



## Message from the Executive Director

It is with great pleasure that I take the keyboard for this section, normally reserved for a message from your association President. When Steve Donnell invited me to take this opportunity to introduce myself, however, I must admit that I was unhesitant. Not because I love to talk about myself, mind you, but because I am so very impressed by what I have experienced in my first 90 days “in office.”



Actually, my tenure with NAFER began unofficially in December of 2013. In order to assure the smoothest of NAFER management transitions, I flew out to Utah (from my home base in Southern California) to meet with your prior Executive Director, Owen Fuller, and his team. Under the direction of NAFER’s founding leaders, Owen and his team helped to establish an administrative infrastructure from which NAFER has grown and flourished. I am honored and excited to have taken the reigns from such a talented group; I must gratefully acknowledge Owen Fuller and each of the individuals at Fit Marketing and Repeatsys who helped to make the transition of management (relatively) painless.

To provide you with a sense of who I am, I’ll give you this brief bit of background: I am a native Californian, born in Walnut Creek, California and raised in Sacramento. My mother was a nurse and my father, Edward D. Corr, worked for the State of California as a CPA and auditor for 35 years. He served under several administrations, including that of Governor Ronald W. Reagan. He retired as Department Chief of PACE (Performance, Audit, Compliance Evaluation), part of General Services, in 1983. My father served as my inspiration and business mentor from an early age. I would accompany him to his continuing education conferences during my high school years and followed his investigations of the

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## NAFER 3rd Annual Conference

**October 23 – 25, 2014  
The Fairmont  
Washington, DC  
Georgetown Hotel**

Join Receivers from across the country for the 3rd Annual NAFER Conference. This can't-miss event will bring together some of the most experienced Federal Equity Receivers in the country. This year's conference is shaping up to be the best yet. Make plans to arrive early on October 23rd as East West Bank hosts a pre-conference welcome reception that you won't want to miss.

*Fairmont*  
WASHINGTON, D.C.  
GEORGETOWN

6-year and \$67 million dollar restoration of the California State Capitol in Sacramento (1976–1982). It was these experiences that led to an interest in, and pursuit of, a career in organizational development and business management.

Fast Forward: My business, MCorr Consulting, was established out of that drive to increase the effectiveness of business, marketing and public relations strategies for organizations in both the for-profit and non-profit sectors. My background includes work with non-profits as the March of Dimes, Ronald McDonald House Charities and the Cristo Rey Network of schools (a college-prep, work / study high school started in Chicago for highly-at-risk kids) as well as for-profit organizations such as Bank of America. MCorr Consulting has organized and managed large-scale special events and conferences throughout California. My current clientele includes the Association for Corporate Growth's 101 Corridor Chapter, California Institute of Technology's (Caltech) Entrepreneurs Forum, and now, gratefully, the National Association of Federal Equity Receivers (NAFER).

I knew from my first encounters with NAFER's leadership—Steve Donell, Jeff Brandlin, Ira Bodenstein, Bob Mosier and Byron Moldo, that it was a powerful and important association. I look forward to being of service to each of you as we continue to grow member services and the promotion of excellence in the field of federal equity receiverships and related fiduciary services.

**Maureen M. Whalen, Executive Director**

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**Third Annual Conference:  
Good (2012). Better (2013). BEST (2014).**

By: Robert P. Mosier, Conference Chair

NAFER will host its third annual conference and two-day educational seminar in Washington DC on October 23–25, 2014. The venue for this year's event is the elegant Fairmont Hotel located in Georgetown. Based on the success of the first two conferences, the organizers anticipate an attendance of approximately 150 federal equity receivers, judges, regulators, counsel, accountants, support staff and support organizations/sponsors to attend. Washington DC was selected as the site because most of the regulatory agencies that seek the appointment of a federal equity receiver are headquartered in Washington.

The focus of the educational component of the conference is discriminating information on complex subjects that federal equity receivers and their professionals deal with in the recovery and administration of Ponzi schemes. Kathy Phelps, co-author of *The Ponzi Book: A Legal Resource for Unraveling*

*Ponzi Schemes*, has organized the six panels that promise to make this third annual conference particularly on point and meaningful for those in this area of practice. A description of each of the panels is included later in this newsletter. New this year is an all-regulator panel defining what they are looking for in a receiver and an all Federal Judge panel with the focus of how they would like their receivers to conduct their affairs.

Also new at this year's conference will be a brief presentation by *American Greed*—a popular TV show that profiles many of those who organized the Ponzi schemes and got caught. This will add some human interest to the academic portion of the conference.

In addition to learning a lot, each attendee will have ample opportunity to get to know this unique assembly of the Nation's top federal equity receivers and their professionals. The conference is on point for anyone who practices in the area or has a desire to move in this direction. We have included a special conference section in this newsletter with details about the venue, our programs, events and conference sponsors.

Lastly, any discussion of the 3rd Annual NAFER must include mention of our invaluable sponsors who make the conference possible. At present, we have three Platinum Sponsors—East West Bank, BMS, and PWC in addition to a dozen gold, bronze and silver sponsors. There is still room for sponsorship. Contact Maureen Whalen at (805) 285-0756 or via e-mail at [Maureen.Whalen@NAFER.org](mailto:Maureen.Whalen@NAFER.org).



