RECEIVERSHIP NEWS

Summer 2022 • Issue 75

In Custodia Legis

A Publication of the California Receivers Forum

Loyola IX Symposium – Finally!

By Jeanne B. Sleeper*

Check out the complete gallery of photos taken at the symposium at: https://amyolsen.smugmug.com/California-Receivers-Forum/

Since the Loyola Symposium in January 2020, it's been a wild toad ride through a two-year pandemic that almost allowed the gathering in January 2022, but Covid variants caused Loyola IX to be rescheduled to April 28-29, 2022. It was a full house, grand reunion among colleagues from across the state at the Hyatt Regency John Wayne. With 150 in-person registrants and remote attendees, all experienced a broad curriculum of educational and social offerings.

Christopher Thornberg, PhD, founder of Beacon Economics, continued the Symposium's tradition of delivering the Thursday dinner keynote with his economic forecasting organization's take on the state of the economy. A blizzard of graphs, charts, and summaries used a microscope on every angle of economic data for 2010–2022.

Bottom line? The world has profoundly changed in the last two years. Conventional doomsday predictions proved to be a disconnect – spending is up, disposable income is up, more jobs were created, and equity is on the rise. Dr. Thornberg commented that in past years he was comfortable predicting what was coming. Today, the risks are bigger and harder to predict. He said, "It's too good to go on, and it won't."

He illustrated that the U.S. economy is in a time of "too." Too much money/spending, too much inflation (with no soft landing in sight), too many supply chain problems, too few workers (drop outs and baby boomers retiring), too much government debt, and too much uncertainty to cost out major investment decisions. Curing inflation with quantitative tightening will be painful, but the choice is pain now or worse pain later with a harder crash. It was fortuitous that the Pacific Club served a fabulous chocolate dessert to end the evening on a sweet note.

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Back to the Future: Non-Performing Construction and Development Loan Workouts

By David Wald*

This is not necessarily about now.

This is about a day in the future. One in which we experience the next significant economic downturn. The one that starts with some big, unexpected, pivotal 'Black-Swan' event that precipitates an economic crisis (like the 2008 failure of Lehman Brothers, Bear Stearns, et al). In good times, it's all about managing profitability. In a steep downturn, it is all about damage control. Since economic downturns are typically sudden, it usually takes time to recalibrate to the new harsh economic reality. Better to be prepared, have a plan, and know your options.

We are now in the longest recorded economic growth cycle in U.S. history: fourteen years and counting. As much as we would like to believe it, deep down we

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Inside

Publisher's Comments

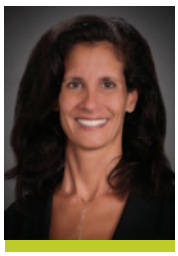
By Robert P. Mosier*

Robert P. Mosier

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

Every time we have a Loyola conference, *Receivership News* is nearly overrun with timely and important articles including a pictorial essay of the Loyola milestone events. This issue, focused on the conclusion of Loyola IX, is no exception. What is different this year is the author of the article – **Jeanne Sleeper** our former administrator for over two decades. After turning over the reins of CRF last year to Olsen & Associates, turnabout was in play as **Amy Olsen** invited Jeanne to the Conference to prepare the write up. Not unexpectedly, Jeanne came through with amazing depth, clarity and capturing the key points of the myriad of panels and presentations at the conference. Balancing all of this positive and upbeat news for the California Receivers Forum, this issue contains a section titled "In Memoriam" where several stalwart receivers, counsel and individuals in support of the Receivership community have passed including some of our biggest and brightest – **David Pasternak** (Pasternak & Paternak), **Doug Morehead** (Optima Asset Management), **Lei Lei Wang-Ekvall** (Smiley, Wang-Ekvall) and **Adam Djou** (Torrey Pines Bank), **Bruce Allen Cornelius**, Receiver, **Brick Kane** and **Rob Evans** of Robb Evans & Associates, Receivers and **Richard Kipperman**, Receiver. Let's hope we don't have a repeat of this section for many issues. Enough is enough. All reports are that business is picking up in both State and Federal Court, and the good news appears to be that the Courts are on the verge of returning to normal post Covid.

We also like to acknowledge and thank our advertisers who make this magazine/publication possible. Our advertisers include Buchalter (law firm), Ingenious Asset Group, Inc. (property management and real estate sales), Orit Gadish of Geffen Real Estate (author of The Practitioner's Handbook for Probate Real Estate), National Franchise Sales (Franchise Brokers), Eric Sackler & Associates (real estate sales), Braun Brokerage, Auctions and Valuation (auctions and valuations), Loeb & Loeb LLP (Law Firm), Ervin, Cohen & Jessup, LLP (Law Firm), Escrow of the West (escrow company), Fiduciary Advisory Services Group (asset recovery and commercial real estate) and finally The Seymour Group (real Estate Solutions for Fiduciaries). All in all, that is 11 advertisers and these are the companies that make this publication possible in addition to providing the receivership community with valuable, quality support services. Thank you, advertisers. RPM



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.

Editor's Comments

By Kathy Bazoian Phelps*

Receivership News is so fortunate to be supported by the energetic contributors and members of the California Receivers Forum. In this issue we celebrate our community's successes at the Loyola conference, balanced by our strong sense of loss of too many our beloved and outstanding members

In the spirit of continued education and information, this issue contains an informative article on non-performing construction and development loan workouts written by **David Wald**, as well as an interesting anecdote by Doug Wilson in "Creative Solutions for a High-Profile Receivership: Inside the Bel Air Hadid House Receivership."

RN is also very proud to report that **Peter Davidson** answered his 100th question in his Ask the Receiver column in this issue. What a great milestone and thank you Peter for answers to all our questions issue after issue.

We also thank **Chad Coombs** for his Tax Talk Column, which contains very useful information on Qualified Settlement Funds, and **Michael Muse-Fisher** for keeping us up to date in Heard in the Halls.

Please let us know if you have any ideas or articles for future issues.

Kathy

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Receivership News
Published by
California Receivers Forum
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Graphic Design & Layout
R.R. Altamirano, LLC

Production Services
Olsen & Associates

Web Services
Olsen & Associates

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Closing Question: What do you think about crypto currency? Answer: Bitcoin? Ponzi scheme.

Special Thanks to **Bob Mosier**, Mosier & Co., Inc. for making the Pacific Club available to the California Receivers Forum for Loyola Symposium's opening dinner.

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Friday: 10 Programs & 16 Roundtables

CRF President, Richard Ormond, kicked off the morning with Welcomes, Thanks, Remembrances and Donations. Loyola Law School Dean **Michael Waterstone** received an oversized check for $5,000 to the Juris Fund, from the Receivers Forum in appreciation of the Loyola Law School of Los Angeles association with the symposium "since the beginning."

Richard Ormond and Kevin Singer present $5,000 check to Loyola Law School's Dean, Michaell Waterstone.

Judge's Panels

Hon. Mitchell Beckloff, Los Angeles Superior Court, assigned to the Civil Division and currently presiding over the Writs and Receivers Department, began the morning with a summary of the breadth of the Los Angeles County Superior

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know that there is no new paradigm of perpetual economic growth. Economies are made up of people making investment decisions who, over time, are generally 'hard-wired' to act in a way that generates pendulum-swinging financial excesses and extremes. Like all economic cycles, this one will inevitably end. So it's business as usual right up until the end.

When the next recession does rear its ugly head, it is helpful to recognize, acknowledge and prepare for the issues and challenges that will have to be addressed to deal effectively with non-performing loans.

There are four main components to construction and development loan workouts:

1) recognition and write-down of the impaired loan
2) workout negotiations, including debt and equity restructuring
3) pre-foreclosure project preservation, completion, or sale; and
4) post-foreclosure project preservation, completion, or sale

In a significant economic downturn, time is your enemy. Once it is clear you will have a large number of non-performing loans, accepting the new reality and understanding the challenges ahead will allow you to quickly and efficiently get on with the business of mitigating losses, recalibrating your expectations, and turning things around.

This is written primarily from the perspective of California state and federal law. Although most states generally track California law, each state is different – Texas in particular. As a result, this is only intended to be a general overview of key issues, alternatives, and strategies involved in the workout of non-performing construction and development loans.

The Write-Down

While you might have a difficult time accepting it, you usually know when things have gone south long before you formally recognize a loan as impaired and take the write-down.

Since your borrower, the developer, is typically still communicating with you and at least superficially cooperative at this point, this is the time to review your loan documents (and their enforcement provisions), disbursement and inspection records, and borrower bank accounts securing the loan to make sure they're complete and current. These documents and records rarely look the way you expect or want them to be, so be prepared. When a receiver is appointed, the receiver is usually in the position of having to reconstruct the property-related loan records, which consumes both time and money. Being prepared and on top of your loan portfolios will create efficiencies in a downturn and allow the receiver to immediately focus on mitigating losses, rather than first having to decipher incomplete loan records.

You will need to designate the loan as impaired and recognize projected loan losses before you can start meaningful action to solve the problem (i.e. workout negotiations, increasing the loan balance, suspending loan advances, or taking other more drastic action like selling the loan or moving for the appointment of a receiver). Most lenders prefer to bundle as many loan write-downs as possible at year-end. Delaying the write-down also delays your ability to take clear and decisive action. It's not easy. In my thirty years of experience with distressed construction loans, I have never come across a lender that didn't agonize over booking a loan write-down.

