



NEWS

A Publication of the
California Receivers Forum

Evolution of a Good Thing

BY JEANNE B. SLEEPER*



Peter Davidson

Toward the end of the 1990's and turning the millennium corner, **Peter Davidson** was the primary advocate, author, and editor of the "6 Panel, Folded" Receivership News. His early efforts primed the pump for the California Receivers Forum, seeing the value of a communication tool to train receivers and enhance the concept of receivership as a legal option. Further, Peter proved that there was merit and benefit for the CRF members to have a printed periodical that addressed important issues in the receiver's practice.

Bob Mosier had a bigger vision – expand from 6 to 20 or more bound pages in a contemporary news magazine format and distribute to members and state court and bankruptcy judges across California. The starting team was **Kirk Rense** as the editor, Bob as the publisher and chief procurer for judge's agreeing to be profiled, **Craig Collins**, CPA-retired as eagle-eyed proofreader and **JBS & Associates** to sell ads, do the administration, get the issue printed and mailed and keep everyone on schedule.



Robert Mosier



Kirk Rense

The fledgling publication was just a great idea until **Phil Seymour**, The Seymour Group real estate, Buchalter law firm, members buying tombstones and LIST subscribers, and other advertisers got on board. **Regina Roland Altamirano** designed and later redesigned the magazine's appearance. She has touched every word, in every issue to date. **Peter Davidson** kept writing articles and The Ask the Receiver column, **Alan Mirman** dreamed up Heard in The Halls and penned years of columns, and *Receivership News* was launched and on a roll. Every advertiser, reader and contributor grew the organization's prominence and the *Receivership News* credibility for sound receivership law education.



Craig Collins

Bob Mosier set the framework for judge and receiver profiles, guidance on what types of businesses and advertisers could participate. Kirk Rense brought his legal scholarship and writing talent and remains the best headline writer to serve *Receivership News*. Early on, the LA/Orange County founders, with support

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Dominic LoBuglio

***Dominic LoBuglio** is a CPA and has provided forensic accounting and taxation services to receivers for 40 years. He has served CRF since its inception as a board member and officer for LA/OC and State.

Publisher's Comments

BY DOMINIC LOBUGLIO

I am honored that **Bob Mosier** asked me to take over as publisher of this transformative newsletter that he created, beginning with his inaugural issue in the Spring of 2003. Bob's innovations in these pages include profiles of California judges and CRF members, member advertising opportunities (Tombstones and The List), vendor advertising, Ask The Receiver, and Heard in the Halls. Through his efforts, *Receivership News* expanded circulation to over 700 judges throughout California. Bob, together with his editors, **Kirk Rense** and then **Kathy Phelps** in 2011, brought us a wealth of in-depth analyses provided by receivers and lawyers covering all aspects of receivership administration from the basics to the very complex, for all types of cases and issues. This newsletter has provided a platform for members to demonstrate their skills and for CRF to showcase our Loyola Symposia.

My involvement with CRF began with an invitation from **David Ray** and **Peter Davidson** to join the Los Angeles/Orange County Chapter when CRF was created in 1994. I have since continued to serve on the State Board and as a State Officer. Since that time, four additional chapters were formed. They are now consolidated into one statewide organization. This structure will enable centralized management of statewide activities and programs and facilitate increased interaction between CRF members. We have been fortunate to have exceptional administrative support from **Jeanne Sleeper** since CRF's inception until Jeanne's recent retirement, at which time she recruited **Amy Olsen** to be our administrator. In addition to administration, Amy is providing guidance and assistance with technical innovations in our membership and education program systems.

I am privileged to serve with the members of our board and our officers who continue to share lessons from their wealth of experience. Their creative ideas are vital as we strive to fulfill our mission to provide a forum for open communication and education. This work concerns all legal, procedural, and administrative aspects of judicially appointed receivers. We seek to raise the level of professionalism in this area through education of members and dissemination of information to both the courts and our membership.

We are extremely grateful to our advertisers for their generous support. We have beautiful full-page ads from Braun Brokerage (Auctions and Valuations) and The Seymour Group (Real Estate Brokers). They do exceptional work assisting receivers with complex asset sales. Equally impressive are ads from Buchalter (Experts in Receivership Law), Eric Sackler & Associates (Real Estate Sales), Geffen Real Estate (Real Estate Sales), and FRES (Fiduciary Real Estate Services), who provide receivers with exemplary professional services. We also feature ads from Douglas Wilson Companies, known for handling complex fiduciary assignments, and National Franchise Sales (Experts in Franchise Brokerage).

Lastly, heartfelt appreciation to our members; you make CRF successful.



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Michael Muse-Fisher

*Michael Muse-Fisher is a Shareholder at Buchalter, a Professional Corporation. He regularly represents receivers across all receivership types.

Editor's Comments

BY MICHAEL MUSE-FISHER*

After 11 years in the role, Kathy Bazoian Phelps has decided to hang up her red pen, and hand over the reins as editor of this wonderful newsletter. During her tenure, Kathy was nothing short of marvelous. Not only did she polish every article to perfection through masterful editing, but she also helped develop *Receivership News* to become what it is today – a preeminent source of all-things receiverships, guiding legal practitioners and receivers to excel at their respective professions. So when Kathy asked me to take over as editor, I asked myself “will I be able to fill Kathy’s shoes?” My answer was swift and decisive – “Not a chance.” It would be like comparing a floodlight to a flashlight. Me being the flashlight, of course. Although I will never be able to replace Kathy, I promise to all of our readers that I will try to shine as bright as I can in my new role as editor.

With an increase in interest rates and inflation, most economists are now predicting that the United States is headed into a recession, likely to start in the second quarter of 2023. A natural byproduct of recessions is an increase in receiverships. *Receivership News* is here to

help. **David Copp’s** article, “The Brewing Economic Storm and the Role of Proper Environmental Due Diligence,” provides useful guidance to receivers in navigating potentially undisclosed environmental issues affecting properties that are in foreclosure. **Richard Ormond** provides insightful guidance on dealing with “dangerous” receiverships in “The Danger Factor in Receiverships: Be Smart.” **Byron Moldo** shares his personal story and history as a receiver and attorney in “Byron Moldo: He Almost was a Photographer.” And, **Daniel Miggins** provides an invaluable perspective on the values of being a member of the California Receivers Forum in his article, “Memberships.”

