RECEIVERSHIP NEWS

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In Custodia Legis

A Publication of the California Receivers Forum

Judge Thomas S. Clark

Kern County's Judge Thomas S. Clark

By Kevin Singer*

Recently, I had the honor of interviewing the Honorable Judge Thomas S. Clark, who is the Supervising Civil Judge of the Kern County Superior Court.

Below are excerpts from our interview.

Question ("Q"): I see that you were born and raised in Bakersfield. What were some of your fondest memories growing up in Bakersfield?

Answer ("A"): Small-town nature of the town. People were extraordinarily friendly and trusting. Many people would leave their homes and cars unlocked. I considered my parents to be overly strict, but as children we were given freedoms almost unimaginable in today's society. For example, I would often go on hours-long bicycle rides into the countryside, sometimes with other children and sometimes alone. Our parents would have only the vaguest idea where we were—only when we were expected home. I don't recall any particular fear about children being kidnapped, abused or killed.

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Partition Referees and Receivers Have Quasi-judicial Immunity

By Peter A. Davidson*

A number of articles previously published in Receivership News have pointed out that while it is clear that receivers appointed by federal courts have quasi-judicial immunity (See, *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298 (9th Cir. 1989); *Trinh v. Fineman*, 9 F. 4th 235 (3rd. Cir. 2021) [collecting cases]) up to now it has been unclear whether that is true for receivers appointed by state courts in California, although there have been a number of unreported decisions that have held receivers do have such immunity (See, *Haider v. Speiser*, 2012 WL 41019411 (2012); Gruntz v. Wiley, 2009 WL 4264343 (2009)). Now, in *Holt v. Brock*, 85 Cal.App. 5th 611 (2022), the court of appeal not only held that partition referees have quasi-judicial immunity, but reaffirmed prior dicta that receivers likewise have such immunity.

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Publisher's Comments

By Dominic LoBuglio

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 the State.*

With this Issue we welcome **Mia Blacker** and **Blake Alsbrook** to the *Receivership News* team. Mia is our Associate Publisher from the Bay Area replacing **Ron Oliner,** who has decided to take a break after many years of service. Blake is our Co-Editor who, together with Co-Editor **Michael Muse-Fisher**, skillfully recognizes and articulates the positive qualities of the articles submitted to us for publication.

I want to recognize our contributing columnists: **Peter Davidson** for providing answers to complex receivership questions, **Chad Coombs** for providing tax advice on complex issues confronting receivers, and **Ryan Baker** for bringing to us what he hears in the halls. Peter, Chad, and Ryan continuously provide valuable content and are fundamental to *Receivership News*. Also, a shout out to **Craig Collins** who performs the critical final review of the entire newsletter before it goes to the printer.

In this Issue, we are proud to feature an interview by our Associate Publisher **Kevin Singer** with the **Honorable Judge Thomas S. Clark**, Supervising Civil Judge of the Kern County Court, and a profile of our Co-Editor, Michael Muse-Fisher. **Dan Miggins** provides an update about the programs CRF will present at the California Bankruptcy's Forum's Insolvency Conference in May. **Amy Olsen**, who is redesigning our website, discusses CRF's digital upgrades. **Dennis Gemberling**'s article explains the impact of the COVID-19 pandemic on the hospitality industry.

We will continue to bring you news about our Loyola X Symposium Scheduled for January 18-19, 2024 in Long Beach. Much appreciation to **Ryan Baker**, Chair of the committee producing this biennial event. This is an enormous task and we are lucky to have Ryan at the helm.

Congratulations to three new members of CRF's Board of Directors – **Michelle Vives**, **Gary Rudolph**, and **Blake Alsbrook**. Michelle and Gary are representatives from San Diego. Michelle will be involved in CRF's membership committee and Gary will be involved in CRF's education committee. Blake Alsbrook, our Co-Editor, is from Los Angeles.

Our advertisers not only continuously provide much needed support for this publication, but they also provide valuable services for receivers. We thank you for your contribution to the receivership community. Ads from our real estate community include **The Seymour/Weinberger Group**, **Erick Sackler & Associates**, **Geffen Real Estate**, **Lee & Associates**, **ROI Properties**, and **Fiduciary Real Estate Sales**. **Buchalter** and **Ervin Cohen & Jessup LLP** provide legal expertise, **National Franchise Sales**, are experts in franchise brokerage, and **Perry Group International** are experts in hospitality management.

We hope you enjoy this Issue and invite your participation in future issues by submitting articles, purchasing advertisements, or simply giving us feedback. We are always looking for creative ideas to enhance *Receivership News*.

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Editor's Comments

By Blake Alsbrook* & Michael Muse-Fisher

Blake Alsbrook

***Blake Alsbrook** is a Partner of Ervin Cohen & Jessup, LLP. He is a receiver and counsel for prominent receivers.*

When I learned that **Bob Mosier** and **Kathy Phelps** were stepping down as Publisher and Editor of Receivership News, it felt like the end of an era. Huge credit to **Dominic LoBuglio** and **Michael Muse-Fisher** for stepping in to fill those giant shoes. In an effort to assist in filling those "shoes," I am joining *Receivership News* as Michael's Co-Editor.

For those of you who do not know me, I am a receiver and legal counsel for receivers and other fiduciaries around the state. Prior to joining my current law firm, Ervin Cohen & Jessup, LLP, I learned at the feet of the late, more-than-great, **David Pasternak**, who was a Co-Founder of CRF and who will always be dearly missed by many folks reading this publication. My hope is that I can apply much of what I have learned over the years about this ever-so-niche field to help keep *Receivership News* what it always has been: a fantastic resource for practitioners and Judges alike.

After months spent learning where and why my roof is leaking, the rain appears to be subsiding, the Sun is finally shining, and that can only mean one thing: it is time for the Spring Issue of *Receivership News*!

What a Spring Issue it is. **Kevin Singer**'s fantastic interview with **Judge Thomas S. Clark** graces our cover page and is this issue's Judge Profile. Judge Clark provides insights into his path to the bench, his thinking on when and how a receiver should be appointed, and practice pointers for receivers after appointment. In addition, our cover page features a must-read article by our own **Peter Davidson**, of Ask The Receiver fame, reviewing a new California case that helps expand a receiver's protection from liability.

My esteemed Co-Editor, **Michael Muse-Fisher**, features in this issue's "Member Profile," which provides a brief look into the life of one of my favorite people in CRF. **Dennis Gemberling**, one of CRF's foremost hotelier-receivers, provides "Revisiting Distressed Hotels: Post Covid Recovery and the Outlook on Defaults and Insolvencies," where Dennis details the pandemic's impact on hospitality and a look forward for the industry. **Daniel Miggins**' "A Chip and a Chair" covers the upcoming 35th Annual Insolvency Conference, where the worlds of bankruptcy and receivership collide, and **Amy Olsen**'s "CRF Goes Digital" details the much-needed digital rebranding of the Receivers Forum website, which looks to be phenomenal. Finally, **Chad Coombs**, **Ryan Baker**, and **Peter Davidson** supply us with the classics: "Tax Talk," "Heard in the Halls," and "Ask the Receiver."

We have a great issue for you, and I am happy to have joined the team.

~Blake Alsbrook

Michael Muse-Fisher

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

I am excited to have Blake join the team. As Blake pointed out, it apparently takes two people to fill **Kathy Phelps**' prior editor "shoes." She is one of a kind. The Receivership News community will only benefit from Blake's knowledge and experience on all things receivership, as he applies the same to editing this illustrious publication. Blake has wonderfully explained why we are very excited to publish this current Issue. The readers are in for a treat. That said, be gentle when reading my article. My embarrassment runs high when I talk about myself.

~Michael Muse-Fisher

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The facts in *Holt v. Brock* were customary for a partition case. A sister and brother each inherited a 50 percent share in a property. They could not agree on a sale, so the sister filed an action to partition the property. The court ordered the property be sold and the proceeds divided equally. When the sister and brother could not agree on a broker to list the property, the court appointed a broker to list the property "as is" with a minimum list price of $882,500, but with the actual price to be determined by the broker's assessment of the market value. The court also ordered the broker to provide a summary of the listing and monthly marketing activity to the court and the parties and that any sale was subject to court confirmation. While the opinion does not explicitly say the broker was a partition referee, he was such because the partition statute (C.C.P. §872.010 et seq.) states in a partition action: "The court shall appoint a referee to divide or sell the property as ordered by the court." C.C.P. §873.010.[1]

The parties and the broker signed a listing agreement with a list price of $925,000. The brother then offered to purchase the property for $1 million and to represent himself in the sale, if the broker agreed to reduce the commission to three percent or not charge him the three percent. (Although not stated in the opinion, it is likely a six percent commission had been established. It is the court that generally determines the referee's compensation. C.C.P. § 873.010 (b)(3).) The broker initially agreed, but then informed the brother he could not or would not change the listing agreement. The brother then moved to have the broker removed. The court denied the motion and reconfirmed the broker was authorized and ordered to market and sell the property "in accordance with the terms and for the price he deems appropriate." Subsequently, however, because the dispute with the brother put the broker "in a difficult situation", the court appointed a receiver to assume management of the property with the sole authority for approval of a sale. The brother then offered $462,500 for the sister's one half interest, $100 down with the remainder to be financed. The sister countered, offering $475,000 for the brother's interest, $10,000 down, all cash at closing. The receiver accepted the sister's offer and the property was sold to her.