*Robert P. Mosier is President and Chief Executive Officer of MOSIER & COMPANY, INC., a crisis management firm whose specialty is working with financially-challenged operating companies and complex real estate projects in a variety of capacities.*  
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## Tips for Dealing with Misguided Investors

By: Ted Fates, Allen Matkins Leck Gamble Mallory & Natsis LLP

As federal equity receivers know all too well, investors often will not accept they have been defrauded, believing the perpetrators of the fraud have been unfairly treated by the government. This tends to occur in larger numbers and with greater fervor when investors were receiving regular Ponzi payments prior to the receiver's appointment. Investors may direct their displeasure with having their "investments" frozen at the receiver and accuse the receiver of conspiring with the government.

The following are ways receivers can efficiently and effectively address investor complaints and diffuse or minimize a potential "investor uprising" in the form of letters to the court, motions to intervene, attempts to interfere with the receiver's performance of his or her duties, and other actions that cause unnecessary delay and expense. Of course, every case is different and the unique characteristics of the case and the investors involved should always be carefully considered.

**1. Receivership Website.** Promptly establishing an organized and user-friendly website as the first source of information for investors is critical. The website should clearly identify the case and provide documents filed in

the case. The receiver's first communication to investors should direct them to the website and advise them to check the website regularly for updates. Investors should also be given the option of signing up to receive an email each time the website is updated. As the case progresses, important reports and pleadings should be promptly posted to the website. Opposition papers should be posted as well so the website is not criticized as providing only one side of the case. It should be made clear, however, that the website is not a comprehensive docket of all filings and investors can access the full docket by obtaining a PACER account.

**2. Frequently Asked Questions.** The vast majority of investors are not familiar with complex securities litigation or federal equity receiverships. Preparing a good list of FAQs for the website with information about the government's allegations, the court's orders, the receiver's role and duties, and general information about the case will help investors gain a basic understanding of the situation and reduce telephone calls, e-mails, and letters. Well-crafted FAQs can also be copied and pasted into e-mails, reducing time spent responding to investors. FAQs should be updated throughout the case as new investor issues arise.

**3. Newsletters.** A periodic newsletter or written update to investors can be helpful in disseminating information, especially when a significant percentage of investors do not regularly use the internet or e-mail. Consider the average age and other characteristics of your investor base in deciding whether a newsletter is worthwhile.

**4. Consider an Investor Meeting.** If a majority of investors are located in one geographic area, consider whether an in-person meeting would be productive and cost effective. Such a meeting will demonstrate the receiver is sensitive to investor concerns. Putting a face with a name is often helpful for investors and a polite/professional meeting can be very disarming. A meeting can also be useful in explaining how to fill out claim forms, gather supporting documentation, and take other actions required of investors.

**5. Be Responsive.** Investors who are upset will quickly become more agitated if they feel they are being ignored. Receivers must balance being responsive to investors with conserving receivership estate resources. Especially in the early stages of the receivership, however, it is wise to err on the side of taking the time to respond.

**6. Be Consistent.** Investors will contact the receiver, his staff, and his professionals. Make sure a consistent message is going out. Assume investors will talk to one another. Having the receiver give one answer and his counsel give a different answer creates confusion and an impression of disorganization. The best practice is to have all inquiries directed to one person and have that person come to the receiver with inquiries that require



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something other than a standard response.

**7. Do Not Engage in Argument.** Investors may send angry emails criticizing the receiver and making false accusations. Receivers should take the high road in these situations, address the criticism in a direct and professional tone, and avoid engaging in argument. Treat every email and letter you send as though it will be attached to a pleading filed with the court. Ask yourself whether the communication reflects the high level of professionalism judges expect from federal equity receivers.

**8. Be Conservative with Time Estimates.** It should be emphasized early and often in FAQs and communications with investors that litigation moves slowly, court approval is required for most actions (including asset sales, claims, and distributions), and there are many factors outside the receiver's control that affect timing of distributions. Be conservative with time estimates or don't give them at all. Assume investors will complain to the court if you say something will happen by a set date and it doesn't. An FAQ that describes the steps to be completed prior to distribution can be very helpful.

Following these guidelines will help demonstrate to investors that the receiver is experienced, organized, responsive, and professional. This in turn will minimize complaints and accusations, and hinder the ability of misguided and aggressive investors to incite others to support their causes. Investor concerns should not be ignored or underestimated as they can grow into significant distractions and obstacles to receivers if not promptly and properly addressed.

