity level tax for federal income tax purposes,¹ thereby avoiding the \$10,000 federal cap on SALT deductions, and the consenting partners or shareholders receive a California tax credit for the amount of tax the partnership or S corporation paid on their share of income.

This new law, commonly referred to as the SALT cap workaround, is only available for “qualified entities” and effective for taxable years beginning on or after January 1, 2021 and before January 1, 2026 (unless the \$10,000 federal cap on SALT deductions is repealed earlier). A qualified entity is either a partnership (including a limited partnership and a limited liability company treated as a partnership) or an S corporation but not a partnership with another partnership as a partner, a partnership that is publicly traded, or an entity that is part of a combined reporting group. The qualified entity annually makes the SALT cap workaround election on its original, timely filed return, and the election is irrevocable.

The entity level 9.3% tax only applies to the share of partnership or S corporation income of each partner or shareholder who is a “qualified taxpayer.” A qualified taxpayer is an individual, fiduciary, estate or trust (but not a disregarded entity) who consents to have the entity level tax applied to the qualified taxpayer’s share of partnership or S corporation income. The California tax credit that each qualified taxpayer can claim is nonrefundable, but any unused credits may be carried forward for five years.

Partners and shareholders will need to carefully evaluate their own tax situations to determine whether the SALT cap workaround benefits them. However, an additional



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TAX TALK...

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complication arises in the case of an insolvent partnership or S corporation, especially when a receiver is appointed and responsible for filing the entity's income tax returns.² Even an insolvent partnership or S corporation could produce significant taxable income from business operations or otherwise.³ Yet a receiver of an insolvent entity is typically charged with distributing the proceeds from the sale of assets to the creditors, not minimizing the income tax of its owners.

The owners of partnerships and S corporations may try to influence the receiver on how the returns are prepared in order to minimize their tax liability. However, any costs incurred to minimize taxable income to the owners, including any fees for tax advice and planning, may reduce distributions to the creditors. And while it may be tempting for the receiver to leave the tax decisions to the partners or shareholders, the receiver will be the one signing the returns under penalty of perjury. Although the receiver may accept comments from the partners or shareholders, the receiver must retain full control over the returns the receiver signs and files.

When, if ever, should receivers of insolvent partnerships and S corporations elect to pay the entity level tax under the SALT workaround? Doing so can be problematic as the optional payments of state income tax – for which the entity is not otherwise liable – solely for the benefit of the entity's owners not only could be contrary to the receiver's mission but could even constitute fraudulent transfers when the entity is insolvent (or becomes insolvent).⁴

Even if the partnership or S corporation is not insolvent, there could be a multitude of factors for a receiver to consider when deciding whether to make the SALT cap workaround election, including the nature of the receivership, the receiver's rights and duties, any claims the entity may have against its partners or shareholders and even the terms of the entity's obligations to its creditors.

A receiver of a partnership or S corporation should therefore exercise caution and consult with the receiver's counsel and tax advisor before making the SALT cap workaround election. Because of the potential conflict that could arise with the SALT cap workaround election, especially in the case of an insolvent partnership or S corporation, a receiver might be well advised to also consider obtaining a court order before making the SALT cap workaround election.

¹ See Internal Revenue Notice 2020-75 in which the Internal Revenue Service confirms that partnerships and S corporations may deduct state income taxes they pay and states it intends to issue proposed regulations to provide further guidance.

² Internal Revenue Code Section 6012(b)(3) requires a receiver of a corporation (or in possession of all or substantially all of the corporation's assets) to file the corporation's returns. The Internal Revenue Service takes the position that a receiver of a partnership (or in possession of all or substantially all of the partnership's assets) must file the partnership's returns. See IRS Gen. Counsel Memo 36811 (1976) and IRS Gen. Counsel Memo 38781 (1981).