The brother then sued the broker, contending he breached his agreement to sell the property to him at a discounted commission, undervalued the property and sold it for less than he offered. The broker filed a motion for summary judgment, which was granted. The trial court found the broker was entitled to quasi-judicial immunity because the broker was "[a]cting under court appointment... was fulfilling quasi-judicial functions integral to the judicial process in the underlying partition action and as an arm of the court." *Holt v. Brock*, *supra*. at 617. The brother then appealed.

The court of appeal affirmed, relying in great part on *Howard v. Drapkin*, 222 Cal. App. 3d 843 (1990) where the

[1] The references to the partition statute are as they existed when the case was commenced. Effective January 1, 2022 California adopted the Uniform Partition of Heirs Property Act, which was limited to heirs and added provisions for a mandatory appraisal of the property and provided co-tenants an option to buy. However, it was amended by the Partition of Real Property Act , effective January 1, 2023. It expands partition "to any real property held in tenancy in common where there is no agreement in a record binding all co-tenants which governs the partition of the property." *See* C.C.P. §874.311 *et seq.*

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Q: Did you know from early age that you were going to pursue law?

A: Yes most definitely. At least from the 7th grade, if not earlier. My mother had been a legal secretary before she retired to raise a family. She greatly missed working in the legal system and she encouraged me—a lot. I was named after a long-deceased grandfather, but my mother occasionally told me that she was also influenced by a prominent attorney general and Supreme Court Justice, Tom C. Clark. I suspect there was some truth to the story.

From that point onward, I never wavered in my focus on the legal profession. By the time I was in law school I focused on real property, real property financing and development and construction issues, but I had a hard time deciding whether I wanted to practice in the real estate development and construction area, or if I wanted to be a full-time litigator.

Q: Was there a specific reason you chose to attend University of Southern California undergraduate?

A: I was fortunate to receive a National Merit scholarship and a California State scholarship. The National Merit scholarship would pay my tuition at any university in the country. The California State scholarship would pay my tuition at any university in California.

Although my parents wanted me to experience living in a different part of the country (and in particular wanted me to apply to Notre Dame, Harvard, Yale or Princeton) I had no desire to go out of state.

For one thing, I was younger than my classmates and was an immature 17-year old and I just did not want to be far from home. I focused almost entirely on Stanford and UCLA.

I was not familiar with USC. My father was a UCLA graduate and had nothing nice to say about USC. I decided at one point my senior year to stay in Southern California because it rained all 3 times I visited the Stanford campus (pretty shallow reasoning). At that point, 3 or 4 months before the start of my freshman year, I felt

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my only alternative was UCLA. But, as much as I liked UCLA, the closer I came to enrollment, the more intimidated I became at the size of the university and the number of students.

Shortly before the start of the semester, I visited the USC campus for the very first time, at the suggestion of an aunt. It was much smaller in area and in number of students and I was, thus, attracted to the school. I stopped by the Registrar's office and, much to my surprise, was admitted on the basis of the oral application. The fact that I was verbally accepted (which would never happen today) really impressed this 17-year old boy.

So, for some pretty shallow and spur-of-the-moment reasons, I attended USC. As so often happens with college students, the school that I attended grew to be a great fit. I was very well-treated as a student. I sometimes characterize that period of my life as a time when I was well-treated and conditioned to be a future donor by the university.

Q: I see you continued on at University of Southern California Gould School of Law. Was that your top pick and was there a professor who made a lasting impact on you and why?

A: That was the only law school I applied to (which was a pretty foolish strategy.) I intended to practice in the Los Angeles area, and there had been a recent study (from several years prior) showing that approximately 75% of the Los Angeles County judges were USC graduates—at least that's the way I remember the numbers. I had no aspirations to be a judge, but I took that as evidence that a USC law degree carried with it a certain amount of prestige in Los Angeles. Also, in my years as an undergraduate, I had been well-conditioned to be an enthusiastic USC supporter (and future donor).

I had many fine young professors at USC, many of whom went on to establish great nation-wide reputations at schools like Yale and the University of Chicago. The

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professors I enjoyed the most were those who based their classes on economic underpinnings. They include Richard Epstein (torts) and Christopher Stone (contracts).

However, the most influential by far was Robert Ellickson, from whom I took Land Development, Land Financing and various construction-related classes. He had personal experience working for a large developer-builder before he became a professor. He had some extreme views about the role of government in land use decisions. He felt that the government should have essentially no role, including zoning issues. He felt that the economic marketplace and landowners could be trusted to determine the best use of their land. He believed that landowners would rarely make decisions that did not support the highest and best use of their land. His other recurrent theme is that private arbitration and mediation is a far more efficient method of resolving disputes. He did not always have a high view of the cost, efficiency and fairness of results in the court system.

He is in his 80's, has written a number of books and law review articles on both subjects, spent most of his career teaching at Yale, and the last time I looked he was still teaching part time at Yale and part time at University of Chicago.

Q: I see you started working in 1973 working for Income Equities Corporation. What type of business were they in and what were your responsibilities while working there? Was there any important lessons you learned while working for this company?

A: Income Equities was a newly formed business. One of the founders was a recent USC Law School graduate and 2 of the Board members were USC Law School professors. The professors recommended me for a part-time paralegal position while I was in law school and I remained with the company after I passed the bar exam.

Income Equities was in the real estate development business, but the position involved many tax and securities issues, since we raised hundreds of million dollars from investors through public offerings. We used the funds raised to build or acquire and rehabilitate low income housing, leveraged by a low interest (government-subsidized) 90% loan. The investors obtained tremendous tax shelter benefits equal to 5-10 times the amount of their investment.

Judge Clark surrounded by USC memorabilia

HUD and Congress identified a critical shortage of low income housing and offered tremendous incentives in order to draw private capital into this market because they did not or could not get budget approval for taxpayer funds to provide additional housing. Congress approved and enacted a tax provision which allowed for depreciation of the entire building over a 5 year period. The investment and resulting tax deduction was risk-free and audit-proof because it was a totally legitimate program.

However, after a few years, government analysts calculated and Congress determined that if the government had collected all the tax revenue that our clients had avoided paying, the additional revenues would have been sufficient to fund construction and acquisition of 3-4 times the number of housing units that were actually provided by private developers under this program. The program was discontinued.

My job was primarily to locate potential properties across the country (primarily on the East Coast), negotiate the terms of acquisition and close escrow. To these ends, I negotiated and drafted between 50-100 limited partnership

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agreements to take title to these buildings. I also participated in drafting SEC registration statements and handling corporate housekeeping for 100 + corporations and numerous limited partnerships which we created to handle the investments and real estate title.

I was extremely very well-compensated—3-4 times the salaries paid to associates at the largest law firms at the time.

I did learn a valuable lesson about how difficult it can be to maintain your objectivity when you are in-house counsel. After 3 years of not really being exposed to other views, the "company culture" mindset slowly crept in. I said "no" a lot more in my first year than during my third year. It is a slow process, but you can find yourself being less objective and making poor decisions, not out of a conscious desire to please your client, but because you have lost perspective and have lost exposure to any competing views other than the prevailing "company culture" mindset.

Q: In 1975, you left Income Equities Corporation to become a Deputy District Attorney for Kern County. What inspired this change and what types of cases did you specialize in prosecuting?

A: I had always had trouble deciding whether I wanted to be a litigator or in the real estate development business. I finally decided that I wanted to be a litigator and was willing to take a huge pay cut to get litigation experience. I was burned out on Beverly Hills and the securities business by then, as well, and wanted to make a change. Getting prosecutor jobs was difficult at that point in time. I had received an informal verbal offer from the Kern County District Attorney, so I took him up on the offer and relocated to my home town.

Q: In 1978 you left the District Attorney's Office and returned to private practice at Arrache, Clark and Potter. Why did you your decide to go into private practice and what were the areas of law you worked in most? Was there an area of law that you enjoyed working in the most?

