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Receivership News

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Judge Jones Named Judicial Editor of Receivership News

By Edythe L. Bronston*

Publisher's Note: RN is pleased to announce that LA superior Court Judge Ann I. Jones has agreed to serve as a Judicial Editor for RN. She will comment from time-to-time on topical issues and provide a Judge's perspective. In accepting the appointment, Judge Jones insisted that she will be presenting her views only and not speaking on behalf of the judiciary at large. Following is an interview designed to introduce you to RN's new Judicial Editor. RPM

The Honorable Ann I. Jones

Judge Ann I. Jones, besides being a delightful conversationalist, has an amazingly varied intellectual, experiential and legal background. She graduated from Brown University, *magna cum laude* in 1977, with a Bachelor of Arts degree and with honors in American History. While matriculating, she was a National Merit Scholar from 1973 to 1977 and Phi Beta Kappa in 1977. She then went on to obtain a Master's Degree in Public Policy at the Goldman School of Public Policy, University of California at Berkeley in 1984, while concurrently attending Boalt Hall School of Law, University of California at Berkeley, from which she obtained a Juris Doctor degree...also in 1984. While at Boalt, she was Executive Editor and Member of the California Law Review from 1982 to 1984, as well as having won the Thelen, Marrin Prize for the Best Published Article and the Moot Court Prize for Best Oral Argument.

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Sales by Rents and Profits Receivers: A Discussion of the Practice and Governing Law

By Joshua A. del Castillo and Stephen J. Donell*

Recently, the arguments presented in *Wachovia Bank, NA v. Downtown Sunnyvale Residential, LLC, et al.* and a Fall 2011 Receivership News article titled *The Ten Commandments of a Rents and Profits Receiver* (the "Article") have resulted in a renewed focus on the ability of a receiver, particularly a so-called rents and profits or rents/issues/profits ("RIP") receiver, to sell real property out of receivership.

In *Downtown Sunnyvale*, the court analogized the proposed receiver's sale of commercial property to a foreclosure and refused to allow the sale on the ground that the sale failed to provide the statutory protections guaranteed to defaulting borrowers under California law. The Article took the position that "[u]nder the California Code of Civil Procedure, [a] Court does not have authority to order the sale of property in a rents and profits receivership" and that "[s]elling free and clear of all liens is without legal foundation." *Downtown Sunnyvale* and the Article highlight a number issues at the core of a receiver's authority to sell real property out of receivership in California, including, most importantly: the limits of a court's authority to allow a receiver's sale, including a sale free and clear of existing liens; the steps that a receiver might take to maximize the likelihood of a sale; and the influence that litigants can exert over a proposed receiver's sale.

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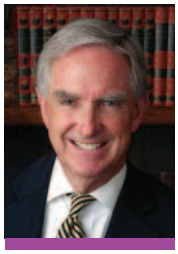
Publisher's Comments

By Robert P. Mosier, Publisher*



Robert P. Mosier

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

I am not sure if there is a biblical record about the reaction of the Children of Israel when Moses returned from Mt. Sinai with the Ten Commandments. However, the article in the last issue of Receivership News that proffered *The Ten Commandments of a Rents and Profits Receiver* has created quite a stir. This issue presents a rebuttal with the intent to convince RN readers that it is perfectly acceptable to sell real estate in a RIP Receivership, and even acceptable to sell free and clear of liens. I doubt that the articles appearing in this issue will be the final word, as the legal scholars of the Receivers Forum continue to debate these fundamental principles.

I am pleased to announce a first for Receivership News: the naming of a Judicial Editor. Los Angeles Superior Court Judge Ann I. Jones has agreed to serve in this role. Judge Jones is profiled in this issue. She sits in Department 86 that is devoted exclusively to the issues that surround writs and receivers and, more specifically, equity receivers. Judge Jones will be called upon to opine on such issues as the ability of a receiver to sell real estate and sell free and clear of liens, among other topical issues. In accepting the assignment, Judge Jones was quite emphatic that she will be expressing her point of view only and does not officially speak for the California judiciary. From the perspective of the RN, however, we welcome having a Judicial editor and believe that it will add to the substance and usefulness of the newsletter. Thank you Judge Jones for agreeing to participate in this role.

Finally, I am pleased to report that RN now has a web-based search engine. Go to www.receivers.org and click on Newsletters. You will see a drop down tool for finding past articles that have been organized both by author and into sixteen different categories of subjects important to receivers and other insolvency professionals (including the subject of Bankruptcy). There is also a helpful "title word search" function to aid in research and analysis. We hope you find this tool useful. Enjoy the 42nd issue.

RPM

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Editor's Comments

By Kathy Bazoian Phelps*

Kathy Bazoian Phelps

Kathy Bazoian Phelps is a partner at Danning, Gill, Diamond & Kollitz, LLP, Los Angeles, and the author of The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes. She frequently represents receivers and trustees.

It is wonderful to see RN serving its role as a forum for discussion in our community about important issues impacting receivers. We welcome the back and forth on the issue of sales by RIP receivers and encourage additional articles or letters to the editor. I have received numerous communications on the subject and have reprinted below a letter addressing this issue. We want to take the opportunity to remind our readers that the views expressed in the articles are those of the authors and not of RN, the California Receivers Forum, or the individuals associated with those organizations. To be sure, we will only run well-written, well-reasoned, and supportable articles, but we also recognize that some areas of practice and the law are uncertain, fluid, and subject to different interpretations and viewpoints. Please keep your letters and articles coming and feel free to contact me at kphelps@dgdk.com.

Kathy

Letter to the Editor

I am writing in response to the *The Ten Commandments of a Rents and Profits Receiver* article, which provided an excellent overview of many important issues routinely faced by rents and profits (RIP) receivers. Nonetheless, I respectfully submit that the article took too stark a position on at least two issues, and hope that my article in this issue of RN and others might add some worthwhile context to the issue of a RIP receiver's authority.

Specifically, the Ten Commandments article took the position that RIP receivers are not authorized to sell real property out of receivership and that, even if they were, such sales could not be free and clear of existing liens. In a vacuum, this might be correct. A true RIP receiver is appointed expressly (and only) to assume authority and control over property and its associated income stream, and to direct that income to the benefit of the estate – a charge that typically aligns the interests of the receivership with those of the secured lender. But RIP receivers do not exist in a vacuum, and the interests of the estates they administer are routinely affected by unforeseen developments. Receiverships are – by their very nature – fluid. A receiver's duties and powers therefore are not static, and can be expanded (or narrowed) by the appointing court. The authors of the Ten Commandments article acknowledged as much, writing that "[t]he Judge is the final arbiter and has complete discretion to determine issues" in a receivership and that "[t]he scope of a Receiver's duties can be amended, expanded, or contracted by the appointing Court."

Appointing orders are amended with frequency for any number of reasons, one of which is that a receiver determines that the interests of the estate would best be served by a sale of real property out of the estate.

I look forward to additional discussion on this very important topic.

Stephen J. Donell, Receiver

Sales by Rents and Profits Receivers...

Continued from page 1.

The law concerning a receiver's sale of real property is sparse and subject to varied interpretations. Nevertheless, receivers' sales are regularly approved and concluded throughout California. Here, we present a case-based alternative to the positions adopted in *Downtown Sunnyvale* court and the Article. We hope to add worthwhile context to the issue of a receiver's authority to sell real property out of receivership and to the critical role that a receiver can play in a contentious real property dispute.

The appointment of a receiver is an equitable remedy. A receiver's authority is likewise equitable, deriving from the appointing court. *See, e.g., Barclays Bank of California v. Superior Court*, 69 Cal.App.3d 593, 598 (1977). As a court-appointed third party neutral, a receiver's authority is limited by the contents of a court's appointing order, unless amended. In simple terms, if the appointing order does not allow for a receiver's sale (and a receiver's authority is not expanded to allow it), no receiver's sale can be conducted.