## BEST PRACTICES: Form Receivership Order

The Best Practices Committee and the NAFER Board of Directors are pleased to present its draft form of receivership order for use in SEC actions. The form receivership order broadly describes, within the bounds of applicable law, the scope of the receiver's powers and duties through the use of clearly yet expansively defined and consistently applied terms. The Best Practices Committee attempted to cull excellent language from existing receivership orders while crafting, where appropriate, new and useful provisions to address recurring issues that create difficul-

ties in the efficient administration of a receivership estate, including issues pertaining to employee benefit plans, insurance coverage and receiver liability. NAFER's Board has approved this form receivership order, which the Best Practices Committee and the Board believe can serve as a useful guide to receivers and their counsel when discussing prospective receivership orders with the SEC. Also, in an effort to promote consistency, clarity and excellence in federal receivership practice, it is hoped that this form order can be presented to the SEC for its consideration as

a template to be used by the Commission when drafting receivership orders. The Best Practices Committee and the NAFER Board of Directors welcome your input as to how we may best promote the use of this form order with the Commission, as well as your comments on how

it may be improved upon. You'll find the draft form of receiver ship on the NAFER website at [www.NAFER.org](http://www.NAFER.org). Please review and send your responses/ideas to: Dave Zaro, Committee Chair, [dzaro@allenmatkins.com](mailto:dzaro@allenmatkins.com).

## NAFER Profile: Ira Bodenstein

By: Michael D. Napoli



A prominent bankruptcy lawyer and experienced federal receiver, Ira Bodenstein specializes in the orderly restructuring or liquidation of troubled companies. He represents both creditors and debtors in proceedings under the Bankruptcy Code, in receiverships and in out-of-court restructuring transactions. Ira has served as both a receiver and as receiver's counsel. He is also a founding member of NAFER.

Currently a member of Shaw Fishman Glantz & Towbin LLC, Ira has practiced as a bankruptcy lawyer in Chicago since 1989. He regularly counsels clients on the necessity and timing of filing reorganization cases, and the rights of unsecured and secured creditors prior and subsequent to the filing of a bankruptcy. His practice covers all facets of Chapter 11 reorganization cases, including preparing and confirming plans of reorganization in debtor cases, representation of creditors' committees, opposing a

debtor's plan on behalf of creditors, and representation of creditors and debtors in preference and fraudulent conveyance litigation. He also counsels lenders on their rights as secured creditors. Prior to his return to private practice in 2006, Ira served for eight years as the U.S. Trustee for Region 11 comprising the Northern District of Illinois and the State of Wisconsin.

A noted speaker and lecturer, Ira has made presentations to a wide variety of professional organizations—including NAFER. He was selected to travel to Belgrade, Serbia in 2006 to lecture on U.S. bankruptcy law and its similarities to the newly enacted Serbian bankruptcy law on behalf of the United States Department of State.

Ira has served as the bankruptcy trustee or receiver over a number of significant fraud cases. He has most recently served as the Chapter 7 trustee for Peregrine Financial Group, one of the most notable bankruptcies in 2012. The Peregrine case involved the collapse of a major future commissions merchant following allegations that its founder had bilked tens of thousands of clients in a scheme that lasted more than twenty years. As trustee, Ira has distributed \$164 million to Peregrine's former customers.

As a founding member, Ira was proud to help host NAFER's Second Annual Conference in Chicago last year. He serves on the Board of Directors, the Conference Planning Committee and is NAFER's President-Elect for the 2015-2017 Term.

# NAFER 3RD ANNUAL CONFERENCE

## *Fairmont* WASHINGTON, D.C. GEORGETOWN

### The Venue

With the grace and charm comparable to any of the state-ly embassies of Washington, D.C., the elegant 10-story Fairmont Washington, D.C., Georgetown hotel was designed by renowned architect Vlastimil Koubeck. The 415-room hotel opened in 1985 and there have been extensive property renovations to the guestrooms and function space in 1999 and 2000 under the direction of Wilson & Associates. Fairmont Hotels & Resorts acquired the hotel in the fall of 2002.

Today, The Fairmont Washington, D.C., Georgetown is considered one of the premier luxury hotels in Washington, offering unsurpassed service and amenities for discerning travelers. With spectacular guestrooms, one of the city's largest most comprehensive fitness facilities, authentically local dining in Juniper, and a much celebrated Sunday champagne brunch in The Colonnade,

The Fairmont Washington, D.C., Georgetown is the hotel of choice for visiting heads of state and Hollywood celebrities. The hotel's business and leisure travelers appreciate its tranquil garden courtyard, relaxing lobby lounge and bar, the full-service business center and the gracious service provided by each and every colleague.

Movie buffs might recognize the hotel from many of the scenes from the Hollywood blockbuster, *Enemy of the State*. Film crews from movies such as the *Pelican Brief*, *Hollow Man*, *Contact*, *Broadcast News*, and *Nixon* have all made The Fairmont Washington, D.C., Georgetown their home away from home. From Muhammad Ali to Itzhak Perlman, Arnold Schwarzenegger to Lauren Bacall, The Fairmont Washington, D.C., Georgetown's service and amenities attract a clientele expecting the best—and they are rarely disappointed!



# OVERVIEW OF PANELS AND TOPICS

By: Kathy Bazoian Phelps

The panels for NAFER's upcoming Third Annual conference will have a strong focus on providing practical guidance for receivers and the professionals who work with them in the administration of complex federal equity receiverships.

The programs will kick off with a *Regulators Panel*, including an insider's look from different regulatory agencies about their expectations of the receivers they appoint.