A: My plan was always to go into private practice after I gained litigation experience at the District Attorney's office. I actually stayed at the D.A.'s office longer than I planned because I enjoyed the adrenaline-generating aspect of being in trial on close to a daily basis.

Most of my litigation practice was related to the real estate and construction industries. Most of my clients were builders, developers, banks and real estate brokers. I litigated numerous disputes involving real estate brokers and I defended quite a number of construction defect cases. I also was retained on several occasions as an expert witness on legal malpractice and real estate matters.

However, my favorite areas of practice were (1) representing property owners in eminent domain trials and (2) defending white collar criminals (tax fraud and various other white collar offenses).

In eminent domain cases my sympathies tended to be with the property owner (although I occasionally represented government entities on the other side). I don't think I ever lost an eminent domain case, and I tried a lot of them. In several instances I achieved verdicts millions of dollars above the government's appraisals and acquisition offers.

White collar criminal defense was not a large part of my practice. I looked at it more as a hobby. I was attracted to it because a large proportion of those cases went to trial; because (in those days) a good and creative defense attorney who understood financial statements and bank records had an advantage over prosecutors who were not very familiar with financial and business records. (That has since changed; almost every prosecutor's office now has a division with experienced and knowledgeable specialists with respect to financial evidence).

Q: Since your 2010 appointment, what types of cases have you been primarily handling?

A: I was assigned for one year to the superior court in Mojave, where I pretty much handled everything. I did traffic court, criminal calendar and arraignments, civil trials and criminal felony trials.

I spent approximately one year presiding over misdemeanor criminal trials and approximately five years presiding over felony criminal trials. I am currently presiding civil judge, and have spent the last six years presiding over major civil trials and handling law and motion matters on a daily basis from the 1100+ civil litigation cases currently assigned to me.

I expect to retain this assignment for the rest of my career.

My staff and I try to make Dept. 17 a "litigator-friendly" court. I feel that we do a good job of making lawyers comfortable and to make things convenient for them (even anticipating their needs). However, I always caution lawyers

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that my first priority is the comfort and convenience of the jurors. I am a member of a very efficient team including an outstanding research lawyer and a great and extraordinarily personable courtroom clerk. Both have been with me for years and, I absolutely could not handle my excessive caseload without them.

Q: What are your general thoughts on appointing Court Receivers? And, What are some of the factors that persuade you to appointment of Court Receiver or Partition Referees?

A: As a former, but active, litigator I often appeared requesting or opposing the appointment of a Court Receiver, so I believe I have a pretty good understanding as to whether or not such an appointment is appropriate.

There are a significant number of civil cases where the business or other asset in dispute is in the hands of one party during the litigation. In some instances, the parties behave honorably, but it is not uncommon that the party in possession is motivated to run the business into the ground, or to sell or encumber the assets in dispute.

I would not automatically appoint a Court Receiver when one party is in possession of the disputed asset or even when the party in possession has a motive to mishandle the contested asset. However, when (as does happen regularly) there is a real and present danger that the other party will damage or depreciate the asset or its value, it is appropriate to appoint a Court Receiver, the sooner the better.

There are other circumstances where there are good reasons to appoint a Receiver. I have appointed Court Receivers several times after the death of a business owner where none of the potential beneficiaries or family members possess the skill or desire to operate the business, while the parties (and sometimes the Receiver) are searching for a purchaser.

Real estate and other asset partition actions also provide opportunities for a Receivership, especially where one or more of the owners does not want to cooperate with the sale. In these circumstances, we often appoint receivers with the power to obtain appraisals, list the asset for sale, and consummate an actual sale.

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Q: What qualifications do you like to see in the receivers that you appoint to your cases?

A: I first ask both sides to suggest a Receiver. If both sides can agree on a Receiver, it often eliminates or minimizes disputes parties often have over operating or other decisions made by the Receiver.

I evaluate potential Receivers (whether nominated or left to my discretion) looking for practical experience in running or managing a business for his or her own account (if a Receiver with these qualifications is available). I find that Receivers with a prior background in business or banking are desirable candidates. I also look for a record of successfully handling and closing previous work as a Receiver or Trustee, experience in accounting, a positive reputation in the community for honesty and trustworthiness, and an ability to qualify for bonding.

Kern County is still generally a smaller county. As such, most judges are familiar with the reputation, skills and track record of potential Receivers. This is helpful.

I would say that the most important matters I look at (pretty much in order) are: (1) prior experience in business, finance and/or accounting. (2) reputation in the community; and (3) experience in handling duties as a Trustee or Receiver AND a record of closing receiverships on a cost-effective and timely basis.

Q: What are your thoughts on ex parte motions appoint a receiver?

A: Many times the threatened damage has already commenced and it is essential to apply ex parte to obtain a quicker appointment. I have, at times, even found the circumstances compelling enough to waive the necessity of prior notice to the other party and make appointments based upon an ex parte, no notice application.

Often times, rather than issuing the requested ex parte relief, I will shorten time for response, set a deadline for receipt of written opposition, and set a hearing 3-5 days later.

Q: On motions to appoint receivers, what types of arguments tend to be most persuasive to convince you to appointment a court receiver?

A: Arguments backed up by strong evidence (typically provided by Declarations and documentation) that damage has occurred, and that the amount and nature of the damage is either irremediable or substantial.

Q: What is the most common mistake you see in motions to appoint a receiver?

A: Defects in notice and (after having presented evidence of damage) failure to address and support the idea that immediate intervention by a Receiver is necessary and cannot wait to be heard by a noticed motion. A related failure that I sometime encounter is an attorney failing to support (with supporting evidence in an admissible form) his or her assumption or conclusion that more damage will occur in the future, absent such intervention.

Q: What is your position on receivers bringing ex parte motions when there are urgent issues that could impact the receivership estate?

A: Generally, I take such actions initiated by receivers very seriously, because the Receiver's position is usually

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neutral and uninfluenced by attempts by litigants to secure some unearned strategy advantage and generally uninfluenced by the emotions of the battling parties.

Q: When do you want to see receivers who are not attorneys retain counsel?

A: Virtually every time, especially when the litigating parties (and/or counsel) demonstrate a continuing inability to behave courteously and civilly.

Q: What is the one piece of advice you'd like to share with anyone that is going to appear before your Department?

A: In the following order:

1. Be clear and concise in your moving and responding papers in describing what you are asking the Court to do and why the Court is authorized to grant that relief.
2. Know the facts about your case and the present dispute. Most attorneys who have appeared before me know, that I will frequently interrupt an attorney's argument to ask questions and to seek clarification. Know your case well enough that you can answer questions without delay.
3. Although it does not happen often, do not send an associate or appearance counsel who is not familiar with the case, the history of the case, or current facts.

Q: What do you like to do when you are not working as a Judge?

A: I continue to be a very strong and active supporter of the University of Southern California and their law school and football program. I have been very active in the Alumni Association, and have mentored some students and student-athletes (especially those who are considering law school). I have been a football season ticket holder for 51 or 52 years. I rarely miss a home game and try to travel to at least 1-2 road games. Some people consider my level of involvement with USC to be extreme.

I have some very good friends of years-long standing. I enjoy socializing with them for dinner and/or drinks.

A few years ago, I would have said (1) skiing; (2) spending time with my grandchildren and attending their sports activities; and (3) traveling, especially when I could take my grandchildren to Europe.

Judge Clark's courtroom team from left to right: Susan Gonzalez reporter, Linda K. Hall clerk for Judge Clark, Judge Clark, Deputy Strunc.

Today, my priorities have changed because my body is too beat-up due to too many orthopedic ski injuries and I am seriously out of shape. Also, by next year, all 3 of my grandchildren will be away at college.

I truly enjoy my job and find it rewarding, but, presently, a significant amount of my "free" time is taken up in preparing rulings and opinions on court trials and motions that I have under submission, and preparing for the next day's law and motions (with the assistance of a truly outstanding research lawyer).

I enjoy some travel (but I don't have time to travel as much or as far as I would like). I try to spend some weekends at my beach house, relaxing, reading and watching movies, but I don't get there as often as I would like.

When and if I retire, I would like to spend some more time traveling (especially if I have opportunities to take one or more of my grandchildren). However, I enjoy my job and have no plans to retire. I consider my job to be a service to the community, which supported my law practice so well. I intend to continue working unless I develop a health problem, which would interfere with my performance.

Kevin Singer

**Kevin Singer is the President of Receivership Specialists with offices throughout the Southwest. Mr. Singer has been a Court Appointed Officer in over 490 cases in the last 23 years.*

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court stated, concerning quasi-judicial immunity, that it was persuaded by the approach taken by federal courts on the issue. "Thus, we believe it is appropriate that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. Without such immunity, such persons will be reluctant to accept court appointments ...Additionally, the threat of civil liability may affect the manner in which they perform their jobs." *Id.* at 901(citations omitted).