Unfortunately, write-down delays result in unnecessary loan losses. For example, we were engaged to sell a sizeable construction loan for a partially-completed condominium project for a lender early in the calendar year. Everyone realized fairly quickly in the marketing process that the price the lender was seeking for the loan was too high to meet the market, but the lender wouldn't reduce the sale price for months because they didn't want to book the write-down until the end of the year.

The outcome was that just two weeks before year-end, the loan price was marked down drastically, subject to closing before year-end. The loan did sell, but only at a significantly greater discount than necessary because of the long delay to lower the price and the requirement for a very quick year-end all-cash close. This is a common occurrence that is easily avoided. We know that lenders are understandably reluctant to recognize losses until the very last moment and want to match the sale of the loan to the recognition of losses, but that delay is costly. Seasoned buyers of distressed loans are well aware of this and wait for those year-end bargains. Ironically, any loan recovery in excess of the write-down is

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then booked as profit, further distorting the true distress of the written-down loan.

In deep recessions, things get worse before they get better, so the sooner you act, the more likely you'll have a successful outcome and recover more money.

Workout Negotiations

In the absence of outright fraud or abandonment of the project by the developer, it is better to do what's necessary to support the borrower to promptly complete and sell the project. Most developers lose interest and walk away from a development project once they've concluded they no longer have any equity. Worse, once a borrower becomes an adversary, everything becomes a costly and time-consuming battle, slowing down the workout and exponentially increasing the costs of doing so.

Even though the loan may require the borrower to cover shortfalls and include personal completion guarantees, it is better to find a way to carry the developer across the finish line as quickly as possible than it is to compel them to perform or cooperate against their will. Sometimes you can't, but it's almost always better if you can. Consult with your legal counsel regarding any written communications (including email) with the borrower and the use of an appropriate forbearance agreement.

The developer is in the best position to get the project completed, and a completed project is significantly more valuable and easier to sell than a partially completed one. In a serious economic downturn, markets tend to deteriorate and languish until they've bottomed out. More and more distressed properties come to market and prices continue to decline.

For example, we took over a large, nearly completed townhome project as receiver to complete miscellaneous interior work, some site improvements, and finalize DRE sale approvals necessary prior to selling the townhomes. The

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Court system. From the pandemic closure of the court, to virtual court, to hybrid court, and back to some in-person appearances has been a process for the system. Judge Beckloff closed with Five Tips for receivers, beginning with number 5.

5. **Inventory** is very important. Be sure it is clear and undisputable from the beginning of your appointment as a receiver.
4. **Status Reports**, with all parties copied and filed electronically, are a good way to keep the judge up to speed on the important actions of the matter and uncover any concerns throughout the case, rather than at the end.
3. ***Ex parte* Motions** should be reserved for true emergencies. Getting a motion one afternoon, then more papers from the parties in the early morning and hearing in the afternoon is a challenging timeline for the court staff and judge given a full calendar already set.
2. **Road Map** is a concise summary of what is going on in the receivership, showing what is agreed upon and what is unsettled/ongoing, is helpful to the judge.
1. **Status Conferences** offer an opportunity to unwind issues timely, so they do not present end of case issues that require backtracking to resolve.

Hon. Judge Mitchell Beckloff addresses attendees.

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California Judges Panel

Moderator, Oren Bitan, from Buchalter, welcomed bankruptcy judge, **Hon. Meredith Jury (ret)**, along with **Hon. Mary Strobel** and **Hon. Mitchell Beckloff**, both of California Superior Court, Los Angeles. The judges commented on questions posed by the moderator beginning with the future of in-person or remote hearings. The benefits of virtual hearings for the court, lawyers, and clients are no commute, no parking charges, less waiting, and potential lower cost for the case. As the court is again open for in-person hearings, all parties must agree to a remote hearing. Judge Strobel commented on the chance of missing an important word and non-verbal cues during remote hearings.

The Superior Court judges pointed out that there is a high bar of evidence needed to appoint a receiver and that there are a small number of appointments each year. When more than one receiver's name is submitted in a case, the judges said that careful review of the candidate's background and experience in similar matters provides some guidance.

California Judges Panel: Oren Bitan, Moderator; Hon. Judge Meredith Jury; Hon. Judge Mitchell Beckloff; Hon. Judge Mary Strobel

Judge Jury commented that sometimes when difficult discussions among the parties are not moving toward agreement, coming before the judge in-person in a court setting, with the formality of a courtroom, the seal on the wall, the flag and a judge in robe improves decorum and promotes reasonableness.

It was an insightful hour for practitioners hearing from Judges Jury, Strobel and Beackloff, and the Receivers Forum is grateful for their time and candor.

Luncheon Roundtables

Sixteen table topics offered a wide range of topics, each hosted by a content expert. Even in a very large room with the window wall open to a garden lawn, a decibel meter would have recorded a high level of engagement and discussion. The challenge was deciding which table to join.

One new topic that peaked this author's interest was **Mia Blackler** on "Freeze! Seize! Distribute! Treatment of Assets in Criminal Receiverships." Lots of new things that I did not recall previously being discussed – court-ordered definition of a victim, working relationship with the District Attorney, criminal courts operations issues, seizure and turn over of assets, operating a business, resolving litigation and distribution impacts of Penal 186.11, receivership law and prior court orders – to name a few.

> "Distribution methodologies can become quite complicated, so it is critical to know the intricacies of the intersection of criminal and receivership law along with the unique features of the receivership assets and interested parties to assist in achieving the most just outcome."
>
> ~Mia Blackler, Lubin Olsen

Casey Ives from KCC hosted a table on **Noticing Issues** saying to consider alternative technology and multiple bank options by partnering with KCC. That can eliminate unnecessary costs to the firm or estate and reduce the frustration and administrative burden of time keeping, expense reporting, and banking for noticing.

FRES, Fiduciary Real Estate Services, in Newport Beach brought a diverse real estate perspective to receivership matters in **New Laws: AB 633 and AB 838**. Host **Ruben**

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Martinez said, "Newly enacted legislation is affecting receivers and partition referees. Beginning with how properties can now be partitioned amongst relatives/heirs, to how tenants can trigger costly repairs, the new legislation has changed the course for receivers and partition referees."

David Weinberger and **Phil Seymour** from The Seymour Group, Keller Williams, shared experiences with **Marketing and Closing Receivership Property Assets**.

"Twenty-three years of solely serving the fiduciary community in selling all types of real estate assets, from health and safety code violation properties to multi-million-dollar estates has taught our group to be flexible in even the most contentious cases and utilize proven strategies to overcome any hurdles that arise in a court-ordered sale."

Peter Ingersoll, Safe Harbour Equity, had a lively table discussing everything around the edges of cannabis cases in **Momentum: The Key to a Successful Cannabis Receivership**. "The tension starts with the 40 or so state's laws and the federal statutes. I don't see that changing when the feds take their tax percentage off the gross receipts of cannabis businesses. Mix that with cash business, banking challenges, lack of access to corporate capital, untraditional investors/owners and culture that celebrates operating outside of the law...it is a recipe for needing a receivership." Peter had a cannabis trivia game planned and remarks about the Safe Harbour Lending programs for cannabis receiverships, but the engaged table conversations may have sidetracked the trivia game.

Receiver Tools Needed to Conduct or Defend a Commercially Reasonable Sale topic was hosted by **Todd Wohl**, Braun and Premiere Estates International. Todd has a long history of marketing unique and challenging properties.

"Rule # 1: Use Common Sense. Never market the sale to a minimum level, but rather to the level at which any party involved could not argue that the marketing was not done

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sufficiently to maximize the sale price of the asset. Follow a logical process from start-to-finish so the court and the buyer understand how the sale process works and want to participate."

Receiver's Counsel - Critical Team was hosted by **Mike Essary** of CalSur, the longest serving CRF leader of the San Diego Council. CalSur is a property management company that also accepts receiverships. Here's what was overheard at their luncheon table, "While there are receivers who are attorneys, many of us are not. Straight forward rents and profits cases sometimes do not require counsel, but partition actions, business operations and cannabis cases have legal needs that make your experienced counsel absolutely critical to carry out the court's wishes."

Eric Sackler, Coldwell Banker Commercial Realty in Los Angeles, hosted **Getting Office Property Leased Up in 2022**. Companies moving and workers preferring to stay remote part of the time have driven change, as have Class B tenants wanting to step up to attractively priced leases in Class A space. Eric observed, "The pandemic has caused a major disruption in office leasing, but not in all markets and not amongst all tenant industries. The manner in which tenants are utilizing office space has changed, requiring many landlords to make physical alterations in order to get space leased up."

Getting Office Property Leased Up In 2022 with Coldwell Banker Commercial Realty Luncheon Roundtable

Busting Blight, Health & Safety Receiverships by **Rick Harmon** included informative tips about a tough assignment. But his Harmonisms may be most recalled: "One way or another, you're going to get an education." "Plan your work and work your plan, but in health and safety receiverships, don't plan your results." "There are a few things you should never ask for a discount on: haircuts, brake jobs, and title and escrow." And lastly, "You can't eat equity, but it CAN feed you."