Nonetheless, California law does permit the sale of receivership property out of receivership. Specifically, Cal. Code Civ. P. § 568.5 provides that "[a] receiver may, pursuant to an order of the court, sell real or personal property in the receiver's possession" in a manner consistent with Cal. Code Civ. P. § 701.510, et seq. In turn, Cal. Code Civ. P. § 701.630 (part of the section referenced by the Code of Civil Procedure [the "Code"]) provides that "[i]f property is sold pursuant to this article, the lien under which it is sold, any liens subordinate thereto, and any state tax lien ... on the property sold are extinguished."[1]

California courts have likewise recognized the necessity of receivers' sales under certain circumstances. Receivers' attorneys routinely cite to *People v. Riverside Univ.*, 35 Cal.App.3d 572 (1973), and *Cal-American Income Property Fund VII v. Brown Dev. Corp.*, 138 Cal.App.3d 268 (1982), for the proposition that, with court permission, a receiver can not only sell real property out of receivership, but also deviate from the statutory scheme outlined in the Code. In Riverside University, the court found that "[g]enerally speaking[,] if no good reason appears for refusing to confirm a receiver's sale ... the sale should be confirmed ... The matter of confirmation rests upon the sound discretion of the appointing court..." 35 Cal.App.3d at 582-83. Likewise, the *Cal-American* court found that "[j]udicial confirmation of a receiver's sale rests upon the appointing court's sound discretion." 138 Cal.App.3d at 274.

Less-cited case law also supports this position. Courts have recognized their "broad" discretion when deciding whether to approve the sale of assets out of receivership, *see, e.g., People v. Stark*, 131 Cal.App.4th 194, 202 (2005), and have held that a receiver's recommendation in favor of a proposed sale is entitled to significant deference, particularly where the proposed sale would yield the highest price possible. See *In re Bank of San Pedro*, 1 Cal.2d 675, 679 (1934) (finding that the fact that a price "on better terms could not be obtained[,]" militated in favor of approving a proposed sale); *MacMorris Sales Corp. v. Kozak*, 249 Cal.App.2d 998, 1004 (1967) (affirming order granting receiver's final report and accounting and finding that "[a]ppellants' principal grievance appears to be that the [property] brought too small a price. But there is no evidence that the receiver could have obtained a better price."); *Riverside Univ.*, 35 Cal.App.3d at 582 ("[I]f no good reason appears for refusing to confirm a receiver's sale, such as the chilling of bids or other misconduct or gross inadequacy of price, the sale should be confirmed."). In *City of Santa Monica v. Gonzales*, 43 Cal.4th 905, 931 (2008), the California Supreme Court reaffirmed the deference standard, including in the context of receiver sales, noting that "[s]uch deference is the rule, even where the court confirms extraordinary action by the receiver, such as the sale of real property." (emphasis added.)

An argument in support of receivers' sales, therefore, appears reasonable. But what of the positions reflected in *Downtown Sunnyvale* and the Article? Multiple lessons may be drawn from *Downtown Sunnyvale*, though two warrant special mention. First, while a court may legitimately interpret the law as allowing for receivers' sales, the very same law supports a court's authority to deny a sale when it is not satisfied that certain equitable protections have been afforded to all interested parties.

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Honorable Ann I. Jones...

Continued from page 1.

Judge Jones' was Law Clerk to the **Honorable Eugene F. Lynch**, U.S. District Court, Northern District of California prior to beginning an eight year stint at Blecher & Collins, where she was first an associate and then a partner, focusing on complex anti-trust, intellectual property and other commercial litigation. From Blecher & Collins, she went on to the Department of Justice, Anti-Trust division, where she was Special Litigation Counsel to Assistant Attorney General Anne K. Bingamin. While with the Department of Justice, she received the Assistant Attorney General's award for Outstanding Achievement…twice! From the Department of Justice, Judge Jones went on to the Federal Trade Commission in Los Angeles, where she was Director of the Regional Office. Once again, in 1997, she received an award for Superior Service.

In 1997, her talent, intellectual excellence and her hard work were recognized, and she was appointed to the United States District Court, Central District, where she served as a United States Magistrate Judge for four years. As a Magistrate, she had occasion to hear complex cases and expand her experience and knowledge. In October, 2001, her career to date was capped by an appointment to the Los Angeles Superior Court by **Governor Gray Davis**. In the ten years since taking the bench, Judge Jones' assignments have exposed her to a multitude of legal subjects: family law (in Pomona), felony calendar, independent calendar and Central Civil West, where she heard many complex litigation cases. One year ago, she replaced Judge David Yaffe in Dept. 86 of the Los Angeles Superior Court, handling Writs & Receivers, along with **Judge James Chalfant** in Dept. 85. As if her plate were not full enough, she is an Adjunct Professor of Antitrust Law at both Loyola and Pepperdine Schools of Law.

Judge Jones' only prior experience with receiverships was as a consumer, i.e., while at the Federal Trade Commission, she frequently moved for appointment of a receiver, often in highly visible insurance cases. She finds her present assignment very interesting and challenging, as no two cases are ever the same. Judge Jones was very clear that she invites and encourages the bar and her receivers to "educate" her as to the facts and application of the law to those facts. Be aware, however, that Judge Jones makes decisions only after carefully reviewing all of the pleadings. Because of that policy, she rarely grants ex parte requests for a receiver. If there is evidence of a threat of loss of assets and a case needs immediate attention, Judge Jones will usually rule that a Temporary Restraining Order or an Order Shortening Time is preferable, to allow her to review the papers.

The philosophy in Dept. 86 is a radical departure from prior years. When Judge Jones appoints a receiver, the receiver reports to the Judge, who is personally invested in the case. She

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Second, and by implication, a receiver must ensure proper notice, of course, but also cooperation among all interested parties, ideally in the form of an agreement to the sale by all parties. Any receiver who has attempted to sell real property over the objections of a second lien holder can appreciate this insight.

The lessons from the Article are equally important. The Article limited itself to RIP receivers[2] in maintaining that courts do not have authority under the Code to approve a sale. But RIP receivers do not exist in a vacuum, and the interests of the estates they administer are routinely affected by the vagaries of the parties, the financial exigencies of the moment, and a myriad of unforeseen developments. Receiverships are therefore necessarily fluid. A receiver's duties and powers consequently can be – and often are – amended by the appointing court. The Article acknowledged this fact, noting that "[t]he Judge is the final arbiter and has complete discretion to determine issues" in a receivership, and that "[t]he scope of a Receiver's duties can be amended, expanded, or contracted by the appointing Court."

A receiver might originally be appointed solely for the purpose of directing an income stream to the benefit of a receivership estate. However, he or she might later determine that the interests of the estate would best be served by a sale of real property out of receivership, and an appointing court might allow this. One might argue that in approving a sale proposed by a RIP receiver, an appointing court would be altering the nature of the receiver's appointment. Indeed, the nature of the receiver's appointment **would** be expanded beyond the original rents and profits appointment to include the authority to sell.

A receiver's ability to evaluate a receivership estate's best interests from an independent, neutral position, and to secure court approval for the proposed administration of the estate, makes a receiver particularly valuable to secured lenders, defaulting borrowers, and courts alike. Receivers should therefore be prepared to adapt to the requirements of the estates they administer and to avail themselves of the benefits that a court-approved and properly conducted receiver's sale can afford – to all parties – when appropriate. This should ultimately inure to the benefit of each estate and should increase both a property's sale price and the likelihood of a positive outcome for a receivership.

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[1] Other than the language of the Code itself, which is subject to interpretation and most often applied in the post-foreclosure context, there appears to be no modern case law directly addressing a RIP receiver's ability to sell free and clear of liens under the Code. Nonetheless, receivers routinely seek, and secure, court confirmation of "free and clear" sales. Secured lenders should further take note that a sale of secured property out of receivership might implicate California's "one action rule." This issue merits particular attention in the context of sales implicating the assumption or modification of a CMBS loan, which is, unfortunately, beyond the space limitations and scope of this article. The authors invite further inquiry and discussion regarding this topic.

[2] Rents and profits receivers are typically appointed in connection with the terms of a relevant deed of trust, or other security instrument, to assume authority and control over real property, and control and divert the income stream from the property during the pendency of litigation.