The court of appeal, again relying on *Howard v. Drapkin*, stated there are three classes of persons entitled to quasi-judicial immunity. The first are persons who perform functions normally performed by a judge, such as court commissioners, hearing officers or arbitrators. The second class are persons who function apart from the court but are engaged in neutral dispute resolution, such as referees and party-selected mediators. The third class are persons connected to the judicial process who "serve functions integral to the judicial process and act as arms of the court. This class includes (1) persons appointed by the courts for their expertise, such as mediators, guardians ad litem , therapists, receivers, ...and bankruptcy trustees." *Holt v. Brock, supra*. at 622. (citations omitted, emphasis added).[2]

With regard to the broker, the court found he was appointed for his expertise to carry out the court's order to sell the property and had discretionary authority to assist the court in resolving the dispute between the parties, specifically the value of the property and the listing price. "By determining the sales price,... [the broker] resolved the principal dispute between the sellers. In a sense, [he] also served as an agent of the court with limited authority. The court not the sellers set...[the] commission rate...And final approval of any sale...rested with the court, not the sellers. In short,...[the broker] was appointed by the court to exercise discretionary judgment in serving a function integral to the partition action and as an arm of the court. As a result, he was entitled to quasi-judicial immunity. *Id.* at 624.

A recent bankruptcy case has gone further. It held that if a court fiduciary's actions were specifically approved by a court or were required to be taken by court order, the fiduciary has "absolute" immunity. *In re Voyager Digital Holdings, Inc.* 2023 WL 2470938 (Bankr. S.D.N.Y., 2023) deals with the court's proposed approval of a disclosure statement and confirmation of the debtor's plan of reorganization, which proposed the sale of the debtor's cryptocurrency business and the distribution of cryptocurrencies, rather than cash, to account holders. The Securities and Exchange Commission ("SEC") objected, suggesting that a specific cryptocurrency might be a security and that the purchaser might need to resister as a securities broker. As the court noted, however, the SEC produced no evidence on these issues, because the Commission itself had not taken a position on these issues. "Regulators themselves cannot seem to agree as to whether cryptocurrencies are commodities that may be subject to the CFTC, or whether they are securities that are subject to securities laws, or neither, or even on what criteria should be applied in making the decision." *Voyager Digital* at *2.

The SEC and other government agencies specifically objected to exculpation provisions in the plan, that provided that fiduciaries and other parties would not have liability for actions that the court approved or that the court directed them to take pursuant to the plan. They asserted the parties would "have to take their chances" on whether the government might contend their conduct was illegal and seek to punish them for doing what the court was authorizing and directing them to do under the plan.

After stating: "I think the Government's position is absurd." The court stated the proposed exculpation provisions should provide more than "qualified immunity". Relying on a number of receivership and bankruptcy cases, it stated: " 'Qualified immunity is a doctrine that is applied to people who have discretion to perform specific functions in quasi-judicial roles but

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[2] In *dicta* the court in *Howard v. Drapkin* also concluded that receivers have such immunity, stating: "We agree with the defendant and amicus that the justification for giving judicial and quasi-judicial immunity to judges, commissioners, referees, and court-appointed persons (such as psychologists, guardians ad litem and receivers) ...applies with equal force to these neutral persons who attempt to resolve disputes." 222 Cal. App. 3d at 861.

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without having obtained specific court approval or acting pursuant to an explicit court direction. Many of the same decisions that discuss such 'qualified' immunity, however, also make clear that there is a broader immunity for actions that are specifically approved by a court and/or that have been explicitly required to be taken by court order, particularly where government officials or other parties had the opportunity to object to the court's approval of an action and did not do so. *See, e.g. Bradford Audio Corp.v. Pious,* 392 F.2d 67,72-73 (2d Cir. 1968) (receiver was immune from liability for having done what a court order approved and directed the receiver to do)***Phoenician Mediterranean Villa,LLC v. Swope (In re J&S Props. LLC)* 545 BR. 91,103 (Bank. W.D. Pa. 2015)(where a bankruptcy trustee acts pursuant to an order of the court, a bankruptcy trustee is generally given absolute immunity)..." *Voyager Digital* at *15.[3] *See also, Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1,3 (1st Cir. 1976) ("At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. Pierson v. Ray, supra. It would make the receiver a lightning rod for harassing litigation aimed at judicial orders."); *T&S Investment Company, Inc.* 588 F.2d 801,802 (10th Cir. 1978)(same).

The distinction between quasi-judicial immunity and absolute immunity is not really significant for liability purposes, but can make a difference procedurally. In both cases, the receiver is not liable for damages. Quasi-judicial immunity, however, is generally raised as a defense and, hence, might be waived if not plead. It can be raised in an anti-SLAPP motion. Absolute immunity can be used to attack and dispose of a case early, because one with absolute immunity cannot be sued. See, *Fisher v. Pickens*, 225 Cal. App. 3d 708 (1990) (judgment on the pleadings).

Partition referees and receivers can now breathe a little easier. So long as they act within the scope of their appointment, they should have quasi-judicial immunity for their actions and if they are carrying out a specific court order they may have absolute immunity.

Peter A. Davidson

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.*

[3] The court's use of "qualified immunity" is a misnomer. What it is referring to is "quasi-judicial immunity". These terms are often confused because they are similar, Quasi-judicial immunity is rooted in common law, whereas qualified immunity is a contemporary doctrine formulated by the Supreme Court, initially dealing with civil rights cases, which takes an objective inquiry into the legal reasonableness of the official action. Common law quasi-judicial immunity extended judicial immunity to persons performing official acts involving policy discretion but not consisting of adjudication. *See, In re J&S Properties, LLC*, 872 F.3d 138,147-152 3rd Cir. 2017)(Fisher,J. concurring). "The application of quasi-judicial immunity involves a functional analysis of the action taken by the official in relation to the judicial process." *Roland v. Philips*, 19 F.3d 552,555 (11th Cir.1994) (emphasis in original). Similarly, some courts use the more precise term "absolute quasi-judicial immunity" instead of "absolute immunity".

Revisiting Distressed Hotels: Post Covid Recovery and the Outlook on Defaults and Insolvencies

By Dennis Gemberling*

The COVID-19 pandemic brought profound impacts to the hospitality industry. Few other sectors of the economy faced the same constraints. Travel spending fell by 42% in 2020, with total losses nearing $200 billion. Occupancy declined about 43%.[1]

As 2021 dawned, the American Hotel and Lodging Association issued an uncharacteristically dire prediction: up to 50% of U.S. hotels could close without further federal assistance.[2] Political will for further assistance quickly drained. No more help was forthcoming.

By the time of our analysis in 2021, leisure and hospitality were seeing some of the highest job gains in the country.[3] Naturally, though, this was in part an effect of the deep trough the industry had suffered.

At that time, we identified some signs of recovery:

- U.S. hotel rates were keeping pace with demand.
- Average daily rates were up.
- 2021 spring and summer numbers saw improvement.

With those positive signals in mind, we noted the U.S. hotel recovery had already exceeded the outlook of many top analysts. This was in large part a result of the number of Paycheck Protection Plan (PPP) loans in the hospitality sector, amounting to about $18 billion in 2021. Hospitality was a top recipient of such loans, with the amount most properties qualified for growing during the PPP "second draw."

Another key factor – though one that, in hindsight, was soon to expire – was the generous package of mortgage and loan forbearances many properties had obtained. As it turns out, 6-12 months to fully resume payments was enough for many hotels to catch a second wind. PPP default was rare, and even the announcement of widespread PPP loan audits had little long-term effect.[4,5]

We also predicted investor cash would continue flowing in the industry, with more investors attracted to glimmers of recovery. Although hospitality is often considered risky among conventional lenders, many investors were aggressively expanding their hospitality portfolios. It was the arrival of high inflation, not underlying investment dynamics (circa 2021), that would ultimately prove the most troublesome.

We ended our 2021 analysis by pointing out that a distressed hotel crisis could still occur in 2022. With lenders' patience running out and federal assistance no longer on the table, financial distress had the potential to turn the tables on the industry – starting with the pivotal December 2021 travel season.

A Decisive Moment as December 2021 Travel Season Coincided with Omicron Surge

The period between November 2021 and January 2022 saw an unprecedented spike in COVID cases that were attributed to the Omicron variant. The period between December 14 and February 14 was characterized by a staggering wave of infections, peaking at 868,707 new reported cases on January 13.