Additionally, *Receivership News* would like to thank **Chad Coombs** for his exemplary Tax Talk, column, **Peter Davidson** for his always respected Ask the Receiver column, which I consider the modern day “Clark on Receivers,” and **Ryan Baker** the newest writer for “Heard in the Halls.” Finally, our beloved **Jeanne B. Sleeper’s** article “Evolution of a Good Thing” provides an historical background of the CRF and *Receivership News*, underscoring just how invaluable Bob Mosier and Kathy Phelps have been to the organization and this newsletter. Please take a moment to thank Bob and Kathy. We would not be where we are today without them.

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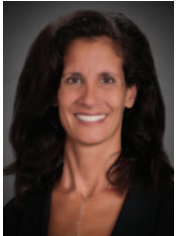
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from across the state, envisioned a symposium and **Edy Bronston** and other Loyola Law School alums approached the Dean about a conference. The law school hosted it until CRF out grew the biggest lecture courtrooms. The affiliation continues on as the California Receivers Forum Loyola Symposium. *Receivership News* has been the print marketing piece and post-program storyteller.



Kathy Bazoian Phelps

At issue 41 in 2011, **Kathy Phelps** took on the role as the successor editor. She came up with article concepts, drafted authors, wrote articles, coached enthusiastic writers and polished the style, grammar and legal facts in every issue. She has been a champion editor. The publication continued to flourish because of the quality content. On Kathy's watch, **Chad Coombs** began his insightful tax column that focuses on unique tax compliance issues confronting receivers. **Michael Muse-Fisher** took the reins of *Heard in the Hall* as successor to Alan Mirman. Kathy's

care nurtured authors through re-writes and kept the law right and the focus on the unique complexity of receiverships.

Mosier Era Stats:

- Publisher issues 9 – 75
- Drafted the services of Kirk Rense and Kathy Bazoian Phelps as editors for 67 issues
- Retained Craig Collins, CPA-retired, on his business staff as proofreader extraordinaire for 67 issues
- Coordinated 36 judges agreeing to be interviewed and many judges as Symposium speakers
- Oversaw 50 Individual Profiles of receivers and those in support of the receivership industry
- Recipient of the California Receivers Robert C. Warren Memorial Outstanding Service Award
- Delivered a product that kept the advertisers coming back and allowing CRF to distribute free copies to members and judges.
- Planted and sowed the seeds of professional journalism, integrity for receivers and created an environment where like businesses could cooperate, collaborate and train the next generation of receivers to better serve their clients and to elevate the profession's stature.

Bob is winding down his business, and Kathy is busy building her practice. As a result, the publisher title is passing to **Dominic LoBuglio**, CPA, and the lawyer-editor title to **Michael Muse-Fisher**. *Heard in the Halls* will now be coordinated by **Ryan Baker**. Dominic has served CRF since the beginning as an LA/OC Board member and Chapter Co-Chair for many terms, State Treasurer and State Chair and since the beginning, as the CRF's tax preparer.

The beat goes on. Give the *Receivership News* new team, including Olsen & Associates management staff, your support and assistance with articles, ads and your participation in California Receivers programs.

- Jeanne B. Sleeper, JBS & Associates as CRF administrator helped produce issues 1-75 as the project manager, author, content wrangler, record keeper and schedule whip cracker.

She is now also winding down her business.



Jeanne B. Sleeper



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The Brewing Economic Storm and the Role of Proper Environmental Due Diligence

BY DAVID COPP*

As most of us are aware by now, the Federal Open Market Committee (the “Fed”) is taking an aggressive stance to combat inflation in the economy, and has been raising the Federal Funds Rate at a pace and magnitude not seen since the 1970s and early 1980s, when inflation was last seen at these levels. This abrupt and significant rise in rates will cause the economy to slow down, although to what degree remains to be seen.

As an environmental due diligence professional since the late 1980s, and an armchair student of the markets since that time, I have been involved in several serious market downturns, most notably those in the early 1990s (manufacturing, housing and aerospace dislocations), the early 2000s (dot com boom/bust), and again during the Great Recession in the 2007-2009 timeframe. These downturns were deeper and lasted longer than many initially expected. Hopefully that will not be the case this time, but the risk of a significant dislocation appears to be present.

Everyone in the lending community and downstream (receivers) needs to be prepared for what may be on the horizon: non-performing commercial real estate loans that will need to be evaluated and worked out in one way or another. During the pre-foreclosure review process is when the due diligence that was performed at loan origination - something that may have occurred several years ago - will have to be assessed.

During the 2007-2009 Great Recession timeframe, I worked as a consultant on dozens of pre-foreclosure assessments for a large regional SBA lender (and others) that made loans on many types of properties from residential tract developments to heavy industrial. Unfortunately, the due diligence that was performed, often at the peak of the market, was frequently inadequate both on the environmental and appraisal sides. There was apparently a “see no evil, hear no evil, speak no evil” mindset with the consultants and appraisers that were being used, and upon pre-foreclosure review, many properties were found to be

both overvalued, as well as having previously unidentified environmental issues. On some of the loans, if the due diligence was inadequate, the SBA guarantee could also be in jeopardy. As a result of the many bank failures and takeovers during the 2007-2009 timeframe, federal lending criteria were tightened on the appraisal side, to mitigate some of these problems, but the environmental side remains less restricted.

When it comes to foreclosure or workouts, it is imperative the lender or receiver have a good understanding of the quality of the asset from an environmental standpoint. From my experience, you should take nothing for granted. Do not necessarily assume that either: 1) the loan origination due diligence was adequate, or 2) that the environmental conditions at the property (or in the neighborhood) remain the same as at loan origination.

Foreclosing on a property with environmental issues has many risks. Receivers play an important role in the process to evaluate the various, often complex, issues related to the property and creditors. Receivers must also be fair and limit the risk to the property and the various parties, including themselves. Obviously, having a team of experienced professionals to assist the receiver in the various pieces of the puzzle for which the receiver may not be an expert is crucial to a successful disposition of the property.

When an economic dislocation occurs, it is vital to have highly experienced due diligence professionals assist you as part of the receivership estate. They can help you get a handle on the quality of the property, and minimize environmental risks.

**David Copp, principal of Manzanita Environmental, LLC, has been performing environmental due diligence for commercial real estate transactions and preforeclosure review since 1989 on thousands of properties, for many national, regional and local lenders, as well as receivers. He has been a member of the ASTM Committee during its Phase I ESA (E1527) revision process in 2013 and 2021, and is a member of the California Receivers Forum.*



David Copp

The Danger Factor in Receiverships: Be Smart

BY RICHARD P. ORMOND*

One of the most concerning aspects of representing receivers and their teams in a contentious receivership case is ensuring the safety of everyone involved. If a receiver is appointed, it is already an “extreme” situation requiring a court to appoint a neutral party to take custodia legis (legal custody) of a business, its assets or more. These situations have high emotions, high-stakes and, in some instances, irrational actors. Contempt can be a powerful tool to curb bad actors, but it is something that is sought well after the occurrence of a bad act.