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Joshua A. del Castillo

Stephen J. Donell

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Continued from page 5.

considers that she and her receivers are in a way, partners, and she expects to be kept abreast of facts as they are discovered. She has a realistic perspective: a receiver doesn't know the facts of the case until he or she has had time to investigate, often a 60 day period. Because of that, she is averse to "gargantuan appointing orders" and rarely approves them *in toto*. Instead, she expects her receivers to come into Court often, to discuss and report on their game plan; she will then be able to expand an Order as needed, when she has been convinced of the facts by the receiver.

(*N.B.*: Lawyers moving for appointment of a receiver should take note and tailor their orders accordingly. It is more than a little disquieting for a receiver to obtain an Appointing Order which is awash in black marker, with various provisions crossed out.)

Judge Jones is also concerned with cash flow, both to protect the parties so that a receiver doesn't end up running a business for his or her own benefit and to ensure that the receiver is paid for his or her time. She is pragmatic, understanding that sometimes a business is just "dead in the water" and can't be resuscitated. In such a case, she will terminate the Receivership to stop the bleeding and protect the receiver from incurring additional expense. Judge Jones is a stickler for supporting information throughout the case and in the Final Report and Account; i.e., the receiver is expected to explain why money has been spent on substantive items.

It is not required that movants reserve a date for noticed hearings (except for writs, which are actually trials); those hearings may be self-calendared for any even dates. Please call Judge Jones' clerk, though, to be sure that the matter is on calendar and file pleadings directly in Dept. 86.

As the reader can imagine, Judge Jones' philosophy and policies require an inordinate expenditure of time and effort, resulting in a six day work week. This leaves her only one day to enjoy her beloved 2-1/2 acre ranch which she purchased two years ago when she decided to fulfill a long-held dream in the present, rather than wait until retirement. She shares her ranch with a friend, and with many adored horses and dogs. Even there, she is "hands on," caring single-handedly for her orchard and huge garden, calling herself a "weekend farmer."

This writer has interviewed many judicial officers, but none with such a varied and successful background. She thanks the editors for the opportunity to interview Judge Jones… it was a pleasure.

Edythe L. Bronston

Edythe L. Bronston *is a Sherman Oaks attorney, whose practice is limited to accepting assignments as a Receiver, Provisional Director and Partition Referee. She is a Founding Director of the California Receivers Forum and Founder and President of the California Jazz Foundation, serving jazz musicians in need.*

Why Rents and Profits Receivers May Sell Property and Courts May Authorize Real Property Sales Free and Clear of Liens: A Rejoinder to the "Ten Commandments"

By David Pasternak and Blake Alsbrook, with assistance from David Wald

The Fall 2011 issue of Receivership News included an article entitled *The Ten Commandments of a Rents and Profits Receiver*. While that article provided some excellent insights, Commandments Seven and Eight advised receivers – and the courts directing them – to refrain from actions that these authors believe are, in fact, legally permissible under California and federal law.

Before addressing the assertions made in the Ten Commandments article, however, it is critical to understand the lens through which the California Courts of Appeal review Superior Court orders confirming receiver's actions. In 2008, the California Supreme Court concluded that the Superior Courts must be given "***considerable deference*** . . . even where the court confirms extraordinary action by the receiver, such as a sale of real property." *City of Santa Monica v. Gonzalez, 43 Cal.* 4th 905, 931 (2008) (emphasis added). Receivers and judges should be confident, therefore, that reasonable determinations made based on the individual circumstances of each case will not be overturned lightly.

Courts May Authorize the Sale of Property in Rents and Profits Receivership

The first question to be addressed is whether courts have the power, in rents and profits receiverships, to authorize a receiver's sale of property absent stipulation from all interested parties. In *Cal-American Income Property Fund VII v. Brown Development Corp.*, 138 Cal.App.3d 268 (1982), the California Court of Appeal considered a dispute arising out of the sale and leaseback of a shopping center where the trial court confirmed a receiver's sale of the property over buyer objection. The appointment order there authorized the receiver to, among other things, receive rents and, importantly, "do such acts respecting the property as the court might authorize or the parties, by stipulation, could agree upon without prejudice to any further order." Id. at 278. The buyer argued that, because the appointment order only established a rents and profits receivership, the lower court had exceeded its jurisdiction by confirming a property sale not expressly contemplated under the terms of that order. The *Cal-American* court disagreed.

To begin with, the *Cal-American* court observed that a receiver's powers derive from statute, the appointment order, and the court's subsequent orders. *Id.* at 273. Based on that hierarchy, the court first looked to the statutory authority provided under the Code of Civil Procedure, and noted that Section 568.5 allows receivers to sell real and personal property subject to court confirmation. *Id.* at 274. Next, the court rejected the buyer's argument that no express terms in the appointment order addressed the sale of property. The court explained that, although the appointment order did not consider such a sale, it did not preclude one either. Because the appointment order provided the parties with the flexibility to address changed circumstances by applying to the court for further orders and modifications, the *Cal-American* court reasoned that "[t]he court thus correctly decided the receiver had the power to sell subject to its confirmation." *Id.*

In sum, *Cal-American* supplies receivers with ample authority to sell property in rents and profits receiverships. As the Ninth Circuit aptly put it – while applying California state law – "*Cal-American* **did** decide that issue and held that, in an appropriate case, a rents, issues and profits receiver can be authorized to sell the security." *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1244 (9th Cir. 1994) (emphasis added).

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Cal-American is particularly important for receivers to keep in mind given the unnecessary clamor of late over a Superior Court Judge's ruling in *Wachovia Bank, N.A. v. Downtown Sunnyvale Residential, LLC*, No. 1-109-CV-153447, disallowing the sale of property over a borrower's objection. First, because Downtown Sunnyvale was merely a Superior Court ruling, it is not binding on ***any other court***. *See Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal.2d 450, 455 (1962). Second, the *Downtown Sunnyvale* court failed entirely to consider the statutory authority to sell receivership property provided under California Code of Civil Procedure section 568.5. As *Cal-American* made clear, Section 568.5, when combined with an appropriate appointment order, provides the authority for a rents and profits receiver to sell property.

Third, and finally, the question we address today is not whether trial courts are willing to authorize the sale of property by rents and profits receivers – trial courts have done so on many occasions with and without stipulation, and over objection – but rather whether a reviewing court might overturn that confirmation as being in excess of the lower court's jurisdiction. In light of *Cal-American* and, as set forth above, the California Supreme Court's recent holding in *Gonzalez* that a Superior Court's confirmation of extraordinary actions by a receiver is to be given considerable deference, such a reversal is unlikely.

Courts May Authorize Receivership Sales of Real Property Free and Clear of Liens

On the issue of sales free and clear of liens, there are three issues that should be analyzed: (1) whether the California Superior Courts have authority to sell a property free and clear of liens; (2) whether the power of federal district judges to confirm the sale of property free and clear of liens emanates from the Bankruptcy Code; and (3) whether only "cutting edge" title insurance companies insure title based on sales authorized by state courts.

First, while no California case has expressly considered the question whether a state court may confirm a receiver's sale of real property free and clear of liens, federal case law makes clear that courts of equity – as all receivership courts are – have enjoyed such power for more than a century. *See, e.g., First National Bank of Cleveland v. Shedd*, 121 U.S. 74 (1887); Van Huffel v. Harkelrode, 284 U.S. 225, 227-228 (1931).

Second, the power to sell free and clear of liens does not emanate from the Bankruptcy Code, but rather is one of those powers traditionally held by courts of equity: "We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receives or on foreclosure." *Id.* That this power is inherent in courts of equity is particularly important for present purposes because, while federal courts are bound by the strictures of the Bankruptcy Code, California state courts of equity are not so tethered. It is therefore entirely reasonable to conclude that the Superior Courts enjoy those powers traditionally held by courts of equity, including the power to sell free and clear of liens.

Third, these authors' experience has shown – and a number of colleagues have confirmed – that reputable title companies are comfortable insuring title to properties sold by order of a California court. And rightfully so: as noted above, the California Supreme Court's decision in *Gonzalez* mandates that Superior Court orders confirming receivership sales of real property are to be reviewed with considerable deference.