A panel on *Receiver Reporting, Disclosure and Tough Operational Issues* will walk the receiver through the practical issues of running a receivership estate, addressing both administrative and operational issues and how to dispose of difficult assets.

*Forensic Accounting Support for the Receiver* panelists will discuss how to best go about establishing the elements of a Ponzi scheme, the use of the Ponzi scheme presumption, and other important issues arising in fraudulent transfer litigation, including the best use of expert reports.

With the explosion of electronically stored information, receivers are facing new challenges in obtaining and preserving ESI, in handling evidentiary considerations, and in managing the cost of ESI retrieval and disputes. These issues and more will be discussed in the panel entitled *Electronically Stored Information: Making and Breaking the Federal Equity Receivership*.

Day Two of the conference will begin with an all *Judges Panel* so we can hear directly from the courts about their expectations of federal equity receivers, along with the judge's views on what instructions receivers should seek from courts, when if ever ex parte communications are okay, and their views on standing and fraudulent transfer issues.

The conference will conclude with a *Case Law Updates* panel discussing the many significant legal decisions from the past year that impact the administration of federal equity receivership estates and the litigation that these cases tend to spawn.

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## American Greed Executive Producer Mike West Joins NAFER 3rd Annual Conference

The NAFER Board of Directors and 2014 Conference Committee is honored to announce the participation of Mike West, Executive Producer for Kurtis Productions' documentary series "American Greed," in this year's conference. The series, now in its eighth season, "is a weekly American 'true crime'



Kathy Bazoian Phelps is a lawyer practicing in Los Angeles, California and is the co-author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes* (LexisNexis\*2012). She has special expertise in all areas of bankruptcy and receivership law as well as in representing trustees and receivers in large-scale litigation involving fraudulent and Ponzi schemes.

She is a Board Member of the National Association of Federal Equity Receivers as well as of the Los Angeles / Orange County Chapter of the California Receivers Forum. Kathy serves on the 2014 NAFER Conference Planning Committee and led the efforts resulting in this year's impressive array of topics and presenters.



television documentary series aired on CNBC. The program is narrated by Stacy Keach Jr. and produced by Kurtis Productions. The program focuses on the stories behind some of the biggest corporate and white collar crimes in recent U.S. history; examples include WorldCom, HealthSouth and Tyco International. In addition, stories about common financial crimes that affect scores of everyday citizens (Ponzi schemes; real estate and other investment frauds; bank robbery; identity theft; medical fraud; embezzlement; insurance fraud; murder-for-hire; art theft; credit card fraud; and, money laundering) are also featured.”<sup>1</sup>

West helps shape and direct the editorial content of the series, and produces some individual episodes. He started working with Bill Kurtis in 2000, as an associate producer for Investigative Reports and Cold Case Files on

A&E. In 2003, West was promoted to Producer and later to Supervising Producer of Cold Case Files, and he was twice nominated for a Primetime Emmy for Outstanding Nonfiction Series (Cold Case Files, 2004 and 2005).

Before joining Kurtis Productions, West was a reporter and anchor at WMTV, the NBC affiliate in Madison, Wisconsin. He has a master of science in journalism degree from the Medill School of Journalism at Northwestern University and a bachelor of arts in American Studies from Northwestern University, where he graduated with highest honors. West’s independent documentary film, *Conviction: The True Story of Clarence Elkins* won Best Short at the Big Sky Documentary Film Festival in 2008 and won the Audience Choice Award for Best Short at the Cleveland International Film Festival in 2008.



**Mike West**

Mike will be providing a look behind the scenes at this year’s Conference Cocktail Party, slated for Saturday evening, October 24th and sponsored by BMS. Click [here](#) for a look at the 2014 Season of American Greed.

## THE SCHEDULE

<b>Thursday, October 23, 2014</b>	5:30 PM – 7:30 PM	Welcome Reception and Early Check in <i>Sponsored by East West Bank</i>
<b>Friday, October 24, 2014</b>	8:30 AM – 4:30 PM	Breakfast & General Registration Conference Panels and Presentations Lunch and Keynote Presentation <i>Sponsored by PriceWaterhouseCoopers</i>
	5:00 PM – 7:00 PM	Cocktail Reception <i>Sponsored by BMS</i>
<b>Saturday, October 25, 2014</b>	8:00 AM – 9:00 AM	Breakfast & Members Meeting
	9:00 AM – Noon	Conference Panels and Presentations
	Noon	Conference Concludes

*\*Schedule subject to minor time adjustments according to final agenda details. Conference room rates at the Fairmont begin at \$279 (plus applicable taxes) per night based on double occupancy and are valid from October 20-27th for attendees interested in extending their visit to Washington D.C. Conference attendees are responsible for booking and payment of his/her own accommodations.*

## Registration

Registration and Conference Hotel Reservation info is available online now! Enjoy exceptionally early registration rates by signing up prior to May 30 at [www.NAFER.org](http://www.NAFER.org).