For some it may seem inconceivable that legal and courtroom disputes can turn violent, but it does happen. As counsel for a receiver, I have had more than one person show up at my office with a weapon (baseball bats are a weapon of choice interestingly). I have been grabbed across tables during depositions, interviews and even once at a court-led settlement conference. I have received more insults than I care to remember. And, the worst, having someone whisper in my ear that they know where my kids go to school. Frightening to say the least.

PART I: INITIAL TAKE-OVER OF A BUSINESS WITH NOTICE

Here is my practical guide to precautionary methods we can take to protect ourselves in no particular order of priority.

1. Social Media, Geo-tagging, etc.

Minimize your personal information on-line and on social media and only share your information with your closest contacts. This is a hard one because we live in a world where social media is a primary form of communication. But, posting publically about your family, your neighborhood, your kids’ schools, your favorite restaurant, etc. provides a bad actor with a lot of personal information. Geo-tagging is also something to avoid. Tagging where you are invites unwanted



visits or lets people know when you are out of town, or in the office. The outside world does not need to know where you are at any given time.

2. On-line Photos

Having your photo on-line is an important part of marketing and industry presence. However, it also helps people identify you more easily. Recently I had a matter that led me to take my official law-firm photo down. It has not been up since.

3. On-site Security Protocols

When taking over a facility, business, home or property there are a number of important factors to consider:

- a. Security. Do you need to take security with you? If there is any aspect that makes you feel, even moderately, unsafe the answer is unequivocally “yes.”
- b. Firearms. Can you identify ahead of time if there is a risk of firearms at the premises? If the answer is yes, do not take over the premises without law enforcement present (see below for instructions).
- c. Advise Local Law Enforcement. Even if you decide not to involve local law-enforcement, it is prudent to let them know the time and location of your take-over. If need be, visit the local department and provide them ahead of time with a certified copy of the order. Many times, someone will call law enforcement and

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CAUTION! • CAUTION! • CAUTION! • CAUTION!

they will show up. If they know ahead of time that it is a civil order, being monitored by a court-appointed officer, they will defer to that process.

- d. Certified Copies of Appointment Order. Take at least 5 certified copies of your appointment order and be ready to hand one out to law enforcement (if present), to the principals at the location, and to any lawyers that are also present at the take-over. Make sure to have one for yourself too.
- e. Computer Preservation. First thing you do when you walk into a facility is unplug all

computers, unplug all landlines, grab all laptops and tablets and turn off the Wi-Fi router. To preserve evidence properly, take a computer-forensic specialist with you to “flash copy” all of the hard-drives and to preserve all tablets. Originals can be sequestered, copied and “tagged and bagged.” You need to ensure that all chain of custody evidentiary rules are followed and documented. Once copied, if needed for operations, the original can be returned or it can be replaced with its clone—this will depend on a number of case factors including whether there is a parallel criminal investigation.

Continued on page 8...

Orit Gadish, Broker / Owner



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WARNING! WARNING! WARNING!

- e. Cell Phones. If possible, identify all cell phones issued by the receivership estate entities or persons. Depending on the circumstances you may want to collect them and preserve them if they were used in the business of the receivership entity. Privacy issues come into play, so be cautious in doing this, and make sure it is authorized by the appointment order (or subsequent order of the court).
- f. Locks. Change all locks. Front doors, closets, cabinets, safe combinations, mail-boxes, etc.
- g. Forward Mail. Forward all receivership entity mail to your designated address. This authority should be spelled out in the appointment order.
- i. Identify all Persons Present. Knowing who everyone is at the location (and present at your take-over) is important. If they refuse to identify themselves, ask them to leave the premises, but not before writing down a description and taking photos. Add these people to your list of “cast of characters,” which is a running list that I recommend you keep for each one of your receivership matters. It is a great source of information that you can

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regularly update so you have relevant and current information about the pertinent actors and so you can understand each persons' relation to the estate.

j. Video/Security. Identify if there are video cameras (indoors and outdoors) at the premises. If so, you must immediately lock down the access to the video servers and records. Change all passwords, online access and preserve all records to-date.

k. Photographs and Video. While not always necessary to take video (although having someone on hand to simply video can be useful), taking lots of photos is critical. There may be accusations that a receiver disrupted a facility, removed documents, sequestered computers, etc. Therefore, you should carefully document with photographs and written notes (that are contemporaneous) what you identify, remove, review, inventory, etc. Later on, these photos will be helpful when preparing your initial inventory that is required by State and Federal law or rules.

4. Should you be armed?

This is a tough question to answer. I know of at least three receivers that have concealed weapon permits in California and another one that is seeking a concealed weapon permit. My own personal feeling is that only in the most extreme and dangerous situations (such as taking over a money-laundering ring, or a receivership that

involves criminal actors) can justify being armed – legally, of course. Regardless, you should have law enforcement assistance and absolutely let law enforcement know that you or someone on your team is armed and then defer to their judgment.

5. What if I Need Law-enforcement Assistance?

Make sure that your court order has explicit language authorizing you and ordering local law-enforcement to assist at your discretion. The following language appears regularly in the appointment orders that I prepare and submit:

The Receiver is hereby authorized to enter any office of the receivership estate (using law enforcement or other personnel as necessary) to gain control of the receivership property.

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<<<<>>>> POLICE DEPARTMENT AND ANY
MUNICIPAL, COUNTY OR STATE LAW
ENFORCEMENT OFFICER OR OFFICIAL.

In the event that the Defendants or their agents, assigns or affiliates do not cooperate with this Order and fail to provide access to the Receiver to any and all of the Receivership Property and its associated records required herein, the Receiver, without further order of this Court is authorized to seek the assistance of local law enforcement to enter any premises, sequester any records (whether digital or otherwise) and to otherwise enforce this Order.

Obviously, for a Federal Court Order you can include U.S. Marshals.

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THE DANGER FACTOR...

Continued from page 9.

PART II: INITIAL TAKE-OVER OF A BUSINESS WITHOUT NOTICE

In some instances a receiver is appointed without notice. This is done in emergencies where assets are at immediate risk and notice to the alleged perpetrator will lead to further dissipation or sequestration of such assets. These can lead to confrontations because you have a vexatious party that is already committing bad acts, and the shock of a “raid/takeover” without any notice to them can create stressful situations. In these instances, I cannot stress enough, that law enforcement assistance should be mandatory. Again, take multiple certified copies of the appointment order and follow the list above.