**David J. Pasternak, Esq.* *is a founding co-chair of the Los Angeles/Orange County chapter of the California Receivers Forum, and a member of the Century City law Firm Pasternak, Pasternak & Patton, a Law Corporation.*

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Reversal of Fortune – The "New and Improved" Abandoned Plan Rule

Part II[1]

James P. Baker* and Beverly N. McFarland*

In Part I of this article, we discussed the expanded "abandoned plan" rule recently promulgated by the U.S. Department of Labor on May 26, 2011. The DOL announced that it was expanding the "abandoned plan" rule to include liquidating bankruptcy trustees in the streamlined process for winding up the affairs of abandoned individual account retirement plans (which include 401(k) plans). Part II discusses the new regulatory scheme to assist bankruptcy trustees in the winding up of 401(k) plans, and also provides some guidelines for receivers and other fiduciaries that have not been included in the expanded "abandoned plan" rule.

The Regulatory Solution for Liquidating Bankruptcy Trustees

In its May 2011 "Preliminary Plan for Retrospective Analysis of Existing Rules" the DOL stated:

> [B]ankruptcy trustees, who often are unfamiliar with applicable fiduciary requirements and plan-termination procedures, presently have little in the way of a blueprint or guide for efficiently terminating and winding up such plans. Expanding the program to cover these plans will allow the responsible bankruptcy trustees to use the streamlined termination process to better discharge its obligations under the law. The use of streamlined procedures will reduce the amount of time and effort it ordinarily would take to terminate and wind up such plans. The expansion also will eliminate government filings ordinarily required of terminating plans. Participation in the program will reduce the overall cost of terminating and winding up such plans, which will result in larger benefit distributions to participants and beneficiaries in such plans.

The allure of the "abandoned plan" rule for bankruptcy trustees comes from the depressing experience of using the standard retirement plan termination process. The traditional procedures for terminating and winding up ERISA-regulated 401(k) plans can be time-consuming, complicated, and tedious. Under the standard retirement plan termination procedures, the 401(k) plan must be updated to conform to the current Tax Code requirements, missing or incomplete Annual Form 5500 Reports must be corrected (and if necessary, late filing penalties paid), operational defects must be corrected through EPCRS, etc., etc.

The DOL's "Termination of Abandoned Individual Account Plans" regulation (which encompasses 401(k) plans, money purchase pension plans, profit-sharing plans and ESOPs), shortcuts these standard termination procedures in favor of its own streamlined process. See 29 C.F.R. § 2578.1 ("Abandoned Plan Regulation"). The Abandoned Plan Regulation provides standards for determining when a plan is abandoned, simplifies the procedures for winding up a plan, limits the exposure of the "qualified termination administrator" ("QTA") to ERISA fiduciary breach claims, and sets forth a simplified process for distributing the plan's assets to participants. What follows is a short summary of how the abandoned plan process will work in a bankruptcy liquidation.

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Identifying the Qualified Termination Administrator

The first step in this process is to identify the "qualified termination administrator." A QTA is responsible for determining whether an individual account plan is abandoned and for carrying out the activities associated with terminating and winding up the plan's affairs. Pursuant to 29 C.F.R. § 2578.1(g), the QTA must meet two requirements. First, the QTA must be "eligible to serve as a trustee or issuer of an individual retirement plan, within the meaning of section 7701(a)(37) of the Internal Revenue Code." 29 C.F.R. § 2578.1(g)(1). Second, the QTA must be holding assets of the abandoned plan. 29 C.F.R. § 2578.1(g)(2). A liquidating bankruptcy trustee easily meets both of these requirements.

Eligible Plans

To qualify as an "abandoned plan" and to be eligible for termination under the procedures set forth in the Abandoned Plan Regulation, a QTA must make two findings. First, the QTA must find that either no contributions to, or distributions from, the plan have been made for at least twelve (12) consecutive months immediately preceding the date on which the determination is being made; or other facts and circumstances, such as the filing by or against the plan sponsor for liquidation under Title 11 of the United States Bankruptcy Code, or any other actions that suggest to the QTA, or of which the QTA is aware, that the plan is or may become abandoned by the plan sponsor. 29 C.F.R. § 2578.1(1)(i)(A) and (B). Second, if, after reasonable efforts to locate or communicate with the plan sponsor, the QTA determines that the sponsor no longer exists, cannot be located, or is unable to maintain the plan, then the plan can be found abandoned. 29 C.F.R. § 2578.1(b)(ii)(A)-(C).

Once found "abandoned," a plan is officially "deemed terminated" ninety (90) days following the date a letter is received from the Employee Benefit Security Administration's Office of Enforcement acknowledging receipt of the notice of plan abandonment. 29 C.F.R. § 2578.1(c).2

Streamlined Process For Winding Up the Affairs of Individual Account Plans

The steps to wind up an abandoned 401(k) plan are simple and straightforward. The QTA must update the plan's records; calculate the benefits payable to each participant or beneficiary; report delinquent contributions; engage service providers; pay (from plan assets) all reasonable expenses associated with

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carrying out the QTA's tasks; provide written notice to all plan participants or beneficiaries; distribute the benefits; file a Special Terminal Report for Abandoned Plans (*see* 29 C.F.R. § 2520.103-13); and circulate a final notice. 29 C.F.R. § 2578.1(d).

Limited ERISA Liability

A QTA is deemed by this regulation to have satisfied the fiduciary requirements of ERISA section 404(a) with respect to winding up the plan, except for selecting and monitoring service providers used in terminating the plan. 29 C.F.R. § 2578.1(e). This streamlined process for abandoned 401(k) plans does not require abandoned plans to be requalified under the Tax Code nor does it require the QTA to file any Form 5500's. The QTA is also not required to conduct an inquiry to determine whether breaches of fiduciary responsibility may have occurred with respect to a plan prior to becoming the plan's QTA. 29 C.F.R. § 2578.1(e)(2). The QTA is not obliged to collect delinquent contributions on behalf of the plan as long as the QTA informs the DOL in writing about any known delinquencies.

Form 5500 Annual Reporting Relief

The QTA is not responsible for filing a Form 5500 annual report on behalf of an abandoned plan, either in the terminating year or any previous plan years, but the QTA must complete and file a summary terminal report with the DOL at the end of the winding-up process.

Class Exemption

Accompanying the regulations is a class exemption that provides conditional relief from ERISA's prohibited transaction restrictions. PTE 2006-06. Absent this class exemption, the ERISA statute would otherwise prohibit the QTA, as an ERISA plan fiduciary, from receiving payment for his or her services from the plan's assets. See 29 U.S.C. § 1106. This section of the ERISA statute generally prohibits a plan fiduciary from dealing with the assets of an ERISA plan so as to benefit himself either directly or indirectly. The ERISA statute, however, also authorizes the DOL to grant administrative exemptions from these self-dealing prohibitions. ERISA § 408(a), 29 U.S.C. § 1108(a). The abandoned plan rule prohibited transaction class exemption permits the QTA to pay itself for services rendered to the plan prior to becoming the QTA; to provide services in connection with terminating and winding up the abandoned plan; and for distributions from abandoned plans to IRAs or other accounts established by the QTA resulting from a participant's failure to tell the QTA where to send his or her plan money. The QTA may also pay reasonable expenses from the plan's assets for winding up the plan.

Participant Notification

The QTA must notify participants that the plan is being terminated because it has been abandoned by the plan's sponsor. This notice must also tell the participant his or her account balance and the date on which it was calculated. The participant notification must include the following statement, "The actual amount of your distribution may be more or less than the amount stated in this letter depending on the investment gains or losses and the administrative cost of terminating your plan and distributing your benefits." 29 C.F.R. § 2578.1(d)(2)(vi)(3)(ii). Participants must also be informed of their distribution options. The distribution notice must include a statement explaining that if a participant fails to make a distribution election within 30 days from receipt of the notice, then the QTA will distribute the account balance to an IRA or to an interest-bearing federally insured bank account or to the unclaimed property fund of the state of the last known address of the participant.