Young Professionals Council: L to R; Lee Naujock, Michael Wilson, Annelise Hitchman, David Weinberger, Megan Husri, Bailey Martinez, Jarrett Osborne-Revis.

CRF's Young Professionals Council has taken the lead in recent years using socials as a forum to bring together their 20's and 30's colleagues. The result has been an infusion of energy, optimism and using technology to do some things better. The first cohort of the YPC has made the move into leadership positions around the state. The second wave is building momentum led by co-chairs **Annelise Hitchman**, Hitchman Fiduciaries and **Bailey Martinez**, Fiduciary Real Estate Services, both from Orange County. Did they draft you with a big blue YPC button? There is lots of room to grow your receivership career and industry leadership with the YPC.

Dennis Gemberling of the Perry Group International has spent a career working with the hospitality industry. **Hospitality Receiverships Revisited** talked about restaurants, bars, hotels and hospitality venues that went from going concerns to locked front doors when the government mandated shut downs. Over two years, some hospitality venues opened in spurts after inventing new ways to operate. "Get back to the basics and don't underestimate the importance of cash controls, taking inventory, redirecting credit card deposits and simple daily reports to instantly improve income when taking over a hotel or restaurant," opined Dennis.

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"Hospitality businesses' most valuable assets are their employees – preserve them first," continued Gemberling, "When the employees don't come back, then what?"

Cohesion Between Receivers and Their Appointing Judges by Benjamin King, Loeb & Loeb

"Since nearly all the powers of a receiver derive from the appointing court's order and rulings, a receiver should act deliberately to foster and maintain a healthy and mutually supportive relationship with the appointing judge from the outset and at every significant step thereafter. How that relationship looks will differ based upon the appointing judge and the circumstances of the case. But like all healthy relationships, it will require focused effort and attention," commented Ben King.

Tax Issues For Receivers with Ervin Cohen & Jessup Luncheon Roundtable

Tax Issues for Receivers by Byron Moldo, Ervin Cohen & Jessup

Tax talk is one of those topics that receivers continually review, to get it right in the cases and to be sure they are not incurring any personal liability.

Takeaway: "Not all taxes are created equal, it's in the details," says Bryon.

Cannabis Receiverships or Large Corporate Receivership Cases by Kevin Singer, Receivership Specialists

Three Top Tips: When you are running a large corporation or a cannabis business receivership: 1) get the money, 2) preserve the records, and 3) look for talent and leadership inside the company to help you run the business. Perhaps there should be a 4) Don't assume that anything on # 1 and # 2 are easy or as they appear.

Nuances of Property Management & Challenges in Covid Environment

Vinny Jain, Ingenious Asset Group, led a lively discussion focused on new government rules and laws enacted since the start of the Covid-19 pandemic, providing numerous tenant protections and how they affect the management of real estate assets. Receivers and attorneys at the table had consensus that the ever-evolving state and local laws for tenant protections have made it very difficult for property owners and receivers to effectively manage any real estate asset. The cost of the regulations has adversely affected the financial implications of some already distressed assets.

Actual situations with difficult tenant(s) were shared. Giving a wrong notice to a tenant, or NOT giving a required notice in some jurisdictions, can put the receiver or property owner in a worse situation regarding tenant protection laws. Knowledge of local, state, and federal laws related to tenant protections and property management is critical, and having a knowledgeable property manager to keep up with everything is of utmost importance. Everyone agreed that having the "right" property manager is an asset, and not an unnecessary expense.

Eviction Moratoriums and Landlord Tenant issues were discussed, with Good News – Bad News commentary by **Daniel Taylor** from **The CREM Group**. Residential and commercial rent collections dried up during the start of the pandemic. Evictions were stayed by governmental orders. Then the flow of PPP grants began and Rental Assistance programs provided some landlord relief at 80%. Next the Rental Assistance Program went to 100% of past due rents owing. But then the program ended and stopped taking applications in March 2022. Processing payments to landlords has been slow. Eviction moratoriums on some properties in some counties are extended to the end of 2022. Generally, commercial properties past due rent evictions can go forward in all of California at this time.

Healthcare Receiverships are possible in a broad range of health-related businesses. The bigger or broader the scope of the health care provider services, drives the complexity of a receivership. Complexity increases with the number of stakeholders – the community, doctors, all the related services providers, the facility owner, and the patients. Table

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host, **Michael Bubman**, of Mirman, Bubman Nahmias, shared that his advice is to "know your regulators and communicate with them often to increase your chance of successful outcomes."

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Concurrent Sessions

Receiverships 101: Learn From the Pros

Panelists: **Ben King**, Loeb & Loeb; **Jarrett Osborne-Revis**, Buchalter; **Scott Sackett**, Fiduciary Management Technologies

Moderator: **Ryan Baker**, Douglas Wilson Companies

Starting with "What is a receiver?" the panel signaled their hard-earned experience with the reply – a job where you never know what you are getting into...with the additional advice – this is not a job for anyone afraid of conflict.

They worked through the usual list of the types of receiverships and discussed the receiver's role as a neutral who is not a party in the case or who has a preference for any entity in the receivership. The only person who can say "my receiver" is the judge. The take away advice was to "stay within your experience lane and only take matters where you have the background to know the operational aspect of the type of receivership."

Receiverships 101 with Ryan Baker, Moderator; Scott Sackett, Benjamin King, Jarrett Osborne-Revis

When Breaking Up Is (Too) Difficult, Think About Calling a Receiver or Partition Referee

Panelists: **Byron Moldo**, Ervin Cohen & Jessup; **Kyra Andrassy**, Smiley Wang-Ekvall and **Michael Bubman,** Mirman, Bubman & Nahmias

When assets need to be sold to split the value several ways, CCP § 873.520 or CCP § 873.610 outline the manner and terms of sale. The skill of the receiver comes in also managing and getting agreement from the asset value recipients. Receivers are commonly called on to be the neutral in corporate or partnership dissolution proceedings.

The panel also discussed the possible role of a receiver in the involuntary dissolution of a corporation. If the court has reasonable grounds to believe that unless a receiver is appointed, the interests of the corporation and shareholders will suffer pending the disposition of the complaint, the court can appoint a receiver to take over and manage the business and affairs of the corporation and to preserve the property pending the hearing and disposition of the complaint.

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"Business divorces don't need to be unpleasant. Consulting with an expert such as a receiver or partition referee in advance can make the process much more tolerable," added Bryon.

Using Receiverships to Manage, Operate, Restructure and Sell Going Concerns

Panelist: **Christopher Celentino**, Dinsmore & Shohl; **William Freeman**, Katten Muchin Rosenman; **Richard Munro**, Invenz; **Joel Weinberg**, Insolvency Services Group

Moderator: **Richard Golubow**, Winthrop Golubow Hollander

Appearing onstage and remotely on the big screen, the panel delivered a plethora of information across this broad topic in 60 minutes. The panelists discussed touch points on dealing with pending litigation and creditors, the staying of creditor actions, and being sure the appointing order authorizes the receiver to defend, prosecute and settle litigation. They also addressed ensuring that the order authorizes the receiver to take appropriate steps on avoidance actions, fraudulent and preferential transfers and grants standing so the receiver can oversee claims of creditors.

The claims administration process and the myriad of deadlines and prioritizing, treatment, and ability to compromise claims were discussed.

Take aways: When selling an asset or business, only do so subject to court order. Be vigilant to make no warranties, promises, or forward-looking statements, sell as is, where is, and fully disclose the status of title insurance, if any, on the asset.

The Ins and Outs of Hospitality, Restaurants and Liquor License Receiverships

Panelists: **Phil Cutting**, Douglas Wilson Companies; **Dennis Gemberling**, Perry Group International

Moderator: **Michael Muse-Fisher**, Buchalter

Starting point: Every problem is an opportunity in disguise. The pandemic shut down this industry for months, the PPP money ran out, the staff was let go and when the re-opening began, the most valuable asset, the trained staff, did not come back in big numbers. The bit of good news is that the industry found that hotel guest customers would tolerate reduced services (housekeeping every 3 to 4 nights), that touchless service took less staff, and restaurants could be closed or reduced to take out – adding economic efficiency to their operations.

The still pending question is how long the CMBS (commercial mortgage backed securities) will hold on with extended term modifications versus loans going to special servicing or foreclosure. Leisure travel is rapidly coming back; business travel not so much. Zoom business meetings worked for 2 years – why travel to meet? Smaller and mid-size properties are rebuilding their business faster than big box convention properties. Larger hotels are just seeing in-person conferences and trade shows return, although not at the same registration counts as their 2019 programs.

The big question in an environment of high inflation, increasing interest, world turmoil, stock market down and talk of recession increasing – how much longer will the forbearance agreements continue?

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Office and Retail: Where It's At and Where It's Going

Panelists: **Mark Birnbaum**, Perkins Cole; **Alexander Quinn**, Jones Lang-LaSalle

Moderator: **Michelle Vives**, Douglas Wilson Companies

This program started with Mark Birnbaum running through the alphabet soup of CMBS loans: Security loans, PSA Pooling & Servicing Agreements, REMIC Real Estate Mortgage tax issues, Master Services vs Special Services and DCH/CCH.