What we do for a living is not always for the faint of heart. Safety for yourself and for the parties should always be paramount (lawyers included, of course).

If an appointment is under seal or without notice, usually it has a short time frame before it becomes public record. As such, it is important to have your team lined up and ready to go and that everyone on your team is discrete. Then, you must ensure, after your takeover, that any notice requirements are timely met.



***Richard P. Ormond**
Co-founder and Chairman of
Brief Shareholder, Buchalter, APC
Principal of Stone Blossom Capital LLC
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United States District Court
Central District of California

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company

Office: 415-992-5806

Email: mike@kasolas.com

Is pleased to announce
the successful completion
of his duties as

Receiver
In re: Vincent Liu vs. Lisa Liu
for the collection of a note secured
by a retail commercial building
Salinas, CA

Superior Court of California
County of Monterey

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company

Office: 415-992-5806

Email: mike@kasolas.com

Is pleased to announce
his acceptance of appointment as

Partition Referee
In re: Twisselmann vs. Twisselmann
et al for the sale of the
Twisselmann Ranch
Gonzales, CA

Superior Court of California
County of Monterey

MICHAEL G. KASOLAS, CPA

Michael Kasolas & Company

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Email: mike@kasolas.com

Is pleased to announce
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of his duties as

Partition Referee
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CRF on the Calendar

BY AMY OLSEN, CRF ADMINISTRATOR

Even though COVID-19 took a bite out of the California Receivers Forum (CRF) during 2020 and 2021, I am happy to report that we haven't been letting that deter us from offering education and networking opportunities. Loyola IX was moved to April of this year due to COVID-19 concerns, but if you read the last Receivership News or attended the event, you know it was an absolute success with people eager to see each other again.

On **June 28**, CRF held its first livestream meeting¹ at the offices of Snell & Wilner in Costa Mesa. The presentation titled "If I Had A Hammer: Enforcing Receivership Orders Against Third Parties" was attended by thirty people in person and another 20 attended virtually.

CRF held the first, but not last, "Day At The Races" social on July 24 at the Del Mar Thoroughbred Club. It was Opening Day and CRF attendees enjoyed a private Celebrity Suite directly overlooking the finish line with food, drinks and amazing views of the ponies. Thanks to sponsors including Enterprise Bank and Fiduciary Real Estate Services, this event was free for CRF members! Attendees had so much fun, the Board of Directors decided to put it on the calendar for 2023 as well. Stay tuned for more information and invitations.



CRF Day at the Races with event sponsors Fiduciary Real Estate Services and Enterprise Bank. L to R: Teresa Gorman, Flynn Martinez, Sunny Han-Jeon, Logan Martinez.

On **September 21**, CRF's Young Professionals Council produced another livestream meeting in Los Angeles. Kurt Stake, CPA presented "A Lively Presentation on Business



CRF Day at the Races. Members enjoying Opening Day with friends and colleagues.. L to R: Doug Wilson, Ryan Baker, Daniel Miggins

Valuation". Twenty-five in-person guests joined another 25 virtual attendees to learn from Mr. Stake. Following the presentation, attendees enjoyed beverages and snacks while networking and socializing.

CRF's latest educational session on **October 20**, "Where's The Recession and What's New for Receivers" was originally scheduled as a livestream session to be held in San Francisco. Registration showed that most attendees preferred the streaming option, so the session was changed to a webinar with almost 50 people attending this informative panel presentation.

UPCOMING

Mark your calendar for Friday, **December 16**, 8pm to 10:15pm. You're invited to attend the CRF Holiday Social during the Newport Harbor Boat Parade. We've chartered the Thunderbird which will be decked out in holiday décor as it cruises through the harbor along with other parade bedecked vessels. Last year, we enjoyed the holiday lights of Newport Harbor, but this year, we're in the parade! Cost is \$100 with a portion of the proceeds benefiting a local charity. This is a fun and festive opportunity to enjoy the holidays with your CRF colleagues. Attendance is limited, so watch for the registration email and sign up soon.

We've officially launched the **Receivers Academy** - an online, on-demand educational platform where you can purchase recorded educational sessions. Most offer MCLE

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Continued from page 12.



Holiday lights at Newport Harbor Holiday Boat Parade.

and CPE credit with discounted pricing for CRF members. To access Receivers Academy, just visit Receivers.org. Links are currently available on the home page.

As we head into the last months of 2022, watch your email for your invitation to **renew your membership** in CRF. We are working hard to bring you education, networking opportunities, publications and value to your receivership practice. Your membership is valued and appreciated as we build the receivership community across the state.

For more information or if you have any questions, please visit the website at Receivers.org or give us a call at 844.211.3151. We look forward to seeing you at the next CRF event.

¹Livestream is defined as a live transmission of an event over the internet. CRF defines livestream as a live transmission of an event attended by others in-person.

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PROFESSIONAL PROFILE:

Byron Moldo: He almost was a photographer



Here's Byron at a restaurant, but something's missing. Where's the wine?

When I was a sophomore in college, I was confused about my future. On the one hand, I considered going to law school as had a cousin of mine. On the other hand, I seriously considered going to photography school and becoming a photojournalist, which, at the time, was my passion. So, what did I do? I took

the job, it was offered to me, and I started working part time during my sophomore year. The lawyer was David Ray. I worked in his office for the remainder of my time at UCLA.

After UCLA I attended Southwestern College of Law. During law school, I continued to work in David Ray's office, although during my first year, I was barely able to work a few hours a week.

I graduated law school and passed the bar exam. I simply transitioned from being a law clerk to working as an attorney. When I started working part time in David Ray's office while at UCLA, I knew nothing about, and indeed had never heard of, a receivership. Not surprisingly, by the time I became an attorney I had learned a great deal about receiverships and had worked on a variety of matters.

I continued to work with David Ray (and his partners) for over twenty years. Shortly after I became an attorney, I met Peter Davidson, and we worked on many receiverships together. Some of the more interesting cases were those that involved a law firm being in receivership and all of the related issues. Those cases were great training ground for a young lawyer. I also began to spend substantial time on bankruptcy matters as David Ray was also a bankruptcy trustee.

When I had been an attorney for approximately ten years, I became a bankruptcy trustee. While knowing receiverships was a great background for bankruptcy cases, due to the existence of the United States Bankruptcy Code, the cases have definite differences.

At or about the same time and having interacted with so many attorneys on receivership matters, I started being asked to serve as a receiver. After having worked on at least two hundred receivership cases, I felt as though I was qualified to serve as a receiver.