Procedure for Terminating an Abandoned 401(k) Plan

The regulations require that the former plan sponsor be sent a "Notice of Intent to Terminate the Plan," to his or her last known mailing address. This letter must be sent via certified mail. Thirty days after the day this letter is sent, a second notice of plan abandonment needs to be mailed. This notice goes to the DOL and will indicate the fiduciary's intent to serve as a QTA. A model notice has been posted on the DOL's website. A "notice of plan termination" then needs to be sent to the plan's participants after the 90-day notice period provided to the DOL has expired. Participants will have 30 days to inform the QTA how they wish to receive their Plan distributions. A model participant Notice of Plan Termination is also provided by the government. When all of the Plan's assets have been distributed, a "Final Notice" must be sent to the DOL notifying it that the termination process has been completed. A model "Final Notice" is also provided by the government.

No Need to Update the Plan

The Internal Revenue Service stated in the "Abandoned Plan" Regulation that it will not challenge the qualified status of any Plan terminated under this regulation or take any adverse action against, or seek to assess or impose any penalty on, the QTA, the Plan, or any participant or beneficiary of the Plan as a result of the termination, including the distribution of the Plan's assets, provided the QTA satisfies three conditions. First, the QTA reasonably determines whether the survivor annuity requirements of the Tax Code apply to any benefit payable under the Plan. The qualified joint and survivor annuity provisions of the Tax Code do not apply to ESOPs. Second, each participant must be provided with a non-forfeitable right to his or her accrued benefits as of the date of the termination subject to income, expenses, gains and losses between the date of the Termination Notice and the date of distribution. Third, participants and beneficiaries must receive a notice of their rights to roll over amounts from the 401(k) Plan to an IRA. An IRS model notice concerning rollovers is also available.

Conclusion

For 401(k) plan participants whose plan sponsor is in bankruptcy liquidations, following the standard retirement plan termination procedures must feel like having to endure one last kick in the teeth. After experiencing bounced payroll checks and worse, these former employees are then faced with the double whammy of a prolonged 401(k) plan termination and having their individual plan accounts charged with significant expenses incurred in the termination process.

The "abandoned plan" rule should be a significant help to both plan participants as well as liquidating bankruptcy trustees.

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It will simplify defined contribution retirement plan terminations, it will lower plan expenses, and it will insulate the bankruptcy trustee from ERISA claims during the plan termination process. More importantly, these new rules will speed up the termination of the retirement plan as well as the distribution of the retirement plan's assets to the plan's participants. Sometimes what is lost is found.

While the DOL has expressly included Chapter 11 liquidating trustees under the "Abandoned Plan Rule," the treatment of receivers and other bankruptcy fiduciaries is unclear. While they can argue that by analogy the new abandoned rule should also apply to them, past experience suggests the DOL will narrowly apply the new rule. If the new rule does not cover a receiver's efforts in terminating a 401(k) plan, then he or she must take care to follow the existing 401(k) plan termination procedures described in Part I of this article.

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[1] The DOL updated its regulatory agenda on January 25, 2012, stating that it expects to issue the revised "Abandoned Plan Rule" regulation in May 2012. See DOL RIN 1210-AB47.

[2] A copy of the "abandoned plan" regulation can be downloaded from the following website: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr2578_main_02.tpl. The regulation includes an Appendix containing all relevant model letters and notices.

James P. Baker, Esq.

* **James P. Baker** *is a partner in Winston & Strawn's San Francisco office whose practice focuses on ERISA litigation and the counseling of employers on the entire spectrum of employee benefit and executive compensation matters. Chambers USA 2010 describes Mr. Baker as "an ERISA legend on the West Coast," and the National Law Journal has recognized Mr. Baker as one of the forty best employee benefit attorneys in the U.S. He has been chosen as the best ERISA litigator in San Francisco by "Best Lawyers in America" for 2012. The views set forth herein are the personal views of Mr. Baker and do not necessarily reflect those of the law firm with which he is associated. Note from Chapter 11 Trustee McFarland: Mr. Baker has performed extraordinary services for this Chapter 11 Trustee on a very complex plan that required termination as soon as possible for the benefit of all participants and the bankruptcy estates where the participants were employed.*

Beverly N. McFarland

* **Beverly N. McFarland** *has four decades of real estate and business experience, serves as a court appointed receiver, Chapter 11 Trustee and is the CEO of an asset management company, The Beverly Group, Inc., located in the Sacramento region as well as the Northern California coastal area. Ms. McFarland is a founding member and past chair of the California Receivers Forum (CRF) and the Sacramento Valley Chapter, has participated and instructed at all four Loyola Law School Law and Practice seminars sponsored by CRF. She is also a member of the CRF Bay Area Chapter and serves on the Northern California Board of the Turnaround Managers Association. The opinions expressed in this article reflect her experiences only and may vary greatly from others according to the circumstances surrounding the plan to be administered.*

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

is pleased to announce
the completion of his duties as

Receiver for Tuscan Cliffs
a high-end 155 – home residential
development in Las Vegas, Nevada

District Court of Nevada
County of Clark

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

is pleased to announce
the completion of his duties as

Receiver for Opus East – Half Street
Construction Completion and sale of
a 442,000 square foot office/retail
building in Washington DC

Superior Court
District of Columbia

Douglas Wilson
Douglas Wilson Companies
Tel: 619-641-1141
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is pleased to announce
his appointment as

Referee for Villa Real
163-unit apartment complex in
Carlsbad, California

Superior Court of California
East County Division
County of San Diego

Douglas Wilson
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Tel: 619-641-1141
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is pleased to announce
his appointment as

Receiver for Reuben Corporation
a 12,960 sf parcel of land in
Seattle, Washington

Superior Court of Washington
County of King

Thomas C. Hebrank
E3 Advisors
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is pleased to announce
his appointment as

Operating Company Receiver for
Buechel Chiropractic

Superior Court of California
County of San Diego

Thomas C. Hebrank
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is pleased to announce
his appointment as

SEC Equity Receiver for
Copeland Wealth Management

US District Court
County of Los Angeles

Patrick Galentine
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is pleased to announce
his appointment as

Rents & Profits Receiver for MSCI
2007-IQI3 Ontario Retail v.
Sarkis Investments

Superior Court of California
County of Los Angeles

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his appointment as

Rents & Profits Receiver for Wells
Fargo v. 425 Market Exchange Two

Superior Court of California
County of Los Angeles

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is pleased to announce
his appointment as

Rents & Profits Receiver for GE
Business Financial Services v.
Chase Hamilton

Superior Court of California
County of Los Angeles

Michael Brumbaugh
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is pleased to announce
the completion of his duties as

Receiver for Umpqua Bank v.
Circle H, LLC, et al
Rents and Profits Apartment
Complex Receivership

Superior Court of California
County of Sutter

Michael Brumbaugh
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is pleased to announce
the completion of his duties as

Rents & Profits Receiver for
American River Bank v.
Laubhan, et al
Two Executive Suite Office Buildings

Superior Court of California
County of Placer

Saleh "Saul" Armian, MBA
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is pleased to announce
the completion of his duties as

Receiver in the matter of
Wells Fargo Bank v. Spencer
Properties Multifamily Complex

Superior Court of California
County of Contra Costa

Randall C. O'Connell
Essex Realty Management
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roconnell@essexrealty.com

is pleased to announce
the completion of his duties as

Rents & Profits Receiver for
Laguna Village Arts & Flowers LLC

Superior Court of California
County of Orange

Thomas Henry Coleman
Thomas Henry Coleman, Receiver
Tel: 661-284-6104
tom@thecolemanlaw.com

is pleased to announce
the completion of his duties as

Equity Receiver for
Pacific Northstar Reeves, LLC

Superior Court of California
Central District
County of Los Angeles

Malcolm N. Bennett
International Realty & Investments
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Mac11215@aol.com

is pleased to announce
his appointment as

Rents and Profits Receiver for
a project brought by
One United Bank

Superior Court of California
County of Los Angeles

Robert P. Mosier
Mosier & Company, Inc.
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is pleased to announce
his appointment as

Receiver for
Rick and Cates Guest House
an assisted living facility
located in Modesto

Superior Court of California
County of Stanislaus

Robert P. Mosier
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Tel: 714 432-0800 x222
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is pleased to announce
his appointment as

Receiver for
Ocean Plaza Investments
Management of a Commercial
Property in Oceanside
that is the subject of owner litigation

Superior Court of California
County of Orange

Robert P. Mosier
Mosier & Company, Inc.
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is pleased to announce
his appointment as

Receiver for Centralia Property
To sell the ownership interests
to resolve a dispute

Superior Court of California
County of Los Angeles
Southeast District

Ask The Receiver

By Peter A. Davidson*

Q A claims procedure was established pursuant to a Court order that provides that anyone seeking to share in the receivership estate's assets had to file a claim with the receiver by a certain date. That time expired. A creditor now wants to have its late claim allowed. I am against allowing the late claim because the creditor had been sent notice of the claims bar date. Am I being too tough?