The panel moved on to how decisions are made within tranches, the bond holder approvals process, how bad boy carve outs happen, the implications of non-recourse loans, borrower/sponsor relationships (or lack thereof), carve out liability, net present value toward the end with imminent default – full recourse triggers – where a receivership is better than a bankruptcy. It was a high speed trip through a process that lacks transparency from an outsider's perspective.

The CMBS have been slow to pull the trigger on defaults. They see the empty offices, the resistance to return to offices, the lease end negotiations for less space and landlord provided tenant improvements to rework space design. Some rents are down, perks are up and Class B tenants are sliding into remnant Class A space.

Closing advice: Don't step on a rake.

Receivership and Receiver Liability for Taxes

Panelists: **David Agler**, Law Offices of David M. Agler; **Dominic LoBuglio**, Dominic LoBuglio CPA; **Kevin Singer**, Receivership Specialists; **Sue Tomlinson**, Crowe Horwath

"Don't let the word taxes in the panel title mislead you to thinking this will not be exciting. The truth said, this panel was the rock opera of taxes," according to Kevin.

The list of possible taxes is long and the liability for a missing payment of a tax is personal to the receiver. What

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the receiver is responsible for depends on the purpose of the receivership, the scope and powers of the appointment order, the entity ownership structure, and the receivership case assets.

Accrued and current tax liabilities, federal, state and foreign obligations, income and franchise taxes, payroll withholding, tax return, sales, use and excise taxes and property tax are starting places to investigate payment status. Section 874.1 reminds receivers that the court cannot make tax decisions or absolve receivers of tax liability.

Chad C. Coombs and **David M. Agler** authored a five-page article on this topic that appeared in the *Los Angeles Lawyer* in March 2015. Contact the authors for copies of this in-depth article.

Closing reminder: Don't close a case until all taxes are paid or formally settled.

The receiver can be personally liable and by statute you can't claim you relied on another professional or simply made an error to escape the liability.

In A World of Few Options, Receivership Becomes the Solution

Panelists: **Blake Alsbrook**, Ervin Cohen & Jessup; **Jeff Ghitman**, New World Markets; **Peter Ingersoll**, Safe Harbour Equities; John Mandel, Akerman

Moderator: **Eric Kaufman**, Dama Financial

In some difficult business situations, a receivership is the last hope before a bankruptcy is the only remaining choice, except in the case of most types of cannabis-related businesses that are not accepted by the federal bankruptcy court. When a receivership is bleeding and there is no hope of recovery, it is important to timely let the court clearly know the situation so the judge can decide to keep the receivership in place or conclude it. An example is where various tax liabilities are so big, there is no hope. Communicate with the judge and the business owners so they understand the "why" of the receiver's recommendation.

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Peter Ingersoll's view from the cannabis trenches boiled down to his comment "the political will is not there at the federal level to take on many states with different cannabis laws to try for a common set of regulations. States' rights issues are long fights and the feds enjoy taxing the business gross, so why rock the tax revenue boat."

Cannabis receivership takeaway: the receiver's job #1 is to preserve value in the business–and begins with keeping the local cannabis license in good standing. Perhaps not easy, but essential.

Receivers in Bankruptcy: Strangers In A Strange Land

Presenters: **Gerard Keena**, Bay Area Receivership Group; **Ron Oliner**, Duane Morris

The last program of an intense Loyola IX Symposium. Some businesses appear to belong in a receivership and others in a bankruptcy. Deciding which route to take can be a complex decision matrix. As receivers, lawyers and other insolvency professionals know, things change and what was right one month turns and becomes no longer viable. Gerard recounted his very first operating business receivership that involved a gas station. It became evident that the judge and receiver were spinning their wheels. The assignment to preserve and protect was not working, the receiver and creditors were not going to get paid; it belonged in bankruptcy.

Keeping the receiver in place when the defendant files a bankruptcy to dispossess him or her requires quick, calculated action in the bankruptcy court, observed Ron.

When a matter starts in receivership and needs to file bankruptcy, there comes a point at which the receiver needs to turn over the "keys to the door and checkbook" to the bankruptcy trustee. Ron Oliner shared insights on how to accomplish the statutorily required task.

Closing Fiesta – Sponsored by FRES Fiduciary Real Estate Services

The collegial relationships among the receivership community were evident as most Symposium attendees and

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speakers stayed Friday evening for some social time together. Live mariachi music, a taco bar, the makings for nachos, and tequila tasting got the party started. A blindfolded **Todd Wohl** working on the Pinata bashing was an Instagram moment.

Receivership and Receiver Liability for Taxes with Dominic LoBuglio, David Agler, Kevin Singer and Sue Tomlinson

Remembering CRF Members

A Moment of Silence For Recent Years Passings

David Pasternak, Pasternak & Pasternak
Douglas Morehead, Optima Asset Management
Lei Lei Wang-Ekvall, Smiley Wang-Ekvall
Adam Djou, Torrey Pines Bank
Brick Kane, Robb Evans & Associates
Robb Evans, Rob Evans & Associates
Bruce Cornelius
Richard "Dick" Kipperman

Our Thanks

It takes months for volunteer leaders to plan and execute a Loyola Symposium. The Symposium would not be possible without "everyone" from leaders to speakers, sponsors, exhibitors, and attendees.

Special recognition to **Amy Olsen** and the Olsen Management team for planning the January 2022 Loyola, adding a hybrid version, cancelling the January dates, negotiating with the hotel to cancel January and rebook and excellent execution of the April live and hybrid versions.

Our Thanks and Appreciation,

California Receivers Forum Board of Directors
and Regional Councils Leadership

***Jeanne B. Sleeper**, CEO, JBS & Associates was the CRF's first Executive Director. She handed over the CRF management to Olsen Management in summer 2021 and is honored to have been invited to author the Loyola IX recap article. This explains her furious note taking at all of the Symposium sessions. After being grounded for two years by pandemic travel restrictions, Jeanne is headed to Cayman Brac in June with her new underwater camera, thanks to CRF's retirement gift generosity.*

Jeanne B. Sleeper

Conference Leadership

Special recognition to this team of members, officers and staff who planned, replanned, and executed the April 2022 live and virtual program.

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California Receivers Forum
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Irvine

Creative Solutions for a High-Profile Receivership

INSIDE THE BEL AIR HADID HOUSE RECEIVERSHIP

*By Doug Wilson

Many in the receivership community, as well as the general public, are familiar with the now-famous story of the "Hadid House" in greater Los Angeles. Mohamed Hadid, known both for his work as a luxury real estate developer and for the high profiles of his family members, embarked several years ago on a major single-home construction in Bel Air, California. After a series of allegations and lawsuits regarding safety and code violations around the home's partially-completed construction, a Los Angeles Superior Court appointed Douglas Wilson as receiver to oversee the demolition of the construction.

The assignment, due to its highly public nature, the numerous stakeholders involved, and the unusual state of the real estate, required some very creative approaches. Today, the demolition and hillside restoration is nearly complete, with a new owner in place to develop the site.

Ultimately, it is a timely example of the critical role receivers play in developing solutions to complex problems, and the tools we have available to effectively complete our assignments.

Background

In 2011, Mr. Hadid purchased the 1.22-acre parcel of land in Bel Air, California, and embarked on a plan to build a 14,000-square-foot mansion on the hillside property. Several years into the design and construction of the home, neighbors began to question the construction relative to city code as the structures grew to 4 stories and 30,000 square feet, and subsequently raised their concerns along with formal claims.

A series of lawsuits ensued, including criminal charges brought against Mr. Hadid in 2017, and later a civil suit claiming he had not followed terms of an earlier plea deal and had continued construction of the home illegally.

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At issue throughout the claims against Mr. Hadid was the stability of the land on which the partially completed mansion sat; neighbors and the Bel Air Association, a homeowners' group, alleged the construction was too big for the unstable hillside and presented a danger to the properties below and adjacent to it. In 2019, the Los Angeles Superior Court judge ordered that Mr. Hadid demolish the construction, upon which Mr. Hadid claimed he did not have the funds needed for the demolition. He subsequently filed for bankruptcy.

A complicated receivership with a creative solution

On December 2, 2019, the court issued an order appointing Douglas Wilson as receiver to demolish the onsite structure for the entity holding the title to the subject property, beginning a highly complex and dynamic assignment involving neighbors, the City of Los Angeles, the Tax Assessor's Office, the Court, and many departments within the city.

The assignment had two main objectives: First, to obtain the funds needed for the demolition; and second, to oversee that demolition process.

Because Mr. Hadid had filed for bankruptcy, the receivership first involved creating the strategy for funding the costly demolition. It quickly became clear that a straightforward sale of the property to net the demolition funds carried too many risks for prospective buyers, indicating the receiver would need another solution.

Through an order of the court, the receiver was granted the ability to use receivership certificates — a key tool which allows the receiver to obtain financing secured by the receivership estate, with priority over existing lienholders.

The receiver next pursued traditional financing through the use of receiver certificates, but again reached a hurdle, finding the loan-to-value on the property was too low. Utilizing the receiver's background in real estate finance and development, the receiver decided to once again shift the approach and pursue a receivership sale of the property in order to fund the demolition.

The property was sold through receivership sale at auction in December 2021 to a contractor that was equipped to complete the demolition.