Peter and I decided to move to a different firm around 1998, and for short time, we joined a large international firm. Unfortunately, the firm never understood the receivership and bankruptcy practice, and in particular, the billing and collecting irregularities of insolvency matters. Our time at this firm lasted approximately eighteen months.

time off from school and traveled for a few months. While I was away, I received a telegram (yes, a telegram) from my parents telling me that I was accepted as a student at the Art Center College of Design in Pasadena with an emphasis in photography. I returned from traveling, spoke to my parents and a few other people, and made my decision. Law school would be in my future.

Let's go back and tell you about my early years. I was born in Los Angeles and raised in Monterey Park, California. When I was in first grade, I moved to North Hollywood (the San Fernando Valley) to be closer to my relatives who had moved nearby a few years earlier. I attended Grant High School in Van Nuys which was a great experience. In my senior year, I was able to attend classes at neighboring Los Angeles Valley College and received college credit. The combination of the curriculum at Grant High School and taking college courses as a senior was great preparation for college.

I attended UCLA and majored in political science, but my favorite classes were French, Italian, and art history. For those of you who are familiar with the UCLA campus, most of my time was spent in North Campus. While I was a student, I needed a part-time job. A family friend told me that a relative of hers was a lawyer and was looking for a college student to work afternoons in an office. I applied for

Continued on page 15...

PROFESSIONAL PROFILE

Continued from page 14.



The Moldo Family – Taylor, Jess, Byron, Allison, Jordan, and Connor.

We then transitioned to a small boutique firm in Century City which was a better fit. I continued to practice at the firm until 2008 when the firm which was then known as Moldo Davidson Fraioli Seror & Sestanovich LLP was looking to either be acquired by or merge with another firm. In 2009, along with twelve other lawyers from my firm, I joined Ervin Cohen & Jessup LLP.

Throughout my career, I have worked with many professionals on a variety of matters, and I have developed some great friendships, many of whom are members of the California Receivers Forum (“CRF”). I’ve had the pleasure of working with many members of the CRF over the years on panels, cases, and simply seeing colleagues at regular CRF meetings. I continue to practice as an attorney, and most of my time is spent by serving as a receiver or partition referee, and as counsel for receivers and referees. In addition, and while there has not been much bankruptcy work recently, I also represent creditors and trustees. As we all know, receiverships can be stressful at times. But I truly enjoy the work that I do, and in particular, the cases where individuals have been defrauded, and I’m able to recover some of the money they invested. One particular area of specialization for Peter and I is the recovery of money through claw-back lawsuits in matters filed by the Securities and Exchange Commission and the Federal Trade Commission.

When I’m not working, I enjoy tennis, working out, art/photography, food, wine, and travel (not necessarily in

that order). I’m an avid sports fan and have had UCLA football and basketball season tickets for over forty years. I’m married to Allison, and we have three children (Jordan (31), Taylor (29), and Connor (25)). Jordan is a film producer, and lives in Los Angeles. Taylor is a digital strategy consultant and lives in Scottsdale, Arizona. Connor is a third-year law student at UC Hastings College of the Law (until the name changes). Taylor was married in 2021, and Allison finally got a girl after having three boys and two male dogs.

I still have some of the camera equipment that I owned when I applied to art school many years ago. Although it hasn’t been used in many years, I just can’t give it away. On family trips I like to bring some of the equipment because the quality of the pictures from thirty-five-millimeter digital cameras is unsurpassed. I wish I had more time to take pictures. Perhaps that time will come in the near future.

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CRF Membership Delivers Valuable Benefits

BY DANIEL MIGGINS*

The California Receiver's Forum means something different to each one of us. For some, it is a part of their life's work, like Jeanne Sleeper who was the driving force behind CRF for over 25+ years. Or, our current operations manager, Amy Olson and her team at Olson and Associates, who have taken the reigns. For some of our members, CRF is a biennial Loyola Symposium conference, where we come together for educational panels, network with new colleagues, as well as reconnect with old ones. While this is the landmark event for our organization, it is but the tip of the iceberg of membership benefits.

For brand new members, joining CRF is their first foray into an industry organization that they may or may not know much about. Normally this occurs through an invitation from one of our current members. However, for new members who found CRF on their own, learning about receiverships can be overwhelming. I ask you all to take a walk down memory lane and remember who it was that first introduced you to the world of receiverships? What was that like when you were learning about this remedy and how did you come to learn about this organization? Did someone take you under their wing, or help guide you through the nuances?

For these new members, their experience may be quite similar to yours. What is a receiver? How do they get appointed? What does ex-parte mean? Who are all these attorneys? How are judges involved? What is the difference between a state vs federal receivership? What is the difference between post-judgment, rents and profits, or health and safety receiverships? Who can guide me? How do I learn about the process? And, why does the word "bankruptcy" elicit a reaction akin to saying Voldemort in Harry Potter?

It is amongst the new members, where the veterans of CRF shine brightest, as the collegiality shared amongst this group is one that I have not found elsewhere. For a new member, there is an opportunity to create relationships, learn about the nuances of this powerful enforcement remedy, as well as those that are involved/retained and their areas of expertise. For veterans, it is the opportunity to not only maintain existing relationships, but also to mentor those they want to help or in whom they see a bit of themselves.

No matter the reason why we are members, there could not be a better time to be one. Why is that you may ask? Someone far wiser than I once told me, "Timing is everything in life."

The initiatives that have taken place amongst the CRF board over the past few years will change the landscape of our organization for years to come. The uniting of the

different CRF chapters into one centralized group throughout the state allows for more transparency, greater communication, and the sharing of ideas to better serve not only individuals, but our entire organization. These resources are not limited to the current calendar year, but also include the digitization of prior years of Receivership News as well as educational materials from Loyola Symposiums I-IX. This includes digital downloads and, for those who need them, CD-ROMs, Floppy Disks, and even the collection of binders on Richard Ormond's dusty bookshelf.

While COVID may be a lingering concern, it is one that hopefully will continue to dissipate and be put in our rearview mirror. For those who are ready, our programming is back, in person, and better than ever. The calendar year is lined up to feature each of our regional groups with industry experts and case study examples. If you are unable to attend in person, you can stream live by Zoom or watch a past presentation through online recordings. These regional events are not limited to educational events but also include social gatherings and happy hours, building upon the camaraderie which is the basis of this group.

The beauty of this organization is that as the cracks in the economy begin to show and our phones begin to ring, it is the time when all hands are on deck, and this group begins to show its true strength in numbers. Matters come across desks, decisions are made about whom to hire and, more often than not, it is those of us who are members, who sponsor, who educate, and who are active participants that receive the first call.