A The general rule is that claimants who do not file their claims within the time limits set by the court are precluded from sharing in the receivership estate's assets when distributed, unless they have a valid excuse for the delay. Courts have indicated that a claims bar date is indispensable to the administration of a receivership estate because the receiver, the parties and the Court need to know, before the Court determines how and to whom the estate's assets are to be distributed, whom the claimants are, the nature and value of their claims, and the total amount of claims being asserted against the estate's assets. The failure to timely file a claim, however, does not operate as an absolute bar, at least where there has not been a final distribution of the assets in the estate. The Court can allow a late filed claim. Courts tend to allow late claims if the claimant offers a reasonable excuse for the delay, if other claimants will not be prejudiced, and there are sufficient funds to pay the claims. A recent case involving a federal receivership, *Commodities Futures Trading Commission v. Lakeshore Asset Management, Ltd.*, 646 F.3d 401 (7th Cir. 2011), analogized the claims bar date in a receivership to the claims bar in a bankruptcy proceeding and held the same standard should apply. That standard is a "excusable neglect" standard as set forth by the United States Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). The Court noted, however, that the "excusable neglect" standard is vague. Citing the *Pioneer* case, the *Lakeshore* court indicated that a court is to take "account of all the relevant circumstances surrounding the party's omission… includ[ing]… the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Lakeshore*, 646 F.3d at 404-05. The *Lakeshore* court noted: "The stronger the excuse and the graver the adverse consequences of rejecting it relative to the adverse consequences to the opposing party if the excuse is allowed, the more the balance leans towards granting." *Id.* at 405.

The facts in *Lakeshore* case are interesting. They show how inaction by a creditor can result in the denial of a claim and that simply claiming "excusable neglect" is not sufficient. In that case, a bank in Andorra invested $7.5 million in Lakeshore's commodity pool. After Lakeshore was shut down and the receiver had the Court establish a claims procedure and a claims bar date, the receiver sent out notice to Lakeshore's creditors

indicating they had forty-five (45) days within which to file a claim or they would be excluded from the distribution of the estate's assets. The receiver sent notice of the claims bar date and a claim form to the bank by Federal Express. No employee of the bank was named as the addressee, because the bank was the only name on the account. The bank claimed it never got the notice and claimed the receiver's letter, as addressed, would not have come to the attention of any bank employee who would have recognized its significance. The court, however, felt this was irrelevant. The bank testified that it believed (the court said "strangely") that U.S. law was similar to Andorran law and concluded that the government would distribute Lakeshore's assets to the defrauded investors in due course and that the bank needed to do nothing. Not only did the District Court find this strange, the Court of Appeals indicated that the thinking was "mind boggling." The bank knew about the receivership, knew about the website the receiver had set up which posted information and documents, and yet did nothing. The court found that the bank did not have a good excuse for failing to timely file its claim. With regard to the second portion of the test, the relative consequences, the Court observed that the harm to the bank would be considerable. The bank would lose $2.6 million which would have been distributed to it. However, the court found that the prejudice to the other claimants would also be significant, and not because of the loss of a windfall that they would receive because the bank's claim would not be paid. Rather, the court held that the prejudice would be the delay in payment to the other creditors if the receiver had to recompute their share of the asset pool and the further delays that would occur because claimants, as the court stated: "would be bound to squawk, further prolonging the receivership proceeding." (This does not seem to be the type of prejudice the Supreme Court meant, but that is what the Seventh Circuit has held).

As a result, the late claimant in your case will have to show that it meets the excusable neglect standard set forth by the Supreme Court in *Pioneer* if it wants to have its late claim allowed. That will depend on "all relevant circumstances" and the impact on the receivership estate and other creditors.

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Ask the Receiver...

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Q Someone warned me that I had to be careful in getting a receiver appointed to collect rents because the appointment might violate the "one form of action rule." What is that and do I need to worry?

A The "one form of action rule" is embodied in California Code of Civil Procedure § 726 which states, in summary, that there can be but one form of action for the recovery of any debt or the enforcement of any rights secured by a mortgage on real property. If someone violates the one form of action rule, they can lose their right to their security interest in the real property. While the one form of action rule was an issue during the last foreclosure crises in the late 1990s, it is no longer a problem, at least with regard to having a receiver appointed. In order to resolve any lingering issues about the applicability of the one form of action rule when a receiver is appointed to collect rents under a deed of trust (among other reasons), the legislature adopted a new California Civil Code § 2938 in 1997 which, among other things, provides that a written assignment of an interest in leases, rents, issues or profits of real property made in connection with an obligation secured by real property, irrespective of whether the assignment is called an absolute assignment, absolute conditional upon default, additional security, or otherwise, is effective to create a present security interest in existing and future leases, rents, issues or profits of that real property. If there is a default by the assignor under the obligation secured by the leases, rents, issues or profits, the assignee (secured party) can do a number of things to collect, including seeking the appointment of a receiver. The statute goes on to provide that an enforcement action, including having a receiver appointed, will not constitute a violation of §726 (the one form of action rule). Cal. Civ. Code § 2938 (e)(2). Therefore, you need not be worried. An application to have a receiver appointed to enforce the terms of a deed of trust or other agreement related to a real property, or the receiver's appointment, will not constitute a violation of the one form of action rule.

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

Gordon Dunfee: *The Life of a Receiver is One that is Crafted, Not Destined*

Gordon Dunfee

Becoming a receiver was not something I dreamed of as a youth in the small coastal town of Toms River, New Jersey, like kids who hoped they would become fire fighters, astronauts or professional athletes. In fact, if I am perfectly honest, I still do not know what I want to be when I grow up. For the time being, acting as an agent of the court as a receiver is my perfect fit.

It was anything but a straight shot to the ever changing and unpredictable world of receiverships. For me, high school was fun, but life really began in college. I began skiing at a very young age, so the choice to attend University of Vermont was not a particularly hard decision. While eventually getting a degree in marketing and accounting, it was the rock climbing, hiking, white water canoeing, ski racing and ski teaching (Sugarbush and Glen Ellen) that placed me in high heaven. My favorite experience there was the springtime tradition to climb Mt Washington and ski the Headwall. Summers were spent lifeguarding on the ocean at Bay Head, NJ. I am still very close friends with my lifeguard buddies.

After graduating, I took a few years off, moved to Colorado, and taught skiing at Vail as a Stage 2 certified ski instructor. There I skied with comedian Don Adams and former President Gerald Ford. I fell in love with the incredibly light Rocky Mountain powder, explored back country skiing, survived a major avalanche in an area now called China Bowl, and continued ski racing. My best ski discipline was downhill, which culminated in the highpoint of my alpine career winning the Galliano Cup at Vail in 1974. Summers during this wonderfully fun period were spent surfing in the Hawaiian Islands. One year after returning from Hawaii and before starting back at Vail, I hitch-hiked across the country. Someday, I will write a travelogue of that adventure.