³ As of this writing, it is not clear if the election applies to income from other sources, such as cancellation of debt or the sale of capital assets, or partnership guaranteed payments under Internal Revenue Code Section 707(c). Hopefully the Franchise Tax Board will provide guidance.

⁴ See Cal. Civ. Code Section 3439 et. seq.



***Chad Coombs** is chief tax counsel at Thomas Seaman Company in Irvine, CA and an expert in insolvency tax law.

Chad Coombs

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- ▲ This symbol indicates those who completed 6 hours of education at the Loyola VIII Symposium in January 2020.
- ▲ This symbol indicates those who facilitated and attended the Loyola VIII Symposium in January 2020.

Loyola I-IV symbols have been deleted.

DENNIS P GEMBERLING

Perry Group International
800-580-3950
Email: dpg@perrygroup.com

Is pleased to announce
His retention as

Property Manager for the
Receivership Estate of
Red Lion Hotel & Conference Center,
Ellensburg, WA

Superior Court
Kittitas County
State of Washington

DENNIS P GEMBERLING

Perry Group International
800-580-3950
Email: dpg@perrygroup.com

Is pleased to announce
The completion of his duties as

Receiver for
Seoul Gom Tang Korean Restaurant

US District Court
San Jose Division

DENNIS P GEMBERLING

Perry Group International
800-580-3950
Email: dpg@perrygroup.com

Is pleased to announce
His appointment as

Receiver for
Arties Countrywood Lounge LLC
and it's bar business

Superior Court
County of Contra Costa

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company
Office: 415-992-5806
Email: mike@kasolas.com

Is pleased to announce
His acceptance of appointment as

Successor Trustee for the
Benjamin M. Picetti 2007
Revocable Trust,
as amended
San Francisco, CA

Superior Court of California
County of San Francisco

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company
Office: 415-992-5806
Email: mike@kasolas.com

Is pleased to announce
The successful completion of his duties as

Real Estate Broker for
Onyx Asset Advisors, LLC
In re: BIOXXEL, LLC, Debtor-in-
Possession for the sale of a
122,000 SF industrial building
for \$13,000,000 Murrieta,
Riverside County, CA

US Bankruptcy Court
Central District of California

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company
Office: 415-992-5806
Email: mike@kasolas.com

Is pleased to announce
The successful completion of his duties as

Partition Referee for a Partition by
Appraisal In re: NAZ Auto Services,
Inc. v. Tierney for the sale of a
commercial building, gas station &
convenience store
San Francisco, CA

Superior Court of California
County of San Francisco

GEOFF WINKLER

American Fiduciary Services
(855) 880-0100
geoff@americanfiduciaryservices.com

Is pleased to announce
His appointment as

Receiver for Profit Connect
Wealth Services, Inc.

United States District Court
District of Nevada

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Is pleased to announce
The sale on behalf of

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In Orange, California
For \$16,700,000
76% over appraisal

US Bankruptcy Court
Central District of California

**ROBERT LEVEEN AND
JAMIE HARRISON**

Fiduciary Advisors Services Group of
Lee & Associates
Tele: 213-995-6684
robert.leveen @leeassociates.com

Are pleased to announce
On behalf of Kevin Singer, Partition Referee

The sale of
Dynasty Shopping Center
Los Angeles CA Retail Center
For \$29,500,000.00

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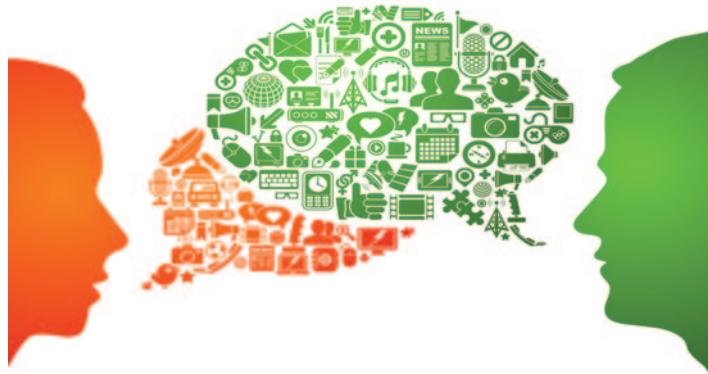