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# If You Think That It Is Expensive To Hire An Experienced Receiver, Wait Until You Hire An Amateur

By: S. Gregory Hays CTP, CIRA

*Portions of this article were previously published in California Receivers Forum, Receivership News Issue No. 45, Fall 2012, and news from the Association of Insolvency & Restructuring Advisors, Journal Volume No. 26, Number 4, 2012, and are reprinted herein in substantially the same form with permission. The information contained in this article: 1) is provided solely for informational and discussion purposes; 2) is not jurisdiction specific; and 3) should not be construed, or relied upon, as legal or business advice.*

A properly structured federal equity receivership administered by an experienced receiver can provide a cost-effective, efficient, and flexible vehicle to obtain the greatest return for creditors and other stakeholders. While enforcement cases always have their own special challenges, most receivership cases administered prior to 2005 were handled under a similar structure within the historically static and vague rules and regulations governing receiverships. However, as federal equity receiverships have become increasingly larger and popular<sup>1</sup> and as financial institutions have increasingly sought the appointment of a receiver in both federal and state courts,<sup>2</sup> the landscape in receiverships has changed dramatically. Receivership cases are now more complex, time consuming, and challenging due to the impact of issues that can affect recoveries and the ultimate distribution to creditors or victims. In part due to litigation arising from major cases such as those involving Madoff,<sup>3</sup> Stanford,<sup>4</sup> and Byers,<sup>5</sup> receivers must now address significant issues related to: 1) whether the receiver: a) should administer the receivership case in bankruptcy;<sup>6</sup> b) should pursue clawback claims; c) has standing to pursue claims against third parties; d) is subject to the *in pari delicto* defense; e) will encounter forfeiture challenges by regulatory authorities; f) should pursue equitable subordination of certain claims and/or parties; and g) will need to address potential tax issues; and 2) the method of allowance of claims and distribution of assets of the estate.<sup>7</sup>

As a result of the new challenges, rapidly changing landscape, and increasingly complex nature of receiverships, the importance of the education and experience of the receiver has increased substantially. In addition to analyzing case law, parties seeking to learn more about issues arising in receiverships should consult a number of resources. The three most comprehensive treatises currently in this area are: 1) *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes* by Kathy Bazoian Phelps and Hon. Steven Rhodes as published in 2012; 2) the *Sourcebook of Receivership Law & Practice* by Phil Stenger as revised in 2013; and 3) *A Treatise on the Law and Practice of Receivers* by Ralph Ewing Clark as reprinted in 1992. To keep abreast of current issues and to obtain a forum to discuss specific situations with members who have encountered similar issues, a receiver should also consider joining the National Association of Federal Equity Receivers (NAFER).

NAFER is an organization of experienced receivers who strive for excellence<sup>8</sup>

Greg Hays, CTP, CIRA, CSAR is a court appointed fiduciary and forensic accountant tasked with the restructuring and/or wind-down of insolvent companies and the investigation of fraud. Mr. Hays is routinely appointed by federal and state courts as trustee or receiver to manage businesses and properties to maximize recovery for creditors and investors. He is appointed as a fiduciary by courts in Georgia, Florida, Alabama, South Carolina, Texas, California, and New York.

Mr. Hays formed Hays Financial Consulting in 2001 and manages a firm of 20 corporate financial consultants that specialize in fiduciary appointments, turnarounds, workouts, asset recovery, forensic accounting, litigation support, and interim management. The firm has served as receiver in over 50 cases including SEC and CFTC enforcement actions in Ponzi schemes and other investment frauds.

and education in the administration of federal equity receivership cases. Prior to the formation of NAFER in 2011, few educational opportunities existed for inexperienced receivers to obtain proper training and education other than the California Receiver's Forum and presentations by the Association of Insolvency and Restructuring Advisors (AIRA).<sup>9</sup> Not coincidentally, inexperienced fiduciaries appointed without adequate training and experience have often encountered difficulties. The failure of a receiver to follow proper procedures or appropriately administer property in receivership whether due to inexperience or other reasons can negatively impact the receivership estate and cause various adverse consequences for all parties involved.

This article draws from a variety of sources, including state court receiverships where many nightmare receiverships occur, to review certain problems and issues that fiduciaries have encountered that have led to nightmare scenarios. Such scenarios have resulted in increased costs for the estate, liability for the fiduciary, imprisonment of the fiduciary, contempt charges, adverse tax implications, and a host of other issues. While certain authority utilized in this article was originally compiled for a guide to demonstrate to financial institutions the ramifications of seeking the appointment of an inexperienced state court receiver, **the underlying principles are generally applicable to federal equity receiverships** and provide an example of the impact of improper decisions and pitfalls encountered by inexperienced receivers.