We all are going to get a lot busier over the next 12-24 months and while our membership numbers are strong and have rebounded quite well in the 2022 calendar year, there are still some missing faces who were once staples of this organization. It is time to not only reengage those who were once active but to also think about who we would like to bring into the CRF fold and educate about the world of receivership. I challenge you to reach out to some of your local colleagues and peers, as well as those rising in the ranks at their firms to join CRF in 2023 and beyond. It is on us as existing members to guide new members to the organization, and with the addition of every new member, our collective knowledge and expertise can grow.

**Daniel Miggins spearheads the business development and client relations efforts at Douglas Wilson Companies. Mr. Miggins engages with creditor's rights and debtor's counsel, special asset groups at banks, private credit lenders, and special servicers within commercial mortgage-backed securities with a particular focus on commercial real estate assets.*



Daniel Miggins

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.
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- ⊗ This symbol indicates those who completed 9 hours of education at the Loyola VI Symposium in January 2015.
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- 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.

Ask The Receiver

BY PETER A. DAVIDSON*

Q A few months ago I was appointed receiver over an operating business. A party is complaining that I have not filed an inventory of the assets of the business. My order of appointment says nothing about my having to file an inventory. The business has hundreds, if not thousands, of items of property (tools, desks, forklifts, supplies, etc.). Do I have to go to the trouble and cost of preparing and filing an inventory and, if so, how detailed must it be?

A Yes. You must prepare and file an inventory. The fact that the order of appointment does not specifically state that an inventory is required is irrelevant. California Rules of Court, rule 3.1181(a) states: “A receiver *must*, within 30 days after appointment, or within such other time the court may order, file an inventory containing a complete and *detailed list* of all property which the receiver has taken possession by virtue of the appointment (emphasis added).” Because rule 3.1181(a) uses the term “*must*,” the obligation is mandatory. Rule 1.5(b)(1) (“*Must*” is mandatory”). Further, if you subsequently take possession of additional property, you are required to promptly file a supplemental inventory. Cal. Rules of Court, rule 3.1181(b).

Some attorneys, in drafting appointment orders, try to avoid this requirement by having the court waive the inventory requirement. This is likely ineffective. “The rules have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions.” *In re Richard S.*, 54 Cal.3d 857, 863 (1991). Just as a court cannot disregard mandatory provisions of a statute, a court generally cannot ignore mandatory provisions of a Rule of Court. Further, although rule 3.1181(a) permits a court to modify the time within which the inventory must be filed this does not mean the Court can waive an inventory altogether. A strict reading of the rule supports this conclusion. If a court had leeway to waive the requirement, rule 3.1118(a) would provide: “A receiver must, unless the court orders



otherwise,..." Indeed, the requirement in rule 3.1181(b) – that a receiver *promptly* file supplemental inventories – further supports the view that a court cannot waive the inventory requirement, because it is a directive to the receiver and makes no mention of a Court’s ability to expand or minimize the requirement.

The filing of an inventory serves a number of purposes. It not only informs the court of the assets its agent has possession of, it also informs the parties, who may be able to tell the receiver if items he should have are missing (i.e., where is the back-hoe, Picasso, or computer server?). It also protects the receiver from later complaints that property is missing or is not property the receiver should have in his or her possession.

For example, in *Dickie v Flamme Bros.*, 251 Neb. 910 (Sup. Ct. Neb. 1997), a receiver was appointed in an involuntary corporate dissolution case to marshal and sell the corporation’s assets and wind up its affairs. The receiver sold the corporation’s real property and various other assets and entered into settlements with secured creditors and the parties, all of which were approved by the court. Four years after his appointment, the receiver filed his final report. One of the parties objected to it. The objections were overruled, but the party appealed. Three years later, the Nebraska Supreme Court reversed and remanded, stating that it could not decide the issues on appeal because the receiver had never filed an inventory of the corporation’s property on the date of his

Continued on page 19...

appointment, which his order of appointment had required. It directed the lower court to require the receiver to do so within 30 days, without any further compensation to the receiver. *Dickie v. Flamme Bros.*, 246 Neb. 66 (Sup. Ct. Neb. 1994).

The receiver filed the inventory and an amended final report, which the lower court approved. However, the same party again appealed contending the lower court erred in accepting the inventory because it did not account for all the property owned by the corporation. Three years later, the Nebraska Supreme Court again reversed and remanded. It held that in order for a receiver to comply with his duty of care, he is responsible for taking an inventory of the corporation's assets and liabilities, which should list all real and personal property of the corporation as of the date of the receiver's appointment, and identify all mortgages and security interests. *Dickie v. Flamme Bros.*, *supra*, 251 Neb. at 916. The record showed that various personal property was not accounted for in the inventory, including a combine, certain harvested crops, negotiable commodity certificates, equipment and possible claims against third parties. Further, the inventory listed an entry of "miscellaneous property of junk value," which the Court held was inadequate because it neglected to list what property the entry included. The court ordered the receiver to file an amended inventory, within 30 days, accounting for all property of the estate. If the receiver failed to provide an adequate explanation for the missing property, the lower court was to surcharge the receiver for any damages the corporation incurred. *Id.* at 917. Although an extreme example, this result, and the attended cost, possible liability and years of delay, might have been avoided had the receiver filed an inventory at the beginning of the case.

As to the inventory's detail, rule 3.1181(a) requires the inventory to be "a complete and detailed list of all property of which the receiver has taken possession..." While a receiver does not have to list every screw and nail on the premises (unless the business manufactures screws and nails), the inventory should be sufficiently detailed so the items can be identified. This will allow the receiver to respond if the receiver is later

questioned as to the property's disposition, or assist the receiver in ensuring that the property is allocated correctly to a specified party, if required. In practice, a receiver should exercise the same care and diligence that an ordinary prudent person would exercise in handling his or her estate under like circumstances. *Vitug v. Griffin*, 214 Cal app. 3d 488, 496 (1989).

Q I was appointed as the receiver to collect a judgment. I have not yet filed my final account and report, the court has not approved my final fees, and other creditors of the judgment debtor are demanding that I pay them, because they were not able to be paid from the judgment debtor's assets taken into receivership. However, the judgment debtor has paid the judgment creditor and is now demanding that the receivership be terminated. Must the court now terminate the receivership?

A Not necessarily. The general rule is a receivership should be terminated as soon as the purpose of the receivership has been accomplished. 3, Clark, *Treatise on the Law & Practice of Receivers*, §691 (3rd ed. 1959) ("Clark"). However, that rule is not absolute and is subject to important exceptions.