Hon. Catherine E. Bauer (Ret.)
Former United States Bankruptcy Judge

Heard in the Halls: NOTES, OBSERVATIONS, AND GOSSIP RELAYED

BY MICHAEL J. MUSE-FISHER*

Welcome to the latest edition of *Heard in the Halls*. Please provide your snippets of news, questions or comments about receivership issues or the professional community by telephone, mail, fax, or email to: Michael J. Muse-Fisher at Buchalter, A Professional Corporation, 500 Capitol Mall, Suite 1900, Sacramento, CA 95814; Phone: (213) 891-0700; Fax: (213) 896-0400; Email: mmuse-fisher@buchalter.com



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

- **Be There or Be Square – LOYOLA IX.** Mark your calendars for Loyola IX scheduled for January 20-21, 2022, at the Hyatt Regency, John Wayne Airport. The California Receivers Forum, in Conjunction with Loyola Law School of Los Angeles, is proud to bring back the mother of all Receivership Events, after a year absence due to COVID-19. The topics will be far ranging, and the presenters are some of the best in the industry. This is a must-attend event, and Registration will be opening soon, so make sure to sign up at <https://receivers.org/>.
- **The New Faces of the YPC.** The Young Professionals Council (YPC) of the California Receiver's Forum is proud to introduce the new leadership team of rising stars in the Receivership world. The leadership team consists of **Bailey Martinez**, Co-Chair (Fiduciary Services), **David Weinberger**, Co-Chair (Seymour Group), **Erik Rasmussen** (Grobstein Teeple), **Jarrett Osbourne-Revis** (Buchalter), and **Ryan Griffith** (Bay Area Receivership Group). The YPC works with small, medium and large firms across the State to provide training to attorneys on all things receiverships. If you or your firm are interested in getting a crash course in receiverships, or fine tuning your existing receivership skills, or if you are interested in joining the YPC please contact Michael Muse-Fisher (at mmuse-fisher@buchalter.com) or Ryan Baker (Rbaker@douglaswilson.com).
- **Amy: She is Okay, She is More than Okay.** The California Receiver's Forum is proud to introduce **Amy Olsen**, as the new Administrator and marketing guru for the CRF. Having only been with us for a few months, she has already made herself an invaluable asset to the CRF, and we are beyond fortunate to have her. If you have not done so already, please welcome her to the CRF and, as always, look out for her emails and updates – amy@olsenmgmt.com.
- **Get to Know the Receivers:** A new aspect of Heard in the Halls is an introduction to Receivers throughout California. In this installment, I'd like to introduce Scott Sackett, from Sacramento, and also one of the Regional Directors for the Sacramento Valley Chapter of the CRF. Scott is extremely experienced, with over seventeen (17) years as a receiver, chapter 11 trustee, plan administrator, special master, and disbursing agent. In addition to his wide-ranging receivership appointments, Scott is also an experienced property manager and real estate investment analyst. He can be reached at scott.sacket@efmt.com.
- **Spread the Word:** Know someone thinking about getting started in receivership work? Steer them to www.receivers.org to order a past Loyola program 4-disc DVD set for \$75 teaching receivership basics and including sample pleadings.

*Michael J. Muse-Fisher is Senior Counsel of Buchalter, A Professional Corporation. Mr. Muse-Fisher specializes in creditor's rights, real estate disputes, corporate and partnership disputes, copyright and trademark disputes, cannabis law, and alternatives to bankruptcy. Representative clients include regional and national lending and financial institutions, state and federal receivers, and companies ranging from family-owned operations to Fortune 500 corporations.  Michael J. Muse-Fisher



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