Common themes in many nightmare receiver scenarios include the failure of parties to properly structure a receivership, the failure of a fiduciary to properly keep the court and parties-in-interest informed as to the status of the receivership, and the failure of the fiduciary to obtain court approval for important decisions. For example, in *In re Golden Grove Pecan Farm, et al.*, a CPA with little prior receivership experience: 1) was appointed as the receiver of five separate businesses; 2) filed bankruptcy petitions for the entities after struggling to effectively manage the receiverships; 3) failed to develop an adequate record in the receivership to document important decisions; 4) was subject to conflicting instructions in the two proceedings; 5) was held in criminal contempt by the appointing court for filing the bankruptcy cases without

the approval of the appointing court; and 6) caused additional costs for the estates from the double layer of administrative expenses and, ultimately, for the receiver in unpaid fees and defense costs.<sup>10</sup>

This article will continue by first examining certain mistakes that arise due to inexperience or ill-advised decisions made by a fiduciary. An experienced professional is better able to avoid such mistakes among other minefields and, as a result, prevent the receivership from incurring the losses that may result from such mistakes. This article will also discuss certain procedures that an experienced receiver follows during the preliminary stages of a receivership and during the course of a receivership to potentially prevent such nightmare scenarios.

## I. Unnecessary Mistakes

An inexperienced receiver can generate costly mistakes that may negatively impact the estate, result in additional administrative expenses, and cause the fiduciary to incur liability. For example, a fiduciary may fail to properly preserve and protect property of the estate, fail to recover certain potential assets for the benefit of the estate, and/or fail to maintain appropriate necessary licenses or insurance.<sup>11</sup> In instances where a fiduciary fails to protect assets of the

estate in disregard of orders of the court, such fiduciary may be held personally liable for the resulting shortfall of estate funds.<sup>12</sup> Furthermore, interested parties may seek leave of court to pursue the receiver individually for purported mismanagement and misconduct.<sup>13</sup> Even worse, a receiver may cause extensive losses to an estate and be subject to a prison sentence in instances where the fiduciary misappropriates funds of the estate.<sup>14</sup>

Mistakes originate due to various reasons. Some mistakes may stem from: a) a failure of the fiduciary to understand the business or assets subject to the pending proceeding; or b) a fiduciary taking actions without prior court approval. For example, in *Welt v. MJO Holding Corp. (In re Happy Hocker Pawn Shop, Inc.)*,<sup>15</sup> a fiduciary failed to understand what property was included within the estate and acted outside the authority provided by the court to close a solvent pawn shop over the objection of the owner due to the mistaken belief of the fiduciary that the pawn shop held some property of the debtor.





Other mistakes may stem from the fiduciary failing to perform a thorough investigation of the debt structure of the debtor, commingling funds from different entities in receivership, improperly disregarding the separate and distinctive nature of different entities that have not been consolidated, and paying personal or inappropriate expenses out of the receivership estate. Such mistakes could expose the receiver to liability for improper use of funds<sup>16</sup> or subject certain stakeholders to a potentially reduced distribution.<sup>17</sup> In an instance where a receiver failed to understand the priority scheme of distribution and paid certain claims at the expense of claims of higher priority, after incurring litigation costs and delaying the administration of the estate, the receiver was required to properly redistribute the proceeds of the estate after the creditors of lower priority were required to disgorge windfall payments.<sup>18</sup>

Other mistakes may negatively impact the value of receivership property. For example, an inexperienced receiver may fail to: 1) properly market and sell property in receivership;<sup>19</sup> 2) properly pursue claims that may be asserted by the receivership estate;<sup>20</sup> 3) adhere to fiduciary duties by paying unnecessary expenses;<sup>21</sup> 4) conform to the applicable standard of care to protect assets in receivership;<sup>22</sup> 5) properly identify insurable property interests;<sup>23</sup> or 6) properly deal with taxing authorities and tax liabilities. The inability of a fiduciary to properly deal with tax liabilities may not only expose the estate to additional liability, but may subject the receiver to the imposition of liens and personal liability for the amount of unpaid taxes.<sup>24</sup> For example, after a receiver diligently attempted to resolve a payroll tax issue with the IRS that occurred years prior to the appointment of the receiver, the IRS filed a lien against the receiver personally that appeared on the credit report of the receiver for a period of time. While the matter was finally resolved, this example

is one reason why extreme diligence is required in managing all tax issues related to the receivership estate.

Mistakes may also originate in the form of inefficient conduct and lost opportunities to preserve or recover property, and such mistakes can significantly increase the total cost of a receivership, particularly when time is of the essence. For example, a receiver filing a bankruptcy petition for an entity in receivership without first obtaining express authority may encounter disputes regarding the authority of the receiver and dismissal of the bankruptcy case resulting in additional expenses for the receivership estate.<sup>25</sup> Among the duties of a receiver,<sup>26</sup> a “receiver has a duty to find assets and bring them under his control....prepare an inventory and value the items comprising the inventory.”<sup>27</sup> The failure of a receiver to timely and efficiently collect and inventory assets and/or perform other required tasks not only harms the receivership estate, but may also subject the receiver to potential liability for mismanagement and other claims.<sup>28</sup> An experienced receiver understands how to prioritize tasks and focus on the issues that require immediate attention. For example, an experienced receiver will know to, among other tasks, immediately: 1) secure the assets, bank deposits, and records of the receivership to prevent the loss or destruction of vital documents and assets; 2) obtain control of the mail to manage deliveries, communications, and mailed payments; 3) identify estate property; 4) recover funds such as security deposits or funds wired out of the company in the days prior to the receivership; 5) coordinate and exchange information with the government agencies; 6) ensure that all assets of the estate are insured; 7) create a database of investors/creditors; 8) communicate with parties-in-interest in the case; 9) obtain an understanding of the big picture and resolve tasks specific to the property in receivership; and 10) investigate potential claims against third parties.<sup>29</sup> Without

a prompt response to such tasks, the value of the property in receivership can be diminished and potentially eliminated.