First, the court must ensure that the receivership is terminated in an orderly fashion. As *Clark* states: the court "must retain jurisdiction of the res long enough to close up the receivership...and see that all receivership claims are properly paid or taken care of or provide for same." *Id.* at §695. "The appointing court pledges its good faith that all duly authorized obligations incurred during the receivership shall be paid." *Id.* at §637. This includes the receiver's and his counsel's fees. The court must also approve the receiver's final account and report. See, California Rules of Court, rule 3.1184.

Second, in some instances a court may continue a receivership for the benefit of other creditors, even though the claim of the party that sought the appointment has been satisfied. *Consol. Rail Corp. v.*

Fore River Ry. Co., 861 F.2d 322, 327 (1st Cir. 1988). This may occur when assets to pay other creditors have been in the receivership and, hence, beyond the reach of the creditors.

These exceptions were illustrated in a recent case, *WB Music Corp. v. Royce Int'l Broad Corp.*, ___ F.4th ___ (9th Cir. 2022), 2022 U.S. App. Lexis 24548 (“Royce”). In *Royce*, the defendant radio stations and their owners were sued for copyright infringement, for playing music without authorization. A jury found the infringement was willful and awarded damages of \$330,000. The court added an additional \$900,000 in attorney’s fees and costs. After unsuccessful efforts to collect the judgment, plaintiffs moved for a receiver. The court initially delayed the appointment, to give the debtors time to pay the judgment. But, when the debtors admitted the only assets they had sufficient to pay the judgment were their FCC broadcast licenses, the court appointed a receiver to operate the radio stations until he could arrange for a sale of the licenses.

Soon after the receiver’s appointment, the debtors moved, ex parte, to terminate the receivership because, purportedly, one of the debtors now had enough cash in his account to pay the judgment. The court denied the motion, noting the debtors’ had repeatedly stonewalled and delayed paying the judgment and failed to cooperate with the receiver. Further, the debtors would also have to pay plaintiffs’ post-judgment costs, which had not yet been determined. The debtors subsequently deposited the full amount of the judgment, plus interest, with the court. The court then granted plaintiffs’ post-judgment fees and unpaid sanctions of \$384,000, which were added to the judgment.

The debtors deposited this additional amount with the court and again moved to terminate the receivership and enjoin the sale of the radio station licenses, contending they had now satisfied the judgment.

Plaintiffs opposed the motion arguing that while the debtors had deposited the funds, they refused to stipulate to their release, and the receivership should not be terminated without ensuring the receiver would

be paid. The receiver also opposed the motion arguing that not only were he and his professionals owed hundreds of thousands of dollars, but a number of creditors were also owed significant sums, one of which had already obtained a judgment.

The court denied the motion to terminate, citing *Consolidated Rail, supra.*, holding that the court could decline to terminate the receiver until the debts of non-party creditors had been paid. “In this way the court can ensure that the receiver will not deplete all of the debtor’s assets on behalf of one creditor, leaving the other creditors without remedy.” *Consolidated Rail* at 327-28. The court also noted that courts normally do not terminate receiverships until the receiver prepares his or her final accounting and the court ensures the receiver is paid. While the court acknowledged it could terminate the receivership, the facts did not support such action given the court had to appoint a receiver in the first instance and the debtors could not be trusted to pay any amounts the court might award the receiver. The debtors appealed and the Ninth Circuit affirmed, agreeing with the reasoning of the District Court and the First Circuit in *Consolidated Rail, supra.*

One argument the debtors made, for the first time on appeal, which the Ninth Circuit refused to address for that reason, was that the receivership was void ab initio because the receiver had never filed his oath and bond as required by C.C.P. §567. This was a major blunder by the receiver and could have been disastrous. As discussed in a prior *Ask the Receiver* (46, *Receivership News*, Winter 2013) while there is no reported California case on point, other states with similar statutes hold the failure of a receiver to file his or her oath deprives the receiver of the authority to act and renders the receiver’s activities null and void. See, *Laron v. Kaley*, 138 Ohio App. 3d 120, 122-123 (2000); *Zeigler v. Trio Realty Group. LLC*, 2011 WL 5119101 (2011).



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

Peter A. Davidson

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

BY RYAN BAKER*

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: *Ryan Baker* at Douglas Wilson Companies, 19200 Von Karman Avenue Suite 416, Irvine, CA 92612; Phone: 213.550.2242; Email: rbaker@douglaswilson.com

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

- **Receivership News Has a Changing of the Guard:** After more than 20 years of acting as Publisher for Receivership News, Bob Mosier of Mosier & Company is passing on the baton to Dominic LoBuglio, of Dominic LoBuglio CPA, Inc., to carry on this storied publication. After more than 11 years of service, Kathy Phelps will also be handing off her Editor duties to Michael Muse-Fisher—the former columnist for *Heard in the Halls*, who’s shoes are being filled by yours truly. A huge debt of gratitude is owed to Bob Mosier and Kathy Phelps for their tireless and invaluable contribution to this publication that has benefitted not just everyone who reads *Receivership News*, but for everyone in the industry as a whole. We know we are in good hands with Dom and Michael’s steady hands at the helm as we look forward to the newest chapter in *Receivership News*’ anthology.
- **Uniting the Clans: Part Deux:** A *Heard in the Halls* exclusive: following the “Uniting the Clans: Part Un”, which saw the California Receivership Forum regional groups consolidate all under one organizational umbrella, comes a potential sequel to our favorite franchise. There are preliminary discussions to merge the Los Angeles/Orange County chapter with the San Diego chapter. This would result in the new super chapter becoming known as: the Southern California Chapter. The benefits would be significant: streamlining education panels and social events, pooling of manpower and aggregating resources. These discussions are still very preliminary and thoughts and comments can be provided to: Richard Ormond, rormond@buchalter.com. What’s the new record of colons used in one paragraph within *Receivership News*? The answer: eight.
- **Winter is Coming:** Literally, and potentially figuratively. Yours truly ran a very (un)scientific poll among seven California receivers and receiver’s counsel throughout the

state. I can say I have heard reports that activity (defined as calls/inquiries/appointments) in the industry has, for the most part, been picking up steam in the past three months. Many report upticks in partnership disputes, post-judgment receiverships, commercial real estate, and partition referee related cases. Although no tidal wave – or at least, not yet – things do appear busier with the expectation of getting even more so. The economic storm clouds have been gathering for some time with everyone waiting with bated breath. This time seems to be a little more tangible as compared to the past 5 years with everyone's crystal ball reporting "it's just around the corner in another 6-12 months." Have the economic chickens come home to finally roost? Only time will tell.