Had this begun even weeks earlier, it might have had a catastrophic effect reverberating through the year. Instead, not only did Americans continue their travel plans, but global visitors returned in force – there was $10.4 billion in international inbound visitor spending in December 2021, up 108% from 2020.[6]

December 2021 hotel statistics held steady, with slight performance increases in average daily rate and revenue per available room compared to December 2019.[7] U.S. demand, ADR, and RevPAR recorded all-time highs, but even the market with the highest occupancy levels (Oahu, Hawaii) was still down nearly 10%.

Despite underwhelming bivalent booster uptake (amounting to about 16% of Americans aged 5 and older), Americans have made it clear they no longer consider COVID-19 a factor in

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their travel plans.[8] This may bode well for hospitality, especially as the COVID-19 emergency is set to expire in May.[9]

Pent Up Demand Fueled a Major Hospitality Resurgence by Q3 2022

As winter gave way to spring, it became clear there were further reasons for an optimistic outlook. Travel restrictions, masking, and other mitigation measures were increasingly sidelined, having the effect of giving an "all clear" signal to millions of Americans who may still have been leery while the Omicron surge took its course. This exuberance was reflected in performance throughout the year.

Global consultancy PricewaterhouseCoopers (PwC) noted strong performance in hospitality, including record-breaking RevPAR levels exceeding the pre-pandemic high by 6.4%.[10] Annual demand was, however, suppressed to a degree by the introduction of anti-inflation measures from the Federal Reserve.

High Inflation and Interest Rates Continue to Drive Hotel Distress

Despite these positive signs, a growing number of hotels face the possibility of loan default due to the macroeconomic situation. As recently as January 2023, advisors from Pryor Cashman LLP emphasized that hotel owners' funding of working capital when expenses exceed revenue is no longer guaranteed.[11]

Inflation and rising interest rates are cited as present threats that costs could outpace revenue gains in 2023.[12] This is unlikely to trigger the "wave of foreclosures" previously foretold, instead creating a smaller but pronounced industry impact, especially in hospitality markets outside the U.S. top 25.

PwC predicted the growth in demand from business travelers and groups retained the potential to offset softening leisure demand. However, a number of factors could still slam the brakes on growth, including inflation, future COVID variants, and the war in Ukraine. Ambiguity may linger for years to come.

2023 Hospitality Industry Outlook in a Nutshell and What Lies Ahead

While there was an expectation last year that conditions would give rise to more defaults and insolvencies, it was due in part to where the hotels are located geographically. However, the upcoming year could see an uptick in distress nationwide given the factors now in play including:

- Many hospitality properties are already facing the prospect of loan defaults in Q2 2023.
- Inflation and high interest rates will continue to place pressure on the hospitality industry.
- Cooling domestic demand may only be partially offset by international and business travel.
- Dwindling lender patience and diminished loan support threaten to make the pain acute.
- As properties fail, investor flight and foreclosures could lead to widespread bankruptcies.

If the hospitality sector does take a hit this year, whether in specific geographic regions or nationwide, lenders and investors should be mindful of the benefits that receiverships may afford as alternatives to bankruptcies and other workout options.

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2 A New Era for U.S. Hotels – American Hotel & Lodging Association – 2023 State of the Hotel Industry Report

3 Distressed Hotels: The Balloon That Never Popped... or Will It? – By Dennis Gemberling, Receivership News – Issue 74, Winter 2022

4 Virtually all PPP loans have been forgiven with limited scrutiny – NPR – October 12, 2022

5 Small business loans above $2 million will get full audit to make sure they're valid, Mnuchin says – CNBC – April 28, 2020

6 ITA Data Release: December 2021 International Inbound Visitor Spending – International Trade Association

7 U. S. December Hotel Metrics Hold Steady – By Jena Tesse Fox, Hotel Management – January 24, 2022

8 Why Is Covid-19 Bivalent Booster Uptake So Low? – U. S. Pharmascist – February 1, 2023

9 Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap – Department of Health and Human Services – February 9, 2023

10 RevPAR to finish 2022 at record highs, but economic headwinds strengthen for 2023 – US Hospitality Directions, PWC – November 2022

11 United States: Considerations for Operators Of Distressed Hotels – By Todd E. Soloway, Pryor Cashman LLP, Mondaq – January 20, 2023

12 Proactive Strategies for Distressed Hotels – By Todd E. Soloway, Bryan T. Mohler, and Itai Y. Raz, New York Law Journal – November 29, 2022

Dennis Gemberling *is a Receiver, Property Manager, and Turnaround Consultant specializing in hotels and resorts, restaurants and retail, bars and nightclubs, and mixed-use real estate with receivership and bankruptcy appointments in Federal and State Courts. Mr. Gemberling has over 35 years of hospitality industry experience and is Founder and President of Perry Group International a hospitality management services firm with offices in San Diego, San Francisco, and Los Angeles.*

Dennis Gemberling

The California Receivers Forum Gets A Digital Upgrade

By Amy Olsen, CRF Administrator

Over the past year, CRF has been working diligently to improve services to members and implement online and digital upgrades that provide more membership options and create a more contemporary appearance to the online face of the organization. The CRF Board of Directors created the Digital Presence Committee to work with staff to execute exciting new and upgraded services.

Searchable Member Profiles

While members have always been searchable on the CRF website, members can now control what others see about them through the online search portal. In the past, members had to pay for "expanded bios." Now, you can update your member information yourself at any time through the new MemberClicks Association Management System. To view or update your profile information, simply go to the CRF website at Receivers.org and click on Member Login (upper left corner of website). Your email is your username and, if you haven't already done so, create your own unique password. Once logged in, click on My Profile and the Edit Profile button. You'll have the opportunity to include a host of information about you and your business, including an "extended bio" where you can describe – in narrative form – your services. If you'd like a step-by-step instruction on how to update your profile, click on "Home" in the member website and select the MemberClicks Training Videos link for a video tutorial on editing your profile.

Member Educational Transcripts

Track your continuing education using CRF's new Continuing Education Transcript tool. Any time you take an educational session through CRF, your session and it's corresponding CLE is recorded in your personal Continuing Education Transcript, also accessible through your Member Profile. You can also add other external educational providers to your Continuing Education Transcript. This provides an easy way to track your CEs and print or download a transcript when it comes time for license renewal.

Digital Education Through "Receivers Academy"

CRF recently launched a new digital, on-demand education platform where you can purchase online education on specific receivership topics to view at your leisure. Receivers Academy provides presentations from experts on a variety of topics with continuing education certification upon completion. CRF members receive significant discounts and new sessions are added regularly. Receivers Academy is accessible on CRF's website at Receivers.org.

New CRF Website

CRF has launched a refreshed and modernized website with more robust navigation and information including:

- **Digital Tombstone Ads** - When you purchase a Receivership Announcement in Receivership News, your ad is now included on a page in the CRF website.
- **Receiver Description** – Information about what a receiver does and the receivership process.
- **Photo Gallery** – View professional photos from various CRF events.
- **Economic News Feed** – Live feeds about financial and economic news.
- **Receiver And Receivership Practitioner Search Engine** – Search for receivers and receivership practitioners using various search parameters including specialty areas, names and locations.
- **Event Calendar** – Live event calendar to access upcoming or past CRF events, descriptions and online registration.
- ***Receivership News*** – Members can access digital copies of current or past issues of Receivership News. The specific article search for Receivership News will be available soon as well.

As CRF continues to improve its digital platform, we invite you to give us your feedback regarding how CRF can provide benefits to members and the receivership community. Your constructive comments are welcome and appreciated. Email your comments to Amy@olsenmgmt.com.

Put the California Receivers Forum Events on Your Calendar

By Amy Olsen, CRF Administrator

The CRF has a full calendar of education and networking events. Make sure to visit **Receivers.org** for information and registration and mark your calendar.

LOYOLA X

Mark your calendar for **January 17-18, 2024** for **Loyola X.** The Decennial Loyola event will take place at the Hyatt Regency Long Beach, overlooking the Pacific with waterfront dining and close to the Pike at Rainbow Harbor and Shoreline Village. The Loyola X planning committee, chaired by **Ryan Baker**, a Vice President with Douglas Wilson Companies, is currently preparing a program designed for new receivership practitioners, seasoned receivership practitioners, and everything in between. CRF welcomes input from the receivership community for program consideration. Contact Amy Olsen, CRF Administrator at amy@olsenmgmt.com with your suggestions.

MONTHLY EDUCATIONAL MEETINGS

CRF has a full calendar of educational events to provide you with information to enhance your practice as well as networking opportunities. Attend in person or join via livestream. Stay tuned for details on these upcoming events.