From Colorado, I packed the proverbial bags and headed to San Diego, where I was accepted to attend USD School of Law. I needed to attend night school because there were no scholarships or trust funds available, which mandated the day job. Working days for the 3M Company selling magazine advertising was a challenge but immensely rewarding career-wise. I made 40-50 "cold calls" a week and learned priceless business selling skills that I use to this day. Even with a full time job and night school three nights a week, I managed to get an article published in the San Diego Law Review ("Territorial Status of Deep Water Ports", vol. 15, No.3).

After law school I took a different path and worked as a commercial real estate broker for Coldwell Banker in San Diego. From that platform, I was drafted to manage a $600 million real estate development and investment portfolio of the San Diego Division of the Lusk Company. I left to develop my own deals consisting of office buildings, a shopping center and a medical build-to-suit. These pursuits brought some fun accolades including a key the City of San Diego, presented by Mayor Maureen O'Connor and a Gold Nugget "Best in the West" Award from Pacific Coast Builders Conference.

This story does lead somewhere, so follow me. My development activities came to an abrupt halt in the early 1990's with that time period's banking crisis (RTC ring a bell?). At that point in time, real estate development skills were similar to that of the blacksmith after the invention of the automobile.

Believe it or not, and without a great deal of choices, I actually hung out my law "shingle" and practiced law litigating business melt downs, medical malpractice, personal injury, commercial loan work-outs and real property transactions. Quite interestingly, at this time I read an article in the Los Angeles Times about a receivership case. This caused a little stir in the dark recesses of my memories of a USD remedies class. A quick reference to Black's Law Dictionary gave me the academic jump start wherein I believed that I could do this craft. In a New York minute I was on the phone, making appointments with banks, selling my abilities to handle receiverships. Before long, Home Savings of America gave me strings of cases, mostly apartments, to handle as their receiver.

The receivership appointments started to fall off towards Y2K and, as we all know, our computers did not crash. From that point forward, all the new work for receivers was across the country mandating constant travel. At that time I had a young family and did not want to be away from home all week. For the next five years (until the next recession), I dove into exciting and rewarding work as a land developer for urban infill redevelopment.

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Gordon Dunfee...

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Most of you know me now as a long time San Diego receiver, past President and current Member of the Board of Directors, and Co-Chair of the Educational Committee of the San Diego Receiver's Forum, as well as the current Treasurer and Member of the State CRF Board of Directors. I have worked on numerous rents and profits and equity cases throughout California and Arizona. I thoroughly enjoy the constant and changing world of receiverships, the challenges it brings, the rewards that accompany a successful case, and the new people you meet almost daily. I find my time spent working on CRF projects extremely rewarding whether it is trying to improve our receivership craft through educational programs or raising money for great charities like The Monarch School.

On a personal basis, I start everyday with a dawn patrol surf session at the La Jolla reefs depending on the tide and swell direction. As past president of the WindanSea Surf Club, I usually end up enjoying daybreak at this spectacular point. Through the years I have been lucky to ride the waves of Ireland, Morocco, Peru, Mainland Mexico, Baja, Fiji, Hawaii, Costa Rica, Puerto Rico, and the East Coast from Maine to Florida. A couple of other fun factoids are a recent successful summit of Mt. Whitney and an incredible trip to the Isle of Guadalupe off the coast of Baja to dive with Great White Sharks. Both trips were accomplished hand-in-hand with my amazing wife Maureen (we all call her Mo).

Gordy with grandson Jax before paddling out at a WindanSea event (January 2012)

Mo has an award winning hat company that specializes in custom made "fascinators," made famous by last year's Royal Wedding. If you have been to Opening Day at Del Mar Race Track, you have seen her colorful creations.

A few years ago, I discovered a son I never knew I had, from a relationship over thirty years ago. He is married, has three sons and lives in Maui. It has been an enriching addition to what we call Team Dunfee. I am blessed to have a big family with (now) seven children and five grandkids. Better yet, all of our children are healthy, working, and living happy lives on their own. Their varied careers include a commercial photographer, a plastic surgery technician, a computer medical programmer, a personal trainer, a teacher, an accountant and a big wave professional surfer. I am especially proud of the productive young people they have become. All that being said, one of life's magical moments for me and one of my favorite things in the world is a surf session with my grandchildren.

Gordon Dunfee lives and works in La Jolla, California.

Heard in the Halls

NOTES, OBSERVATIONS, AND GOSSIP RELAYED BY ALAN M. MIRMAN*

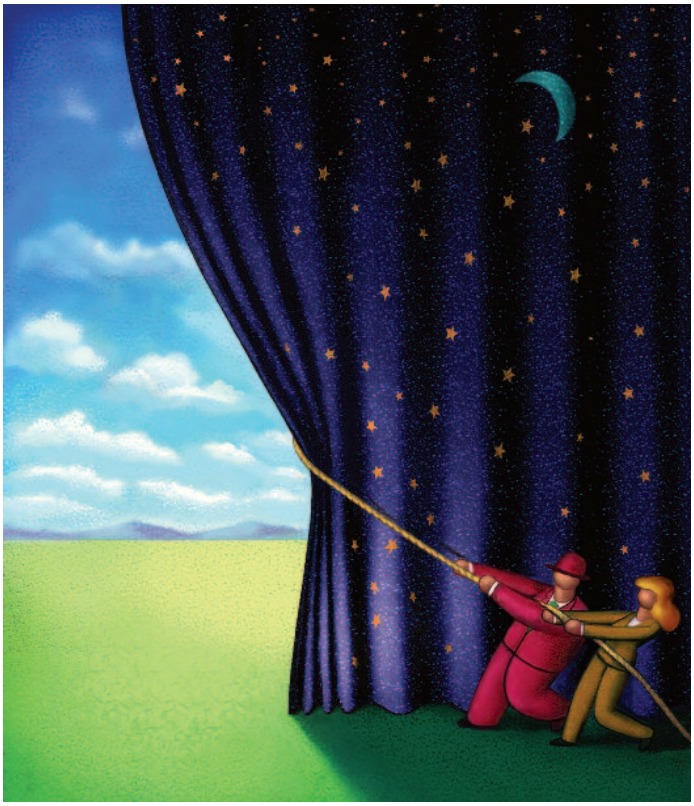
Welcome to the latest edition of *Heard in the Halls*. Please provide your snippits of news, questions or comments about receivership issues or the professional community by telephone, mail, fax, or email to: Alan M. Mirman, Mirman, Bubman & Nahmias, LLP. 21860 Burbank Blvd, Suite 360, Woodland Hills, CA 91367. Phone: (818) 451-4600; Fax: (888) 451-7624; email: amirman@mbnlawyers.com

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

- Valuable input from **Judge Barbara Meiers**, who presides over rents and profits receiverships in Los Angeles Central, Department 12. She responded to my recent inquiry with the following worthwhile tidbits:

    - Remember that when a plaintiff's attorney fails to give a meaningful notice to the trial court that Department 12 has stepped in, the trial court continues to set status conferences, etc. Attorneys can avoid this problem by calling the clerk in the trial court and/or specifically directing a notice to that trial department, rather than just filing a "notice" to the trial court in the court file. Those representing defendants that have cross-complaints or other issues in defense of the foreclosure action should be sure to ask Department 12 to carve out from its assumption of case control all matters not related to receivership issues so that discovery, etc. in the trial court can continue. A plaintiff seeking relief against guarantors in the same action as plaintiff's specific performance action might also want this limitation made clear for the trial court as to Department 12's order.

    - Ex parte grounds are often supplied by a documented history showing that rent has been being delivered to the defendant while mortgage obligations are not being paid, forming a basis for a request for relief under the terms of the assignment of rent before another month's rent can be collected and diverted. Such a showing will not always suffice, however. A motion on a fully noticed basis might be more likely to be required where, for example, the monthly rent coming in is very small and/or the amount of arrears or debt due is de minimis, and/or if notice has not been given or has not been possible, or some combination of these factors. Attorneys also need to keep in mind the limitations of Department 12 matters, and the fact that Departments 85 and 86 also handle real property receivership matters.