## II. Procedures During the Preliminary Stages of a Receivership

The power of a court of equity to appoint a receiver is something like the power of a skillful surgeon to use a sharp knife. If used skillfully by the court and with proper exercise of discretion, the power to appoint a receiver is frequently a great aid in business affairs, but when used unskillfully and without discretion it often results in loss to everyone concerned.<sup>30</sup>

Although a government agency seeking the appointment of receiver in an enforcement matter generally selects and recommends a receiver to the court, the court appointing a receiver as an equitable form of ancillary relief has wide discretion in selecting, empowering, controlling, and replacing a receiver.<sup>31</sup> Few limitations generally restrict a court in selecting a receiver,<sup>32</sup> and the selection of a particular party as a receiver is generally not a basis for appeal where the appointing court had an opportunity to review the purported qualifications of the receiver.<sup>33</sup> Because the selection and installation of an appropriate receiver are critical elements to the ultimate success of a receivership, in non-enforcement agency cases like state court real estate receiverships, parties-in-interest are encouraged to assist in structuring the receivership created by the court.<sup>34</sup> During the preliminary stage of a receivership, the party seeking the appointment of a receiver and other stakeholders are best served by performing due diligence and focusing on obtaining: a) a receiver who is and will remain a neutral third-party; b) the appointment of a cost-effective receiver with a sufficient amount

of relevant knowledge and experience; and c) appropriate content, procedures, and liability protections in the order appointing the receiver.

### A. Selecting a Neutral Third Party Receiver

The appointment of a neutral third-party receiver is critical to maintain the integrity and fairness of the receivership process and avoid liability for all involved.<sup>35</sup> A receiver is an officer of the court with the fiduciary responsibility to act in the best interests of all parties involved in the receivership rather than any particular party-in-interest.<sup>36</sup> While complying with the duties of a court-appointed fiduciary, a receiver must balance the diverse goals of a federal equity receivership of administering assets, investigating and reporting conduct of the entity in receivership, recovering funds, fulfilling roles not well-suited for government agencies, and assisting law enforcement.<sup>37</sup>

The primary objective of a federal equity receivership in most cases is to recover funds to be returned to victims;<sup>38</sup> however, a receiver: 1) has factors in addition to the desires of victims to consider in performing the duties of a receiver; and 2) “may not subordinate the interest of one creditor in favor of those of another creditor.”<sup>39</sup> To the extent that a receiver acts contrary to the best interests of all parties or the duties of the receiver to the court, such receiver may be subject to a surcharge by the court.<sup>40</sup> Similarly, interference by creditors and other parties-in-interest with the functions of a receiver is punishable by contempt.<sup>41</sup> Accordingly, in order to limit exposure in a receivership, parties in a receivership should seek to: 1) obtain a neutral receiver; and 2) act throughout the receivership in a manner consistent with the receiver functioning as an independent fiduciary.

### B. Selection of a Cost-Effective Receiver

A receiver takes possession of and manages property in receivership as a fiduciary at the direction of the court that appointed the receiver.<sup>42</sup> As an officer of the court, the receiver answers to the court as an agent of the appointing court.<sup>43</sup> A receiver acting within the scope of the authority of the receiver may be protected by quasi-judicial immunity for breaches of fiduciary duty arising from omissions or actions during the course of the receivership.<sup>44</sup> Although a receiver may be replaced, the court that appointed the receiver will be the same court that reviews any concerns regarding the ability or conduct of the appointed receiver.<sup>45</sup> Furthermore, parties cannot generally seek recourse for the selection of a receiver or damages caused by a receiver from a party who does



not assert inappropriate control over the receiver or take other actions that may lead to the imposition of liability.<sup>46</sup> Given that: 1) a receiver may receive limited liability in the form of quasi-judicial immunity for conduct within the scope of the authority of the receiver and a potentially favorable disposition by the appointing court; and 2) parties will have limited alternative sources of recovery, the interests of stakeholders are best served by initially seeking the appointment of a knowledgeable, experienced, and cost effective receiver.