May	Hospitality and Safety Receiverships Sacramento Council Meeting
June	Bay Area Council Meeting
July	Los Angeles/Orange County Council (meeting held in Los Angeles)
September	San Diego Council Meeting
October	Los Angeles/Orange County Council (meeting held in Orange County)
November	Los Angeles/Orange County Council (meeting held in Los Angeles)

CALIFORNIA BANKRUPTCY FORUM

Thirty-Fifth Annual Insolvency Conference
May 19-21, 2023
La Quinta Resort and Club

CRF is honored to participate in the 2023 California Bankruptcy with an exhibit table and three panel presentations.

Friday, May 19

9:00 – 10:00AM ***Ante Up: The Rise of Receiverships in 2023***

Saturday, May 20

8:00 – 9:00AM ***Roll the Dice: Cannabis, Restructuring and Receiverships***

1:30 – 2:30PM **Bankruptcy Card Counting: When to Stay and File vs. When to Split and Double Down on the Alternatives**

In addition to the panel presentations, CRF will be hosting a morning coffee "meet and greet" on Friday, May 19 from 8:00 – 9:00AM.

For more information and to register, visit **www.CALBF.org/cbf-conference.** A special thanks to CRF member and Director, **Daniel Miggins** for his assistance in organizing this opportunity.

Professional Profile:

Michael Muse-Fisher: How I Learned To Stop Worrying and Love Receiverships

Michael Muse_Fisher

As is typical for most elementary school-age children, for as long as I can remember I wanted to be either an astronaut or a lawyer specializing in receivership law. Just kidding, but the astronaut dream is accurate: SpaceX, if you are reading this and looking for a middle-aged man to command your Starship that is of average physique, with a rudimentary understanding of astronomy, no real science background, and average math skills (unless you ask my fourth grade daughter; stupid common core), then please call me.

I grew up in a small town outside of Sacramento, which has probably quadrupled in size since my youth. My mother was a family law commissioner turned private practitioner, and my father was a law school graduate who pivoted to real estate development. They are the kind of people who seem to have found a twenty-fifth hour in the day. Not only were my parents highly accomplished in their respective careers, but also they were heavily involved in the community. They probably needed that extra hour in the day because they had seven children – my two older sisters, my younger sister, my three younger brothers, and me. My parents emphasized the importance of education and community, and apparently really pushed the University of California public school system, as five of us ended up going to U.C. Berkeley, and the other two went to U.C. Davis and U.C. San Diego, respectively. My siblings are all impressive individuals. I cannot brag about them enough. But, I digress as this article is supposed to be about me (truthfully, my family would be a more entertaining read). Suffice to say, the focus on hard work and community that my family instilled in me from a young age has been a key component of my adult and professional life.

I took a typical path through college, and majored in Japanese language studies. After college, I moved to Los Angeles for a year, where I met my wonderful wife, Lauren. I was accepted to the JET Program to teach English in Japan. I lived in a small town outside of Osaka for a year teaching elementary school children, and my favorite part was traveling and integrating myself into a new and extraordinary community halfway around the world. After a year in Japan, I returned to California to start law school.

After law school, I worked for a few years at a midsize law firm that specializes in municipal law, before being hired by Buchalter in 2009. At that time, the Great Recession was in full swing, and it was then that I was introduced to receivership law. To say that I was trained by some of the best receivership legal practitioners in California would be a massive understatement. My mentors included Michael Wachtell, Jeffrey Wruble, Scott Smith, Barry Smith, and Richard Ormond, all of whom have honed their craft in their own unique, but extremely successful, ways. I was also introduced to some of the best receivers in the country – too many to name, but you know who you are. Through them, I was introduced to every type of receivership imaginable and immediately came to appreciate the versatility and benefits that receivers can offer to complex situations. An effective

Michael Muse-Fisher enjoys a day on the slopes with his daughters.

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receiver will be able to create a solution for problems that most would perceive as a solutionless. Receiverships afford a component of flexibility and creativity that is often not available in typical litigation contexts. The receivership world has become my professional home.

As much as I enjoy my work, my wife Lauren, and my two children, Marlena and Katherine, are my true driving force. Lauren is an exceptional artist and muralist. I have exclaimed on many occasions that she is better at art than anything I have ever been at in my entire life. She should also probably be credited with keeping our family functioning. My girls are my ski buddies and accomplices in mischief. They question everything and are always exploring. The practice of law can be extremely demanding, but they are always there to support me. That said, the last two years I have received a "World's Greatest Dad, Runner Up," mug for Father's Day, so maybe they are trying to tell me something. If you can't find me in the office, or playing with my girls, I am probably doing woodworking or (in the winter) skiing.

There you have it. A little about me. Go tell your friends.

Michael and his wife Lauren at a sunset dinner in Napa.

A Chip and A Chair

By Dan Miggins

Shuffle up and Deal! The time has come, the table is set, and the market is showing its hand. Why the card references you ask? This year, members of the California Receivers Forum will be featured at the 35th Annual Insolvency Conference hosted by the California Bankruptcy Forum. It is a casino-themed affair that will take place May 19th-May 21st at La Quinta Resort in Palm Desert. Is this Loyola Light? Did I miss an email? No you did not! While Loyola was and will continue to be a tremendous success, it is only a biennial event and our two organizations thought it would be best to join forces in Loyola's off year to put together a few CRF panels for those in attendance at CBF. Current President of CBF, **David Goodrich**, our Immediate-Past President, **Richard Ormond**, and current President, **Dominic LoBuglio**, along with the CRF Board, voted unanimously in favor of our participation in this conference. In year prior, CRF would often be featured in the "highly coveted" Saturday afternoon time slot, however this year we are not only kicking off the conference, we will have three educational panels on Friday and Saturday, as well as a statewide CRF Board meeting on Sunday. It was once a tradition for our two groups to come together; however, good economic times have seen not only the membership of our two organizations, but also the number of bankruptcy cases and receivership assignments, dwindle. Nevertheless, we all expect to be busy (if you are not already) in the upcoming months, and this conference is a fantastic opportunity to register as an attendee and/or sponsor, while representing both CRF and your firm. Lastly, while there is, has been, and will continue to be, a strong contingency of CRF members who are also active in CBF, we wanted to make sure that all CRF members are aware of this upcoming opportunity to socialize with your peers and colleagues as a representative of CRF. The goal of our participation is simple: To educate the CBF community and provide resources to their membership, should they have the need to appoint a receiver in the future. There is strong demand for industry experts with distressed workout experience and no group more qualified and ready to assist than our CRF members. While some attorneys from CBF exclusively represent debtors, others represent creditors and lenders locally in California and throughout the country. There are also times when bankruptcy is not the only (or best) remedy available and our panels will showcase when retaining a receiver may be in the client's best interest. CRF will achieve this goal by building upon the educational segments produced at Loyola as well as local events held regionally, to inform all of those in attendance about who CRF is and what we do as receivers.

We will be starting the conference on Friday morning at 8 am with a "Coffee Meet and Greet". This is a great opportunity for the CBF representatives in attendance to socialize with CRF members and learn who specializes in receivership while at the conference. Immediately following this coffee and conversation, **Mia Blackler** will be moderating the first panel of CBF: "Ante Up: The Rise of Receiverships in 2023" featuring our very own **Ryan Baker, Gerard Keena, Steve Donnell**, and **Scott Sackett** as panelists. This panel, produced by **Dominic LoBuglio**, will highlight what they are currently seeing in the market, what has changed over the past few quarters, and will look into the proverbial receivership crystal ball to discuss where the opportunities for appointments will be in the future. Our second CRF panel – "Roll the Dice: Cannabis Restructuring and Receiverships" – will take place the following day on Saturday at 8 am. Moderated by **Michael Muse-Fisher** and produced by **Daniel Miggins** and **Aram Ordubegian**, this panel features a diverse group of experts in both the legal and workout community, including **Kevin Singer**, **Jason Rosell**, **Tim Bossidy**, and Iran **Hopkins**. While cannabis may still be the "Wild Wild West" as a young maturing industry, it still lacks bankruptcy protection and has a need for turnaround specialists and receivers to handle dysfunctional cannabis companies. The professionals on this

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panel are the ones who have been retained to solve the problems over the past few years and will touch upon how the market has evolved, the workout remedies available, and how to avoid these problems in the future. The last CRF panel, at 1:30 pm on Saturday, is directed at the Young Insolvency Professionals (YIPs) in attendance. Produced by **Alphamorlai Kebeh** and moderated by **Ben King**, "Bankruptcy Card Counting: When to Stay and File vs When to Split and Double Down on the Alternatives" will equip these YIPs with a variety of remedies other than bankruptcy. **Krya Andrassy**, **Jake DiIorio**, **Molly Froschauer**, and **Veronica Rocha** all have years of experience serving as a receiver, assignee, turnaround professional, or counsel on their behalf, and will discuss when to use which remedy through case studies and hypothetical examples.