- **Gail Squar** reports that the **San Diego Chapter** will present a lunch program on Thursday, Feb. 23rd at Barney & Barney. It will be a roundtable format with the following topics: "Who's Got Your Back"-- Custom tailoring your receivership order, protecting the estate and other legal issues regarding receiverships; "Show Me the Money"—Forensic accounting tools in the pursuit of receivership assets; and "Got Insurance?.....How Much is Enough"—Special insurance needs and coverage issues of the Receiver, and the estate assets, including due diligence/carrier issues/property considerations/quick issuance. Go to www.sdreceivers.org to register.

- **Kathy Phelps**, our *RN* editor, along with **Hon. Steven Rhodes,** United States Bankruptcy Judge from Detroit, have just completed *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*. Kathy Phelps explains that *The Ponzi Book* is an approximately 800 page resource discussing case law relevant to receivers and bankruptcy trustees, among others, in handling issues that arise during the administration of such cases. *The Ponzi Book* is available for purchase at www.lexisnexis.com/ponzibook. More information is available at www.theponzibook.com.

- **Mia Blackler** of Buchalter Nemer and the Chair of the Bay Area Chapter reports: Here in the Bay Area, we're getting excited for our joint educational and networking program with the Sacramento Chapter on February 29 concerning our 2012 forecast on real estate receiverships, with particular emphases on office, industrial, hotel and agricultural sectors.

Continued on page 21...

Continued from page 20.

In the vein of "if you build it, they will come," we adopted a slightly different motto to encourage attendance at the event with "if you come, we'll give you 2 drink tickets." Check the Chapter website for details and signup.

- **Jim Lowe**, newly appointed Chapter 11 Trustee, reports the following for the Central Valley Chapter: There has not been a lot of receivership activity in the Central Valley. Local Receivers have stated that their case load is down at least 50% from the high point in 2009. Most of the receiverships we are seeing are rents and profits including strip malls and apartment complexes. Farming enterprises have been doing fairly well and even the dairy industry has picked up to a point where there is very little receivership activity. The next planned event for the Central Valley Chapter is an educational mixer (St. Patrick's Day theme) scheduled for Thursday March 15th. Please e-mail Wendy at wendy@executivesedge.net for details.

Alan M. Mirman

Alan M. Mirman *is a partner in the Woodland Hills law firm of Mirman, Bubman & Nahmias, LLP, and specializes in creditor's rights. His practice includes provisional remedies, representation of receivers, litigation, loan and lease documentation, and the like.*

Save the Dates!

Thursday, March 1
Partition Actions: The Art of Selling Real and Personal Property Through the Court Systems
Buchalter Nemer, LA

Thursday, March 29
Networking lunch: Receivership Meets Speed Dating
Buchalter Nemer, LA

Thursday June 21
Meet the Judges
Buchalter Nemer, LA

Thursday August 16
Trend in Receivership Appointments: How/Where to Get the Work
Buchalter Nemer, LA

Visit www.receivers.org/laoc_schedule to register for the upcoming Los Angeles, Orange County education programs. Meetings include lunch, substantial written materials, 1 hour MCLE/CPE Credit and networking time prior to program.

California Receivers Forum
Los Angeles and Orange County
In Custodia Legis

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, have the indicated educational experience and are list subscribers.

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• This symbol indicates those receivers who completed a comprehensive 16-hour course on receivership administration and procedures presented at Loyola Law School in April 2000.

♦ This symbol indicates those receivers who completed a comprehensive 16-hour course on receivership administration and procedures presented at Loyola Law School in October 2004.

■ This symbol indicates those who facilitated the October 2004 Loyola Law School course.

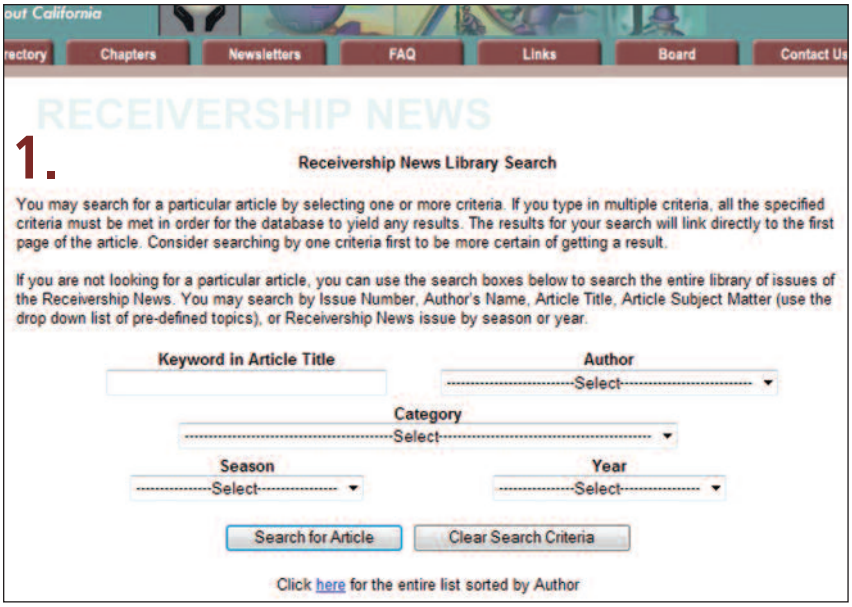
❖ This symbol indicates those receivers who completed a comprehensive 16-hour course on receivership administration and procedures presented at Loyola Law School in January 2009.

♒ This symbol indicates those who facilitated the January 2009 Loyola Law School course.

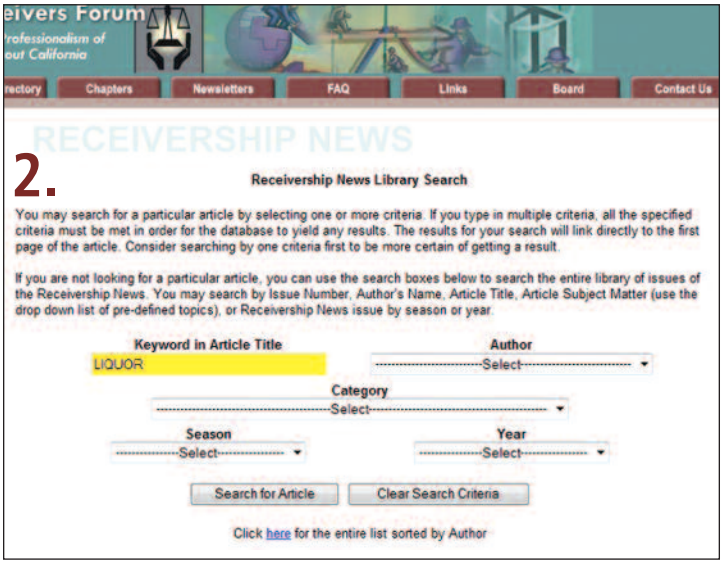
⌘ This symbol indicated those who completed up to 20 hours of receivership law and practice, Loyola IV Symposium, at the LA Convention Center in January 2011.

☼ This symbol indicated those who facilitated the January 2011 Loyola IV Symposium

Finding Receivership Buried Treasure is as Easy as 1-2-3



Type in a keyword in the article's TITLE, the author's first or last name, the season (such as summer), the year the article was published from 2003 – 2012 or from the drop down menu in Category choose a topic. Type the LEAST criteria you can to yield the most results.



In this example you are looking for an article about liquor licenses and the ABC rules in a receivership. Type only the word Liquor in the article title box.

The results show an article in Fall 2011, issue 41, by Kevin Singer. Click on the article title and the search engine will take you to the first page of the article in issue 41.

Receivership News ("*RN*") is pleased to report that the Receivers.org website now offers an improved *Receivership News* index search for the 182 articles written by 62 authors to date. The new search function is designed to facilitate research and review of past issues by author, issue, content category, or key word in title. The 31 editions of *RN* dating back to the Spring of 2003 can be found at www.receivers.org/newsletters. This is a major research enhancement for users wanting to access receivership "buried treasure" in past issues. You may search by any combination of criteria, just remember that each time you add a criteria, the search engine must find all the criteria, exactly as you typed them, in order to return a result. Fewer specified criteria generally yields more results. Happy hunting (research)! *RN*

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