- **2023 Membership Renewal:** It's time to renew you CRF membership. With education seminars back in the mix and in-person events becoming more and more available, access to all the amazing information that comes with being a member is incalculable: attending educational conferences, being able to search every (!) historical *Receivership News* for articles that relate to cases you might currently have, the resources and materials found in historical Loyola conferences, YPC Events, and more! Visit receivers.org to sign up or renew now!
- **Spread the Word:** Know someone thinking about getting started in the receivership industry? 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.



Ryan Baker

****Ryan Baker** has been a Receiver for nearly 15-years and is with Douglas Wilson Companies. Mr. Baker has overseen receiverships of nearly every flavor including operating companies, rents and profits, construction, environmental contamination, regulatory, post judgement, and many, many others.*



Tax Closure

BY CHAD C. COOMBS*

Under the federal priority statute, 31 U.S.C. Section 3713, a receiver of an insolvent estate who knew or should have known about the existence of federal claims against the receivership estate, including tax claims, may be held personally liable for failing to pay all such federal claims to the extent there were funds available to do so.¹ A receiver in such case will therefore want to make certain that all federal taxes are determined and paid or provided for before making distributions to other claimants and closing the case. But how?

For federal tax returns that the receiver files, the receiver may be able to seek prompt assessment,² estimate a reserve for federal taxes or wait until the applicable statute of limitation expires before making distributions to other claimants. But there may be other federal tax liabilities, especially in complex cases or receiverships involving fraudulent activities. The receiver may need to conduct tax due diligence, such as reconstructing and analyzing accounting records, reviewing prior year tax returns, and seeking information from the taxing authorities.

The Internal Revenue Service, however, is generally not bound by informal communications. Even filing a claim in the receivership does not necessarily bind the IRS. The IRS may later assert additional taxes, even after distributions have been made, leaving the receiver exposed to personal liability for any unpaid federal taxes.³

Furthermore, the receiver cannot count on the receivership court to grant relief from the receivership's federal tax obligations or block the IRS from recovering against the receiver.⁴ The sovereign immunity right of the United States from being sued and the federal Anti-Injunction Act generally prohibit

(with limited exceptions) any suit to bar the IRS from assessing and collecting any federal taxes,⁵ and the Anti-Injunction Act also prohibits any suit to bar the assessment or collection of any liability of a receiver for any federal tax.⁶

But the receiver has some options. One possibility is a closing agreement with the IRS.⁷ A closing agreement may cover many types of federal taxes, not just income taxes, and binds the IRS. The IRS may enter into a closing agreement when it is advantageous for the IRS to have the matter permanently or conclusively closed or the taxpayer has good reasons for a closing agreement and the IRS will not be prejudiced.⁸ Moreover, the IRS acknowledges that an acceptable reason for a closing agreement is a receivership in which the receiver desires a final determination before making a distribution.⁹

While this sounds good, the IRS is not required to enter into a closing agreement and may be reluctant to execute one that resolves any or all potential federal tax claims, including claims that are unknown, or otherwise cannot be quantified.¹⁰ Thus, there is no guarantee that the IRS will consider a request for, or finalize, a closing agreement.¹¹

Another potential solution is a constructive trust, but this only applies in limited circumstances. A receivership court may impose a constructive trust as an equitable remedy in fraud cases where the receivership funds and assets can be traced to the victims. The cash and other assets improperly taken from the victims are deemed held in trust for the benefit of the victims and thus not available to pay tax claims against the perpetrators of the fraud. This effectively subordinates tax claims to the claims of the victims.

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Department of Justice Tax Division Directive No. 137 states that in certain circumstances, the DOJ's Tax Division will recognize the priority of a victim's claim over a federal tax claim if the victim can trace its property to the receivership and either (a) the claims arise from the same transaction or (b) title has not passed to the perpetrator (e.g., in cases of theft) and a constructive trust was imposed prior to assessment of the tax or would be imposed absent any assessment. The directive instructs that the Tax Division should seek a reasonable settlement in these cases given that a court could relax the tracing requirements or find a means to rule in favor of the sympathetic victims. A receiver in a fraud case should therefore consider asking the IRS to subordinate its claim or, should that fail, file a motion with the receivership court seeking a constructive trust and subordination of the tax claim.¹²

What if these options fail or are unavailable? Each case depends on its own unique facts and circumstances, and the receiver may be able to reach some other type of agreement or arrangement with the IRS. But if not, this highlights the importance of the receiver seeking tax guidance from the outset of the case and exercising all necessary due diligence with respect to potential tax liabilities. Such actions will help demonstrate that the receiver did not know, and could not have known, about any unpaid federal taxes that the IRS may later assert.

¹ See 31 U.S.C. Section 3713(a) for when federal claims have priority over other claims. Courts have carved out exceptions to the federal priority statute for payment of secured claims and reasonable administrative expenses. Courts have also limited receiver liability to federal claims for which the receiver knew about or had inquiry notice. Federal taxes may also have priority pursuant to a federal tax lien.

² See Coombs, Prompt Assessment, Receivership News, Issue 71 p. 18 (Spring 2021).

³ See Internal Revenue Manual Section 34.4.1.8 regarding IRS collection policy in receiverships.

⁴ See SEC v. Credit Bancorp, Ltd., 297 F.3d 127 (2d Cir. 2002).

⁵ Internal Revenue Code Section 7421(a).

⁶ Internal Revenue Code Section 7421(b).

⁷ Internal Revenue Code Section 7121.

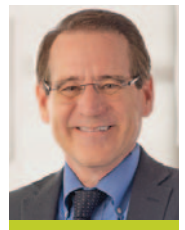
⁸ Internal Revenue Manual Section 8.13.1.2.2(1).

⁹ Id.

¹⁰ IRS private letter rulings are also binding on the IRS but likewise might not be practical solutions as they are limited to the specific stated facts.

¹¹ For further discussion on closing agreements, see Strahan and Greenwald, Closing It Out – Past, Present & Future, Los Angeles Lawyer, Volume 44, No.11 Page 24 (February 2022).

¹² See Rosen, Does Constructive Trust Raise Harmed Parties' Claims Above Pre-Receivership Receivership News, Issue 21 p.1 4 (Spring 2006).



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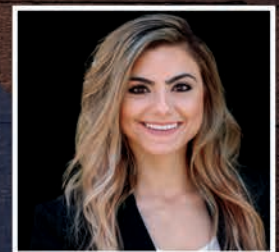
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