Some of us may not be old enough to remember Kenny Rogers' full anthology of classics, however no matter your age, his 1978 hit "the Gambler", perfectly summarizes where we currently sit within the workout, restructuring, and insolvency community in today's economic climate. "You've got to know when to hold 'em, know when to fold 'em, know when to walk away, know when to run. You never count your money when you're sittin' at the table, there'll be time enough for countin' when the dealin's done." For our members that are interested in attending the California Bankruptcy Forum's Insolvency Conference please feel free to visit their website at https://www.calbf.org/ to register. We hope to see you all on the felt!

Daniel Miggins

**Daniel Miggins* *spearheads the business development and client relations efforts at Hilco Real Estate. 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.*

Ask The Receiver

By Peter A. Davidson*

Q I was appointed as receiver for some major assets owned by a corporation. I just learned the corporation filed for bankruptcy. I know I have to eventually turnover the assets to the representative of the bankruptcy estate. Can I wait to see if the bankruptcy sticks or if a trustee is appointed? Can I demand the corporation pay for the cost of my turning over the assets?

A No and no (although you may have a claim for the cost). As most receivers know, if a bankruptcy is filed that involves an entity or assets in receivership, the receiver must turnover any property of the debtor in the receiver's possession to the debtor or, if one is appointed, the trustee. 11 U.S.C. §543(a). The exception to turnover is if, after notice and a hearing, the bankruptcy court excuses compliance with the turnover requirement. 11 U.S.C. §543(d). While there is nothing in §543 which specifies the time within which the receiver must deliver possession of the property, cases hold the receiver must act promptly. *In re Billy Joe Watkins*, 63 B.R. 46, 47 (Bankr. D.Colo. 1986); *In re 245 Assocs.*, 188 B.R. 743, 753 (Bankr. S.D.N.Y. 1995). The court in *In re 245 Assocs.*, held that the failure to promptly turnover estate property "prevents the debtor from administering its property for the benefit of the estate." Id. Indeed, the failure to promptly turnover estate property may be a violation of the automatic stay. 11 U.S.C.§ 362(a)(3) ("a petition... operates as a stay, applicable to all entities, of any act ... to exercise control over property of the estate"); *But see, City of Chicago. Ill. v. Fulton*, 141 S.Ct. 585, 590-92 (2021) (passive retention of estate property, absent a turnover order or demand, does not violate the automatic stay).

Acting too quickly can raise issues as well. In In re Billy Joe Watkins, the Court ruled that if a receiver acts too quickly he will moot any request to excuse turnover compliance, because if turnover has occurred, the court cannot excuse compliance with the requirement. (In re Billy Joe Watkins, supra, 63 B.R. at 48.) A receiver, therefore, may retain possession for a short period to see if "a motion is timely filed", in which case the receiver may refrain from turnover pending determination of the motion. Id.; 5 Collier on Bankruptcy, ¶ 543.05 (16th ed. 2022).

A new case, In re Preferred Ready-Mix Llc, 647 B.R. 158 (Bankr. S.D.Tex. 2022) illustrates the trouble a receiver can get into for failure to promptly turnover estate property. A creditor obtained a default judgment in state court and a receiver was appointed, who seized the assets of Preferred Ready-Mix ("Ready-Mix") on October 1, 2021. On October 14, 2021, Ready-Mix filed a Chapter 11 bankruptcy. The receiver admitted that by October 21 he had actual notice of the bankruptcy. (The court found that the receiver knew of the bankruptcy on the day of the filing.) The receiver did not automatically turnover the Ready-Mix assets, which consisted mainly of cement mixing trucks. On November 10, 2021, counsel for Ready-Mix made demand on the receiver to turnover the Ready-Mix assets. Because the trucks had not been used since the receiver's seizure, a number of them had battery, tire and mechanical issues. The receiver stated he needed $5,565 prior to turnover to pay for tow fees, but stated: "I'll do $2,500 with the rest of my expenses accepted as an administrative expenses..." Ready-Mix paid the $2,500 demanded and the turnover took place on November 20, 2021. Ready-Mix then sued the receiver for turnover, violation of the automatic stay and to deny the receiver's $7,000 administrative claim.

The court found for Ready-Mix. It held it may sanction a party for violation of §§ 542 or 543 (the turnover provisions) and the receiver's failure to promptly turnover the trucks when demanded and conditioning the turnover were violations. The court found the damages were $500 per day per truck for a total of $35,000 for the receiver's 10-day delay in turning over the trucks. It also found the receiver violated the automatic stay by exercising control over the trucks after the turnover demand was made (§362(a)(3) discussed supra.) and imposed punitive damages of $10,000. The court also denied the receiver's $7,000 administrative claim, finding his demand and receipt of estate funds, without court approval, was cause to disallow the claim.

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The court rejected the receiver's claim that the turnover delay was caused by the receiver being on a cruise, stating: "As a claimed 'expert' receiver he cannot simply disappear for ten days on vacation and not have any associate counsel to which to turn emergency matters, like the one in this case, to during any absence." Id. at 162 fn. 13. The court also noted the receiver was lucky his liability was not higher, being capped due to the tardy turnover demand; which was caused by Ready-Mix's initial counsel's unresponsiveness and disappearance, which resulted in the court ordering her to disgorge her retainer, her arrest when she failed to do so and her own bankruptcy to avoid the disgorgement order. Id. at 161.

The take away – be careful. If a bankruptcy is filed, turnover should be effectuated promptly, unless a timely motion is filed to excuse turnover compliance.

Q I was appointed as a state court receiver over a corporation. There are a number of pending lawsuits against the corporation. Currently there are few liquid assets and I would rather not use them to defend the lawsuits. Can the receivership court stay the lawsuits and require the claims be dealt with in a claims procedure in the receivership case?

A It depends. The pivotal issue is whether the case you were appointed in is an action (Code Civ. Proc. § 22) or a special proceeding (Code Civ. Proc. § 23). The distinction is important because Code of Civil Procedure section 526(b)(1) prohibits an injunction: "to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless the restraint in necessary to prevent a multiplicity of proceeding." [Emphasis added]. Because the section only refers to action, the prohibition does not apply to special proceedings. See generally, Veyna v. Orange County Nursery, Inc., 170 Cal. App.4th 146, 154 (2009).

So, what is the difference between an action and a special proceeding? An action is defined as: "...an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code Civ. Proc. § 22. A special proceeding is everything else. "Every other remedy is a special proceeding." Code Civ. Proc. § 23. As the cases acknowledge, the definition is not too helpful. " The term... is not generally defined by statute ... the term does not have a well-established meaning...special proceedings being of statutory origins do not proceed according to the course of the common law but give new rights and afford new remedies." Boggs v. North American Bond & Mortg. Co., 20 Cal. App. 2d 316, 319 (1937). The California Supreme Court has explained: "As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity." Tidewater Associated Oil Co. v. Superior Court, 43 Cal. 815,822 (1955). The following types of cases, for example, have been held to be special proceedings and hence Code of Civil Procedure section 526(b)(1) would not apply. An action for the dissolution of a corporation. Esparza v. Kadam, Inc., 182 Cal. App. 2d 802,807 (1960); for the same reasons, actions for the involuntary dissolution of a limited partnership or limited liability company (see Corp. Code §15908.02 et. seq. and §17707.03 et. seq.); probate proceedings, Estate of Quinn, 43 Cal 2d 785,787 (1955); insurance company liquidations, Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307,327 (1937). The Code of Civil Procedure itself lists a number of cases that are defined as special proceedings. Part 3. Of Special Proceedings of a Civil Nature, starting at Code of Civil Procedure section 1063.

Even if you cannot stay the pending actions, a judgment obtained is only a claim in the receivership and its payment is subject to the receivership court. Credit Managers Ass'n v. Kennesan Life & Accident Inc. Co., 25 F.3d 743,751 (1994) (A judgment "operates only as an established claim against the assets... It is not enforceable by execution. The manner of paying it is under the exclusive control of the court in which the receivership proceeding is pending...").

The situation would be entirely different if your case was filed in federal court because Code of Civil Procedure section 526(b)(1) would not apply. Federal courts have repeatedly upheld stays enjoining the commencement or prosecution of actions against entities or assets in receivership. SEC v. Wencke, 622 F.2d 1363 (9th Cir. 1980) (issuing a stay is an inherent power of a court of equity and protects the res in the court's possession).

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Peter A. Davidson

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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Loyola I-IV symbols have been deleted.

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* ...