Though the sale of the real property was complete at that point, the receivership then continued to include its next major objective: completing the demolition, which the buyer and general contractor agreed to complete within nine months of the sale.

Before demolition.

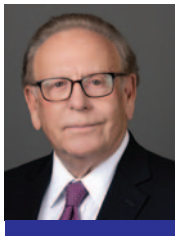
The demolition itself required an objective assessment as to a process that would be safe and secure. Again, the receiver leaned on experience in real estate development in order to create a strategy that was acceptable to the court. With the support of numerous consultants, including structural, geotechnical and civil experts, the receiver developed a plan for demolition — the majority of which has been safely and soundly completed.

During demolition.

Demolition almost complete.

While receiverships are often complicated, the Hadid receivership, with its multiple steps, stakeholders and priorities, underscores the importance of this remedy and the creative solutions a receiver can provide.

Douglas Wilson is the Chairman and CEO of Douglas Wilson Companies, a specialized provider of real estate and receivership services, headquartered in San Diego.



Doug Wilson

***Douglas Wilson** is President of Douglas Wilson Companies. The company provides a wide range of specialized business, fiduciary, workout and real estate services throughout the country.*

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lender had stopped making advances to the developer when it realized the project was worth less than the loan. However, the developer would not finish the project without further advances from the lender, so work stopped while the bank tried to force the borrower to perform. Finally, the lender was left with few options and sought our appointment as receiver. Of necessity, the process of completing and selling the project by a receiver on a bulk basis took months longer than had the lender simply funded the borrower to complete the project and sell the units. The lender would have undoubtedly recovered more proceeds in a much shorter period but for its failure to work with the developer.

If you can't promptly find a workable way for the developer to complete and sell the project, then the next step is to use personal guarantees and the move to appoint a receiver to motivate the borrower to cooperate with the remaining available strategies:

1) restructuring the borrower's debt and equity
2) borrower sale of the property
3) lender sale of the loan
4) borrower agreement to keep the property safe and secure while the lender completes the foreclosure, or
5) borrower cooperation with the appointment of a receiver

Often, simply initiating the process of appointing a receiver is sufficient to motivate a borrower to cooperate.

If the borrower will not quickly agree to complete and/or sell the project on terms acceptable to the lender, then it is important to immediately move on to the next step in your pre-foreclosure strategy. In work outs, time is not your friend and things do not magically get better with time.

Pre-Foreclosure

It is important to remember that a lender can't control, manage, or operate a property prior to completing the foreclosure. Doing so runs the risk that the lender's loan proceeds are deemed by the court as having been converted to passive equity and may constitute a violation of the very complex one-action rule. So a lender's remaining pre-foreclosure alternatives are limited to:

1) selling the non-performing loan
2) standing by until the foreclosure is complete, or
3) obtaining the appointment of a receiver to protect, complete, and/or sell the project

A receiver cannot control or sell the loan itself, as it is the underlying agreement between the lender and the borrower. However, the lender can sell its loan, and market it directly or through a broker or auction platform. Although the sale of a non-performing construction loan yields the lowest sale proceeds, it is often the fastest and most cost-effective way to get a non-performing loan off the books. The buyer of the loan is taking on an incomplete project, the risk of borrower bankruptcy, and must complete the loan foreclosure process – which typically results in a very steep discount and substantially greater loan losses.

Most lenders do not want to foreclose on an incomplete construction project – particularly apartment, condominium, or tract housing projects – in order to avoid taking on liability for construction defects or environmental contamination. In California, construction defects liability continues for ten years from completion and environmental liability is perpetual. In this case, the exit strategies are limited to the appointment of a receiver or sale of the loan.

A receiver can get to work right away and generally insulates the lender from the liability associated with the completion, operation, and sale of the project, as the lender will not take possession or control of the project (avoiding lender liability issues by having the property in 'legal custody').

A receiver can also be given the authority to negotiate and settle mechanics liens or sell the project free and clear of junior liens (but not stop notices). Since there is typically no income generated by an incomplete construction project, the lender will need to fund the receivership through protective advances or the receiver must borrow funds from a third party with a super-priority lien using receivers' certificates in order to do so. The lender will need to be

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comfortable making prompt funding decisions so the receiver can proceed ahead without unnecessary delays.

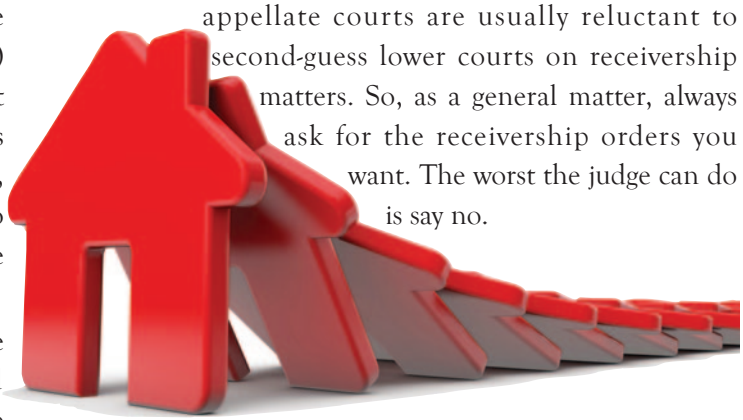
The specter of borrower and guarantor bankruptcy exists until the property is sold or foreclosed. To reduce the risk of borrower bankruptcy, a receiver can be appointed to take control of the borrower entity (rather than just the property) with a receivership order that gives the receiver the sole right to file a bankruptcy action for the entity. If a receiver is already in place when the borrower files for bankruptcy, generally the bankruptcy court will allow the receiver to remain in place as custodian during the pendency of the bankruptcy.

More broadly, with an experienced receiver and the proper receivership orders, a receiver can quickly and efficiently step into the shoes of the developer to secure the property, perform due diligence, amend public agency approvals and development agreements, complete construction, remediate environmental issues, and market and sell the property free and clear of liens. In the case of condominiums or tract housing, the receiver can either sell the units 'wholesale' on bulk basis or for full 'retail' market value to individual buyers. In the case of environmental issues, the receiver can also sell the property unremediated pursuant to court order absolving the receiver and lender of environmental liability.

A lender has the option to file the receivership action in either state or federal court, subject to jurisdictional considerations. The decision as to which court to file in is very specific to the location and details of the underlying litigation, an issue that should be discussed with the lender's legal counsel.

While a lender cannot 'direct' or 'control' a receiver, as a receiver is legally an officer of the court, a lender can indirectly guide the scope of the work through the court's orders, as well as through the disbursement of funds to the receiver. For example, a court will often agree to require that the receiver only take certain actions with the prior written consent of the lender. In addition, if the receivership order allows the receiver to borrow from the lender, the lender can often de facto control the scope of the receiver's work by its willingness to advance funds to the receiver for that work. It is important that the lender's counsel have extensive and specific experience in crafting the receivership order and proposing a receiver that has equally specific and extensive experience with the completion and sale of distressed development projects.

It's also worth noting that courts have very broad discretion over the receivership orders they issue, and appellate courts are usually reluctant to second-guess lower courts on receivership matters. So, as a general matter, always ask for the receivership orders you want. The worst the judge can do is say no.



Judicial Foreclosure

In many states, to have a receiver appointed, the lender will need to file a judicial foreclosure action. In states with so-called one-action laws – where a lender can either foreclose or sue the borrower for any losses – a judicial foreclosure and appointment of a receiver is also necessary if the lender wants to both foreclose and recover any additional monetary damages or deficiencies. While judicial foreclosure may sound good, it is usually not. It can be defeated by borrower bankruptcy, can take a very long time to complete, and requires a very costly process to establish the 'fair value' of the foreclosed property. And in California, the borrower retains the right to repurchase the property for up to year after it is foreclosed, leaving the property in receivership limbo for a year after the judicial foreclosure is completed. In thirty years, I have only seen two judicial foreclosures litigated through to completion, and no one was happy with the outcome in either case, so proceed with caution. In most cases, a better outcome is achieved when the court allows the receiver to sell the property.

Post-Foreclosure

Once the lender has completed the non-judicial foreclosure of the project, it is free to complete, operate and sell it, since the lender is also now the fee owner of the property. However, the lender is now both responsible and liable for the project and, as mentioned above, any environmental liability is in perpetuity.

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In order to further limit the liability associated with the ownership of construction projects, some lenders elect to create a separate wholly-owned legal entity in which to foreclose distressed properties. At the very least, this provides some 'political distance' between the lender and the property.

Post-foreclosure, the key issue for lenders beyond basic liability management is to have the staff and decision-making structure in place to make efficient construction and development decisions necessary to complete and sell a distressed project. These decisions involve public agency approvals, design, capital allocation, insurance, risk management and asset pricing that are not typically part of a lender's business culture or training.

Developers calibrate risk to maximize financial opportunity. Lenders minimize liability, seeking to move as much risk to the borrower as possible. Lender staff are, at best, discouraged from taking risk and often penalized for it, while their developer borrowers are rewarded for taking risk. The two are fundamentally different cultures and business models.

Conclusion

It is always better to be prepared than caught off guard when the economy turns, as it inevitably will. Time is not your friend in a recession. Markets can deteriorate for years.