- **Loyola X Symposium:** The California Receiver's Forum is doing it again! Mark your calendars for January 18-19, 2024 where the California Receiver's Forum, in conjunction with Loyola Law School of Los Angeles, will be hosting the biggest, and everyone's favorite, biennial Receivership event! If you have any panel topics you'd like to see, feel free to email the programming chairs Mia Blackler (mblackler@lubinolson.com) and Scott Sackett (scott.sackett@efmt.com).
- **CRF at the CBF – The Meet-Cute We've All Been Waiting For:** The California Receiver's Forum (CRF) and the California Bankruptcy Forum (CBF) are joining forces at the CBF's Thirty-Fifth Annual Insolvency Conference being held this year at the sun-kissed La Quinta Resort and Club on May 19-21. The theme for this year's Insolvency Conference is "Playing to Win," and certainly has set forth a victorious program of panels and activities. CRF, for its part, has infiltrated and will be hosting a set of three panels within the conference: 1) Ante Up: The Rise of Receiverships in 2023, 2) Roll the Dice: Cannabis Restructuring and Receivership, and 3) Bankruptcy Card Counting: When to Stay and File vs When to Split and Double Down on the Alternatives. Yours truly is a panelist of the first panel, Rise of Receiverships in 2023, along with the amazing and impressive **Mia Blacker**, **Steve Donnell**, **Scott Sackett**, and **Gerard Keena II**.
- **Double Duty – Upcoming CRF Education Program:** Jake Diiorio, a Managing Director at the Stapleton Group, will be kicking off CRF's renewed push for in-person education panels on behalf of the CRF this year. Mark your calendars for April 6, 2023 12:00pm when Jake will moderate the panel titled "Receivers in Bankruptcy". The education panel will be hosted at Buchalter's downtown LA offices located at 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017. A webinar version for CRF members outside of LA will also be set up. Lunch will be provided for in-person attendees so don't forget to sign up!
- **CRF Goes Digital! (New and Improved Edition!)** – The CRF Board of Directors had the soundness of mind to last year create the Digital Presence Committee committed to enacting up to date technology for the CRF through several new and upgraded services. These upgrades include the ability for members to manage expanded bios, a new Continuing Education Transcript tool which allows for tracking and creating a transcript for continuing education, the launch of a refreshed and modernized website, and the crown jewel: a digital, on-demand education platform where you can purchase online education on specific receivership topics. Check out Amy Olsen's article for more detailed information on these wonderful updates.
- **Statewide CRF Education Committee:** The CRF has a new statewide committee that will be putting together future education panels for 2023 and beyond. The committee includes **Chris Seymour**, **Gilmore Magness Janisse** (Central Chapter); **Mike Brumbaugh**, MBI Consulting Group Inc (Sacramento Chapter); **Jake Diiorio**, The Stapleton Group (LA/OC Chapter); **Oren Bitan**, Buchalter (LA/OC Chapter); **Gerard Keena**, Bay Area Receiver's Group (Bay Area Chapter); **Gary Rudolph**, Sullivan Hill (San Diego Chapter); and **Ryan Baker**, Douglas Wilson Companies (LA/OC Chapter). Please feel free to reach out to any members of the Education Committee if you would like to host or produce an education panel in the future or simply have a topic that you would like to hear about.
- **Pulse of the Industry:** I continue to keep a pulse on the industry and conduct a (un)scientific poll of CRF members on their activity levels in terms of new cases and work they are seeing. This may not be true of all members, but I am receiving reports that while there was a substantial uptick in the number of calls and inquiries during the end of 2022 and beginning of 2023, those calls have not necessarily translated into a corresponding uptick in new appointments. Many, however, see this as an early indicator of new work coming around the corner.
- **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 judgment, and many, many others.*

Filing Income Tax Returns

BY CHAD C. COOMBS*

One of the first and most basic tax issues a receiver must address when taking on a new case is whether the receiver must file income tax returns and, if so, what kind of returns. And critically, a receiver who must file federal income tax returns must pay any tax liability reported on those returns[i] and may be held personally liable for failing to pay any federal tax claims to the extent the receiver had funds available.[ii]

For receiverships involving business entities, a receiver need not be appointed as receiver for the entity itself to be required to file income tax returns for that entity. The Internal Revenue Code (IRC) requires a receiver of assets of a corporation to file the income tax returns for the corporation if the receiver takes possession of all or substantially all of the property or business of the corporation,[iii] and the Internal Revenue Service essentially takes the same position for a receiver in possession of all or substantially all of a partnership's assets.[iv] Therefore, the receiver in such cases may need to conduct due diligence on the entity's assets or business to determine whether the receiver has a filing requirement.

Where a receiver is appointed over the financial affairs of an individual, the test is slightly different. The IRC requires a receiver for an individual to file the returns of the individual unless the receiver is in possession of only a part of the individual's assets.[v]

Separately, 28 U.S.C. Section 960 provides that a federal court appointed receiver who operates a business is required to file all applicable federal, state and local returns and pay all applicable taxes. This applies even if the business will be liquidated.

A receiver is required to prepare income tax returns in the same manner and form as the entity or owner of the property would have had to file the returns. However, if the receivership is a qualified settlement fund (QSF) for income tax purposes,[vi] the assets of the receivership are deemed transferred to the QSF. The QSF is a new and separate tax entity for which the receiver files tax returns, and the receiver may have to file returns for both the QSF and the entity or owner of the property in receivership.

When filing income tax returns, a receiver cannot simply rely on what was done previously. For example, a receiver of an entity which has filed S corporation returns could discover that the entity is not a valid S corporation.[vii] Or a receiver of real property in which the owners are tenants-in-common and have treated themselves as such for income tax purposes could find that the IRS may require that partnership returns be filed.[viii] The receiver may need to break some bad news to the parties in interest and take appropriate action.

Another problem receivers sometimes face is a lack of adequate books or records, especially in cases involving fraud, and a receiver may have to reconstruct the books and conduct substantial forensic accounting. No matter the state of the records, it is critical that receivers disclose on the income tax returns that the receiver does not have personal knowledge of the records of the business or individual and therefore cannot provide assurance as to their accuracy.

Additional and inescapable issues arise when prior year income tax returns have not been filed. In these situations, bankruptcy cases provide some guidance. For corporate debtors, courts have held that a bankruptcy trustee's obligation to file the corporate

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debtor's income tax returns include returns due prior to the bankruptcy filing,[ix] and it is reasonable to conclude that receivers have a similar responsibility.

For partnerships, however, the IRS has taken the position that a bankruptcy trustee is not obligated to file the prior year returns (and, in filing current year returns, may rely on the current year information to the extent possible).[x] In fact, one court held that a Chapter 7 trustee for a debtor partnership only has a duty to file returns for the period during the trustee's appointment and therefore denied any fees related to investigation of a debtor's prepetition activities.[xi]

Nevertheless, in most instances a receiver will need to prepare prior year returns if only to be capable of filing meaningful current year returns. Given the uncertainty in this area, the receiver would be wise to seek instruction from the appointing court regarding the receiver's tax filing obligations.

Another issue receivers sometimes face is whether to amend prior year returns. The IRC does not address the amendment of returns, but the tax regulations provide guidance on when a taxpayer should (but not must) amend a return.[xii] Amending a return can raise a host of issues to be addressed on a case-by-case basis. In some cases, a receiver may wish to amend a prior year return to claim a refund (if timely).

In all, given the importance of tax return filing requirements, a receiver should seek guidance from a tax professional early in the case so the receiver may ascertain the proper filing requirements and obtain the necessary information to file any required returns without unnecessary delay.

i I.R.C. Section 6151(a). See also 28 U.S.C. Section 960.

ii See Coombs, Tax Closure, Receivership News, Issue 76 at p. 22 (Winter 2022).

iii I.R.C. Section 6012(b)(3). See also Treas. Reg. Section 1.6012-3(b)(4).

iv See IRS Gen. Counsel Mem. 36811 (1976) and IRS Gen. Counsel Memo 38781 (1981).

v I.R.C. Section 6012(b)(2). See also Treas. Reg. Section 1.6012-3(b)(5).

vi See Coombs, Qualified Settlement Funds, Receivership News, Issue 75 at p. 30 (Summer 2022).

vii See I.R.C. Section 1361.

viii See IRS Rev. Proc. 2002-22 regarding advance rulings.

ix I.R.C. Section 6012(b)(3); In re Hudson Oil, Inc., 91 B.R. 932, 946 (Bankr. D. Kan. 1988); In re JD Tool, Inc. 2013 Bankr. Lexis 184 (Bankr. W.D. Mo. 2013).

x Private Letter Ruling 8535015.

xi In re Riverside-Linden investment Co., 85 B.R. 107, 114 (Bankr. S.D. Ca. 1988), aff'd 99 B.R. 439, 445-46 (9th Cir. BAP 1989), aff'd 925 F.2d 320, 324-25 (9th Cir. 1991).

xii See Treas. Reg. Sections 1.451-1(a) and 1.461-1(a)(3).

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