Understanding the general issues and consulting with experts on potential strategies and alternative approaches to distressed construction and development loans will allow you to have a plan in place so, when the time comes, you can promptly and methodically resolve them. The sooner you can execute your strategy, the lower your cost and the greater your recovery of loan proceeds will be.

**This article was originally published in the 2022 Construction Lender Risk Management (CLRM) Journal and was republished with permission.*

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Is pleased to announce
its appointment as

Post Judgment Receiver for a
$28,856,000 Consumer Judgment.

Superior Court of California
County of San Diego

INVENZ, INC.
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Is pleased to announce
its appointment as

Equity Receiver for a
heavy engineering services
company.

Superior Court of California
County of San Diego

Michael G. Kasolas, CPA
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Is pleased to announce
his acceptance of appointment as

Partition Referee
In re: 3001 Richmond Blvd. LLC vs.
Lindbergh G. Low, et al
for the sale of a multi-family
residential building
Oakland, CA

Superior Court of California
County of Alameda

Michael G. Kasolas, CPA
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Office: 415-992-5806
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Is pleased to announce
his acceptance of appointment as

Receiver *In re: PureCrop1*
Disco Bay, Inc., PC1 Holdings, Inc.
and R.C. Formulas, LLC
Ukiah, CA

Superior Court of California
County of Mendocino

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 the indicated educational experience. Inclusion on this List shall not be deemed an endorsement of any of the names listed below by the *Receivership News*, the California Receivers Forum, or any of its Regional Councils. This is a paid advertisement.

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- ♦ This symbol indicates those who completed up to 14 hours of advanced receivership education at the Loyola V, Complex Case Symposium in January 2013.
- ■ This symbol indicates those who facilitated and attended the Loyola V, Complex Case Symposium in January 2013.
- ⊗ This symbol indicates those who completed 9 hours of education at the Loyola VI Symposium in January 2015.
- ≠ This symbol indicates those who facilitated and attended the Loyola VI Symposium in January 2015.
- ● This symbol indicates those who completed 9 hours of education at the Loyola VII Symposium in March 2017.
- ♦ This symbol indicates those who facilitated and attended the Loyola VII Symposium in March 2017.
- ▲ 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.
- ◗ This symbol indicates those who completed 6 hours of education at the Loyola IX Symposium in April 2022.
- ❖ This symbol indicates those who facilitated and attended the Loyola IX Symposium in April 2022.

Loyola I-IV symbols have been deleted.

In a world full of uncertainty, one factor we can all count on is the reality that each of us come with an expiration date. The California Receivers Forum is saddened to report on the passing of several of our colleagues over the past year. With apologies in advance, for those representatives we may have missed, we acknowledge the loss of **David Pasternak**, Pasternak & Pasternak; **Douglas Morehead**, Optima Asset Management; **Lei Lei Wang-Ekvall**, Smiley Wang-Ekvall, **Adam Djou**, Torrey Pines Bank as well as the following members:

Bruce Cornelius

BRUCE ALLEN CORNELIUS
(June 30, 1949 – April 20, 2021)

Bruce Cornelius passed away on April 20, 2021, after a valiant six-month battle against leukemia. Over a 45-year legal career, Bruce's statewide practice centered on receiverships, principally representing real estate secured lenders and occasionally the receivers themselves. Bruce made frequent appearances in Superior Courts throughout California, and when the occasion required, in California bankruptcy courts.

Bruce grew up in La Crescenta and graduated from high school there in 1967. He earned his undergraduate degree from UCLA in 1971. In 1972, Bruce enrolled in Hastings College of the Law, where he met his future wife, classmate Janet Evans; they married in 1980. In 1975, Bruce earned his law degree from Hastings and was admitted to the California Bar. That same year he began practice with the Oakland firm of Graves & Mallory (later Graves, Allen, Cornelius & Celestre).

In the mid-1990's, Bruce relocated his practice to Lafayette and became of counsel to Belzer, Hulchiy & Murray. He continued to focus on receiverships until his retirement in September 2019. In October 2020, he was diagnosed with leukemia and spent his final six months in and out of UCSF hospital in heroic and ultimately unsuccessful efforts to combat the disease, to which he succumbed on April 20, 2021. Bruce is survived by his widow Janet Evans, son Brian and daughter Megan, son-in-law Justin Pabbert, brother Gary and sister Linda Sullivan, many cousins, nephews and nieces, and numerous good friends.

Bruce was a long-time active member of the California Receivers' Forum, a member of its Bay Area Board, representative to the State Board 2006 – 2009, and Chair of the statewide organization in 2014. He was an active member of Contra Costa Country Club, and for more than three decades of the Bay Area Lawyers & Judges Golf Association, on whose board he served for many years.

Bruce brought dedication and enthusiasm to representing his clients and to his many and varied non-legal interests. The latter included golf, exploring the out of doors, photography, politics and current affairs, rock & roll music, movies, the Olympics, meteorology, geography and travel (both domestic and foreign), astronomy and helping his friends. He enjoyed watching almost all sports in person and on television, and was a deeply committed, knowledgeable and opinionated fan of the Oakland A's, the Golden State Warriors, the SF Forty-Niners, and Bruins basketball. He had an encyclopedic knowledge of subjects that interested him and the uncanny ability to recall accurately myriad details about them. Most of all, Bruce was a truly good, genuine and loyal friend, generous with his time and always willing to lend a helping hand. His friends and family miss him very much.

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BRICK KANE AND ROBB EVANS OF ROBB EVANS & ASSOCIATES LLC

(Provided by Kenton Johnson)

Brick and I were 20-year members of Robb Evans & Associates LLC. Brick served as the President and Chief Operating Officer. I served as an Executive Vice President.

Very unexpectedly during labor day weekend 2021, doctors determined Brick was stricken with brain cancer. He passed away less than 30 days later on October 2.

Robb Evans

The death of the firm's founder, Robb Evans, on August 26, 2021 and Brick's unexpected sudden passing about a month later severely impacted the firm.

Robb was a 5th generation Californian, born in Santa Barbara at Cottage Hospital to Arthur Evans and Carmelita Jansen. He graduated from Hart High School in Newhall and received his degree from CSU Northridge. He met the love of his life, Linda, in Bakersfield and they were married for 59 years.

Robb worked his way through the banking industry: starting out as a teller and working his way to Chairman of the board of a number of respected institutions. During his career, he was an international and domestic banker, fiduciary, and chief executive officer of six banks. He was a Trustee, managing the United States governments interest in the BCCI matter. Robb was a past President of the California Bankers Association and was named California's 2012 Distinguished Banker of the Year. His company, a federal regulatory firm, continues to be trusted and respected in the industry

He and his wife spent joyful years fixing up their beach house in Cambria, hosting parties, and enjoying the grandchildren. Robb is survived by his wife, Linda, his two sons, Steven and Matthew, their wives, and two talented grandchildren.

Richard Kipperman

RICHARD M. KIPPERMAN

Richard M. Kipperman passed away peacefully on March 29, 2022 after a long illness. Born in Trenton, New Jersey February 7, 1944, Richard graduated from the University of Denver, MS in Business Administration; MBA, San Diego State University. Richard proudly served in the Marine Corps from 1968-1971 (honorably discharged), and completed a one year tour of duty in Vietnam.

In 1986 Richard founded Corporate Management, Inc where he became well known and respected in the bankruptcy and insolvency community of San Diego. His astute mental acuity made him a natural for solving financial challenges.

He has served as President of National Association of Bankruptcy Trustees, a consultant and trustee for the San Diego County Construction Laborer's Benefit Trust Funds, administrator of the San Diego Carpenters Group Insurance, Pension and Vacation Funds, board member of the San Diego's City Employees retirement system, Director and officer of San Diego bankruptcy Forum, Director of California Receivers Forum, Director and Officer of San Diego Receivers Forum, member international Foundation of Employee Benefits Plan (Taft Hartley/Unions). Richard was selected as Mediator of the Year, Bankruptcy mediation panel, Southern District of California 2009-2010. From a very young age Richard was adept at and loved golf, always ready for a game whether he was playing Pebble Beach or his beloved San Diego Country Club. Richard loved adventure – skiing the slopes of Vail or Aspen, river rafting down the Snake or Salmon Rivers with family and Friends. Trips to New York City for theater and fine dining, visits to New England for lobster were many. Richard loved life.

He is survived by his wife Bonnie, two sons; Jamie and Sean; one grandson, Parker; two brothers, Robert and Douglas.

A celebration of life was held in April.

Ask The Receiver

By Peter A. Davidson*

Q I am a receiver in a partnership dispute case. I have been served with a subpoena issued from a case outside the receivership case, seeking partnership records and emails to and from a defendant in that case. Neither the partnership nor the partners involved in the receivership case are parties in that case. Do I have to comply with the subpoena? There are few liquid assets in the estate and it will be costly to locate and produce the documents.

A Based on the reasoning in a recent bankruptcy case, from the Central District of California, if the subpoenaing party did not first obtain leave of the receivership court to subpoena you, you likely do not have to comply.

In the case, *In re Egan Avenatti. LLP, 637 B.R. 502* (Bankr. C.D. Cal. 2022), the chapter 7 trustee was served with two subpoenas from Michael Avenatti's criminal case in the Southern District of New York. They sought the production of various financial records and the trustee's appearance, and stated the trustee could "not depart the Court without leave thereof, or the United States Attorney." The trustee had four terabytes of data that would have to be gone through to locate all the subpoenaed records. (As an aside the court notes one terabyte would equal "50,000 trees made into paper and printed". *Id.* at 504 fn.3.).

The trustee filed an emergency motion seeking permission, under 11 U.S.C. §363, to use estate property to pay for the time and expense to search for and produce the responding documents. The court denied the trustee's motion.

The court notes that subpoenas are issued by a court, counsel merely fill them out and serve them on behalf of the issuing court. Id. at 507 fn.6. Because the subpoenas were issued without leave of the bankruptcy court, under the *Barton* doctrine, *Barton v. Barbour*, 104 U.S. 126 (1881), the issuing court had no jurisdiction and, hence, the subpoenas were invalid. *Barton* held that the failure to get prior receivership court permission to sue a receiver, deprived the other court of subject matter jurisdiction. Over the years this requirement has been expanded to cover other court appointed parties and their professionals, including bankruptcy trustees, their counsel and agents. See, *In re Crown Vantage, Inc.* 421 F.3d 963 (9th Cir. 2005).

The court held that *Barton* is not limited to simply

prohibiting suing a trustee or receiver without court permission, but applies to all legal proceedings, including subpoenas. This is necessary, the court stated, in order not only to protect the court's *in rem* jurisdiction over estate property, but to limit needless costs and impact on the estate's administration. *Id.* at 508. The court cites *In re Circuit City Stores Inc.*, 557 B.R. 443 (Bankr. E.D. Va. 2016), which also held *Barton* requires prior court permission to serve a subpoena on a trustee. It held that the purpose of the *Barton* doctrine is to prevent trustees from being subject to legal proceedings that interfere with their ability to administer the estate and, under *Barton*, the court serves as a gatekeeper to protect trustees from all outside legal proceedings. *Id.* at 449-450.

The court noted and rejected an unreported BAP case that held otherwise. *In re Media Group, Inc.* 2006 Lexis 4842, 2006 WL 6810963 (9th Cir. BAP 2006). It held *Media Group* was not controlling for a number of reasons. First, being a BAP opinion, it was not binding precedent. (While unstated, it is also an unreported decision.) Second, it held *Media Group* did not correctly apply *Barton*, by engaging in too narrow of a reading in light of the 9th Circuit in *Crown Vantage, supra.* and other courts referencing its application to all legal proceedings. It also felt the BAP applied the wrong standard of review, *de novo* rather that clear error. The court does not mention that in the sixteen years since Media Group was decided it has only been cited once; in *Circuit City, supra.* which rejected it. 557 B.R. at 449.

The court's decision applies with even more force where a subpoena is served on a receiver. *Barton*, first of all, was a receivership case. Its holding was only much later applied to trustees. More importantly, receivers are the court's agents and act for the court. *Turner v. Superior Court*, 72 Cal.App. 3d 804, 819 (1977). A trustee, on the other hand, is an independent contractor, appointed by the United States

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Trustee, whose office is a component of the Justice Department. *Avenatti*. 637 B.R. at 509 fn.10. The service of a subpoena on a receiver is akin to serving the court. The receivership court, therefore, has even more incentive than the bankruptcy court to determine how assets under its control, through its agent, are expended and what activities its agent and officer should be undertaking. Further, the requirement of prior court approval is not only consistent with *Barton*, but also with other acts which require prior court permission because they adversely affect the receivership. For example, receivership property cannot be levied on, garnished or attached without receivership court approval. *Robbins v. Bueno*, 262 Cal. App. 2d 79 (1968).

Therefore, you should respond to the subpoena, objecting that it is invalid because prior permission of the receivership court was not obtained. If the subpoenaing party files a motion for permission to subpoena you, you should ask the court to at least condition such allowance on the party paying the cost of complying with the subpoena, so the estate and its creditors do not bear that burden.

I represent a receiver in a contentious family law receivership. In order to prevent attorney client and work product information from being disclosed to one of the parties, the receiver does not want to attach my detailed bills to his monthly reports or to an upcoming interim fee application. I am concerned that not attaching my detailed bills may result in my fees not being allowed. Should I be concerned? Is there a way to protect such sensitive information and still have my fees approved?

Surprisingly, California law does not generally require detailed time sheets to be attached to fee requests. This, however, is not the case where a statute or rule requires otherwise, or where fees to be awarded only relate to a portion of a lawsuit, such as a specific claim or defense. In such a case, the fees requested must be shown to relate to the claim, which is best done by showing the hours billed and work performed relate to the claim. For example, in *Gregg v. Revelle*, 2004 WL 2601780, a cross-defendant won its summary judgment motion and sought attorneys' fees and costs pursuant to the underlying contract. The evidence in support of the fee claim was a declaration of one of the attorneys setting forth the hours expended on the cross-complaint, the rates charged, and the background of the professionals who rendered services. The attorney stated where time was spent on issues unrelated to the cross-complaint, the fees were excluded. A detailed bill was not included in order to protect the attorney-client privilege.

When the cross-defendant objected that without detailed time records it and the court could not determine whether the amounts sought were reasonable and properly apportioned to only the cross-complaint, the attorneys supplemented the request with heavily redacted copies of its bills, with many line items only having a few words, such as "research" or "telephone conf." The trial court awarded all the fees requested and an appeal followed.

Reversing, the appellate court, citing the landmark case of *Serrano v. Priest*, 20 Cal. 3d. 25 (1977), stated: "...the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case...[t]he experienced trial judge is the best to judge the value of the professional services rendered in his court." It then stated: "In applying these principles, our court have constantly found fees may be awarded even in the absence of detailed time sheets." *Id.* at *4 (citations omitted). It went on, however, that there are circumstances where more than a declaration of hours performed and a general description of the work is needed. It cited as an example, *Bell v.Vista Unified School Dist.*, 82 Cal. App. 4th 672 (2000), where fees were only awardable on one of the claims brought. In such cases, more detailed information that connects the tasks performed to the claim are needed. However, the court stated that actual billing records are not required so long as there is a general description of the tasks performed, which connects the tasks to the claim. *Gregg, supra.* at *4.

This general description of what is required for fee requests does not apply to receiverships, however, given the specific receivership Rules of Court. Rule 3.1182, dealing with monthly reports, states: "The receiver *must* provide monthly reports to the parties..." The reports "*must* include: (1) a narrative report of events; (2) a financial report; and (3) a statement of the fees paid to the receiver, employees, and professionals showing: (A) itemized services; (B) a breakdown of the services by 1/10 hour increments; (C) If the fees are hourly, the hourly fees..." (emphasis added). Given that the Rule states the report *must* include not only itemized services, but that they be broken down in 1/10-hour increments, it is clear that the general fee application requirements discussed in *Gregg, supra.* and the general cases it cites are not applicable. *Continued on page 28...*

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Of course, in order for the receiver to be paying his or her own fees or professionals' fees, that must be authorized in the order of appointment or a subsequent order. If there is no such authorization, the receiver and professionals can either file motions for interim fees or wait until the end of the receivership and file final fee applications. While the rule relating to interim fee applications is silent on what must be included (Rule 3.1184 (a), it can be inferred that an interim fee request must include the same detail given the detail to included in the monthly reports and the fact that the rule for final fees (Rule 3.1184(d)) also requires the request: "must state in detail what services have been performed."

Where it is necessary to protect disclosure of sensitive information, because of privilege or otherwise, there are a number of possible ways of doing so. Counsel can try to get the parties to agree to a protective order or stipulation regarding redacting the bills. Counsel can ask the court to allow unredacted bills to be filed under seal or *in camera* for court review. The receiver and professionals can choose not to seek to be paid on an interim basis for the specific sensitive line items and instead indicate that compensation for those items will be sought at the end of the receivership, when disclosure may no longer matter. Finally, the receiver and professionals can just redact those portions of the bills necessary to protect the confidential or privileged matters. Care in doing so, however, is required. If there is excessive redaction the court may deny the fees requested or parties may object claiming they cannot make "specific" objections as required by Rule 3.1183 (b). In addition, an explanation should be provided why the redactions were necessary and what the redactions generally relate to, so the court understands why the redactions were made. A number of bankruptcy cases have addressed this problem. The court in *In re Las Vegas Monorail Co.*, 458 B.R. 553 (Bankr. D. Nev. 2011), denied portions of interim fee requests because counsel had not disclosed, until the hearing, why the redactions were made, did not try other methods to protect the confidential matters, and overly redacted the bills. One firm redacted 13% of its time, another 6%. The court concluded: "Simply put, the existence of either confidential or privileged information, and the attorney's duty to protect both, does not excuse or alter the burden that an attorney must satisfy before a court may award fees…" *Id.* at 559. While, admittedly, bankruptcy rules are different, this same tension exists in receivership cases.

Q I represent a party in a receivership case. While the receiver has been in place for over 3 months, she has not served the parties or creditors with any reports. I have written the receiver requesting reports, but she has ignored my requests. What should I do? Can the receiver be sanctioned?

A Rules of Court 3.1182(a) requires a receiver to provide monthly reports to the parties. It says: *must.* The receiver is not required to provide reports to creditors, unless the creditor is a lien holder and requests the reports. If the receiver is not complying with the rule, there are a number of actions you can take. Initially, as you have done, you should write the receiver, and his or her attorney if there is one, requesting that he or she comply with the Rule. If the receiver fails to comply, you can ask the court to order the receiver to comply or, alternatively, ask the court to replace the receiver for not complying with the Rules of Court and failing to perform his or her fiduciary duties. You can also object to the receiver's, and possibly his or her counsel's, fees. This is what happened in *Jeffer, Mangel, Butler & Marmaro v. Southland Land Corp.*, 2010 WL 892302. There the trial court reduced the receiver's fees and his attorney's fees by 15% for failing to file monthly reports as required. The court stated the failure to prepare and serve monthly reports "prevented the parties and creditors from making informed decisions about the conduct of the case." *Id.* at *6. Jeffer argued that it was the receiver's duty to file the monthly reports, so it should not have its fees reduced. While the court agreed that, as a fiduciary who acts for the benefit of all parties interested in the property, the receiver "must account accurately for all money and that a receiver may be surcharged for failure to carry out this duty, an attorney owes a duty to his or her client to advise them of the relevant legal principles in order to facilitate an informed decision…" *Id.* The court, therefore, upheld the fee reductions. *See also, Mission Bank v. Kushwaha*, 2020 WL 3526474, where the court denied all fees to a receiver, who served for four months, because the receiver did not prepare and serve monthly reports, as required by the Rules of Court and the order of appointment, despite demand from the bank's counsel that he do so.

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Peter A. Davidson

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* ...

- . **Let's Get Digital**. The California Receiver's Forum has not fully entered the digital world, and is working to expand its use of technology for the benefit of all members. Many of the new features are included at www.receivers.org, and include: receivership members search function at https://crf.memberclicks.net/receiver-search-3#/ (you will need to update your personal bio to tailor the database to your specific bona fides), interactive calendar at https://crf.memberclicks.net/meeting-event-calendar, and in the Fall 2022, CRF will be launching a new on demand digital education platform. Through the platform you can watch educational sessions when you want, and where you want to watch it. Further, CRF members will receive substantial discounts and many of the sessions are approved for MCLE and CPE credit.

- **Loyola IX Symposium** – Son of a Gun We Had Good Fun at the Hyatt Regency in Orange County. After a hiatus as a result of COVID-19, the CRF's mother of all conferences, the Loyola Symposium, came back with a vengeance this past April at the Hyatt Regency in Orange County. The panelists, speakers, sponsors, and social events were extremely impressive and the attendance was outstanding. The event started off with a judges panel that consisted of some of the most knowledgeable receivership judges in the State, and continued with excellent panelists that provided expertise in a wide range of receivership topics. Thanks to the help of the Olsen Group, Loyola IX was a huge success, and we cannot wait until the next receivership event!!!!

- **Get to Know the Receivers and Their Teams:** Everyone in the California Receivership world knows of The Stapleton Group. Led by **David Stapleton**, they are a household name in the receivership world with experience in every asset class known to man. But David does not work alone, and in this installment I am proud to introduce you all to **Jake DiIoria** the only name/word I've ever seen with two consecutive "i's" (except maybe skiing). Jake is a Managing Director at the Stapleton Group and has been with them since 2010. Prior to that he was a senior analyst at Ernst and Young (which means he is good with numbers). Jake is a focused project manager and financial analyst, and has the skills to resolve complex turnarounds and loan workouts for business and real estate engagements. He applies deep experience in forensic accounting, business valuation, operations and asset disposition to manage projects ranging from solvency analyses to comprehensive receiverships and chapter 11 restructurings. If you have a moment, make sure to reach out to Jake at jdiiorio@stapletoninc.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 a Shareholder at 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

Qualified Settlement Funds

BY CHAD C. COOMBS*

In certain circumstances, a receivership may create a new and separate entity for income tax purposes called a qualified settlement fund (QSF). QSFs typically arise in criminal cases such as fraudulent investment schemes and other cases involving fraudulent and tortious conduct.[1] The assets in the receivership are deemed transferred to the newly created QSF, resulting in a host of unique income tax reporting requirements and consequences.

A QSF is a fund, account, or trust that is 1) established pursuant to an order by a government entity or agency or court of law and subject to the continuing jurisdiction of such entity, agency or court of law, 2) established to resolve or satisfy one or more contested or uncontested claims (except for certain excluded liabilities) that arose either a) under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), b) out of a tort, breach of contract, or violation of law, or c) under circumstances designated in an Internal Revenue Service revenue ruling or procedure, and 3) a trust under applicable state law or its assets are segregated from the transferor's other assets.[2] Excluded liabilities under the second element include payments to general trade creditors and debtholders in a bankruptcy or similar case or workout.[3] A receivership may constitute a similar case for these purposes,[4] and thus a receivership involving payments of such claims might not constitute a QSF.

A QSF is not elective but arises when the requirements are met. Although a QSF is typically a separate taxable entity, when there is only one transferor, an election may be made to treat the QSF as a grantor trust (a pass-through tax entity) for income tax purposes.[5]

When a QSF is a separate taxable entity, the assets in the receivership are deemed transferred by their owner(s) to the QSF in a taxable sale or exchange.[6] The transferor(s) could have a gain or loss on the deemed asset sale or exchange[7] and may be entitled to a deduction for the amount deemed transferred to the QSF.[8]

A QSF that is a separate taxable entity will receive the receivership assets tax free and have fair market value tax basis in the assets.[9] A taxable QSF is taxed at the maximum rate applicable to trusts and treated as a corporation for certain other purposes.[10] It also is subject to special rules for calculating its gross income and deductions[11] and may incur gain or loss on any distribution of assets.[12]

When the QSF is a separate taxable entity, the transferor must include in its income tax return and provide to the receiver, as the QSF administrator, a statement of the cash and assets it transferred to the QSF.[13] This statement must include the dates on which the entity transferred its cash and assets to the QSF, the amount of cash transferred to the QSF, and the fair market values of assets transferred to the QSF.

Depending on the circumstances, the receiver may have to prepare and file the income tax returns for both the QSF and the entity in receivership.[14] In some cases it may take years to investigate, discover and recover assets, and the additional time necessary to search for assets and/or conduct forensic accounting work may delay the preparation and filing of the returns. Depending on the facts, such delays could constitute reasonable cause for relief from any late filing penalties.

For the QSF returns, the receiver may request the federal 18-month prompt assessment which applies to a dissolving corporation and a decedent's estate.[15] Unfortunately, this 18 month wait may be of little consolation for those eager to receive distributions, especially in cases where it is difficult to determine a reasonable reserve for taxes so partial distributions may be made. [16]

Given the unique tax treatment of a QSF, a receiver who suspects that a receivership may constitute a QSF should seek tax guidance at the beginning of the case. This should help the receiver to take the proper steps and avoid going down the wrong road.

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1 See, *e.g., United States v. Brown, et al.*, 348 F. 3d 1200 (10th Cir. 2003); Treas. Reg. Section 1.468B-1(l), examples 1 and 4; IRS Priv. Ltr. Ruls. 201718018 and 202139004.

2 Treas. Reg. Section 1.468B-1(c); *United States v. Brown, et al.*, 348 F. 3d 1200 (10th Cir. 2003).

3 Treas. Reg. Section 1.468B-1(g)(3). See also United States v. Brown, et al., 348 F. 3d 1200 (10th Cir. 2003) (describing general trade creditors are those who are owed for providing goods or services and debtholders as only those who hold a debt instrument).

4 See Treas. Reg. Section 1.468B-1(g)(3) and Internal Revenue Code Section 368(a)(3)(A) which defines a title 11 (bankruptcy) and similar case to include a receivership.

5 Treas. Reg. Section 1.468B-1(k).

6 Treas. Reg. Section 1.468B-3(a).

7 Id.

8 Treas. Reg. Section 1.468B-3(c). See also IRS Priv. Ltr. Rul. 202139004.

9 Treas. Reg. Sections 1.468B-2(b)(1) and (e).

10 Treas. Reg. Section 1.468B-2(a) and (k). A QSF treated as a taxable entity files a Form 1120-SF.

11 Treas. Reg. Section 1.468B-2(b) and (d). See also IRS Chief Counsel Advice 201347019 (addressing treatment of expenses and losses incurred in a receivership treated as a QSF) and Coombs, CARES Act Changes to NOLs, *Receivership News*, Issue 79 at p. 18 (Fall/Winter 2020) (regarding net operating loss issues).

12 Treas. Reg. Section 1.468B-2(f).

13 Treas. Reg. Section 1.468B-3(e).

14 A receiver is responsible for filing the returns of entities for which the receiver has possession of all or substantially all of the entity's assets. See Internal Revenue Code Section 6012(b) and Treas. Reg. Section 1.6012-3 regarding the filing obligations for receivers of corporations and individuals. The IRS also takes this position for partnerships. See IRS Gen. Counsel Mem. 36811 (1976) and IRS Gen. Counsel Mem. 38781 (1981).

15 Treas. Reg. Section 1.468B-2(m). For this purpose, a QSF is treated as dissolving on the date it has no assets (other than a reasonable reserve for potential tax liabilities and professional fees) and will not receive any further transfers.

16 See also Coombs, Prompt Assessment, *Receivership News*, Issue 71 at p. 18 (Spring 2021),

Chad Coombs

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