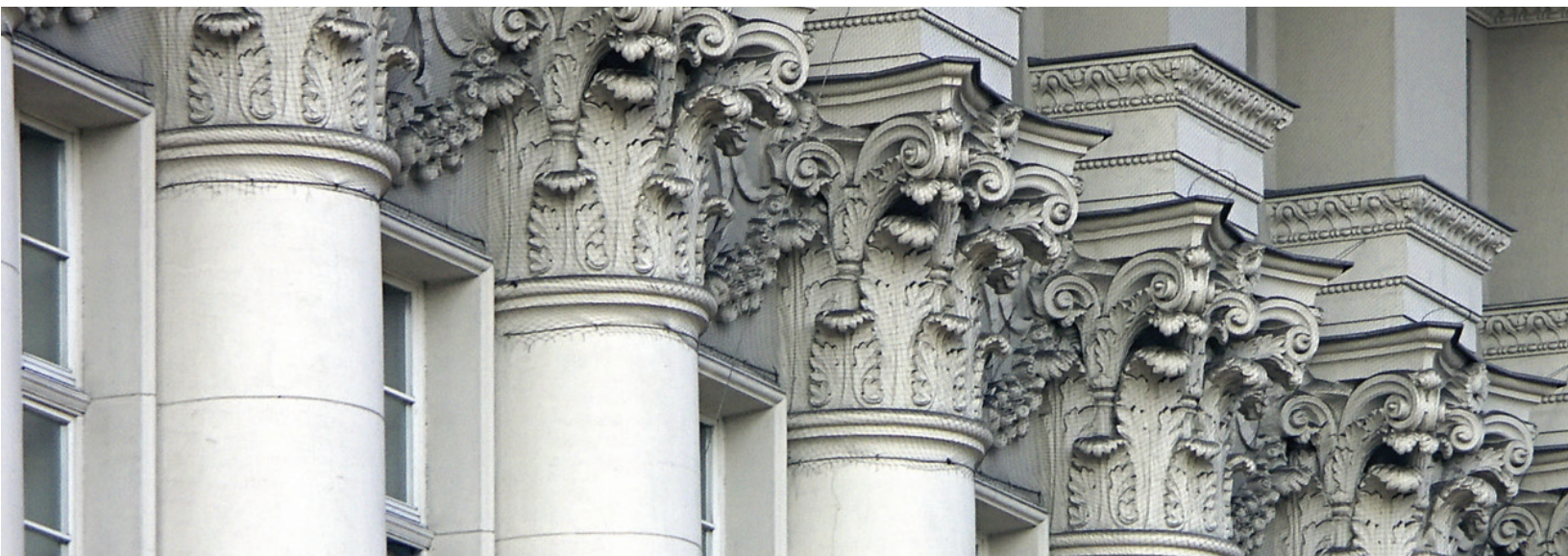
An ideal receiver will have experience managing entities or properties similar to the entity or property in receivership, understand the nuances of receivership law, and have the proper skill set to function as a court-appointed fiduciary administering the receivership for the benefit of all creditors of the receivership estate. While an inexperienced receiver may offer a lower hourly rate than an experienced receiver or even a “free receivership” (as has been offered in some state court cases) in exchange for future commissions or other business arrangements,<sup>47</sup> such arrangements may be illegal or inappropriate in some states.<sup>48</sup> An inexperienced receiver may: 1) not have the ability to personally perform all functions required of some receivers such as liquidating, preserving, and pursuing assets or pursuing litigation matters; 2) not adequately understand court procedures, legal implications, or tax consequences of particular acts; or 3) have a learning curve at the expense of the creditors. Ultimately, the conduct of an inefficient receiver with a lower hourly rate may cost a receivership more than a more qualified and efficient receiver with possibly a higher hourly rate. Accordingly, the actual total cost of a receiver is comprised of: 1) the cumulative fees charged by a receiver; 2) the impact of inefficient conduct and lost opportunities

to preserve and recover assets; and 3) any losses caused by mistakes generated by the receiver. Such costs should be considered when selecting a receiver, especially in light of the fact that Monday morning quarterbacks will often question and critique the conduct of a receiver with 20-20 hindsight and cause the receivership estate to incur even greater costs in attempting to assess liability for the conduct of the receiver or any failure to follow proper procedures.<sup>49</sup>

### C. Carefully Crafted Order Appointing Receiver

After selecting the most cost-effective neutral receiver with a sufficient amount of relevant knowledge and experience, the content of the order appointing the receiver is a critical component of a successful receivership. The powers, duties, and scope of the authority of the receiver are defined in the order appointing the receiver.<sup>50</sup> If given an opportunity, prudent parties will want to participate in the drafting of the order appointing the receiver to ensure that the order addresses the concerns of the parties and reduces the need to return to the court to obtain a clarifying order.<sup>51</sup>

The order appointing a receiver empowers a receiver to perform tasks necessary to accomplish the objectives of a receivership and provides an overlying structure for the receivership. One of the most important issues in planning a receivership is determining whether the entire entity or just certain assets owned by an entity will be placed in receivership. In some instances, placing only the assets of an entity in receivership is preferable in order to avoid potential legacy problems associated with the entity. When an entity is placed in receivership, the receiver may potentially have to administer outstanding income, payroll, and sales tax issues, litigation with third



parties, and other issues that can be avoided if only the assets or property are placed in the receivership. Placing an entire entity in receivership when the only value is in certain assets owned by the entity can result in increased administrative costs and reduced distributions as the receiver is burdened with the issues related to the entity without a corresponding benefit to creditors. In certain circumstances parties-in-interest may consider a receivership related to the individuals who own an entity in order to assist in recoveries related to the entity or assets owned by the entity. If the tax returns and tax payments of the individual are not current; however, including an individual in a receivership involving corporate assets may result in devastating tax consequences to the receivership estate that would not otherwise be applicable if only the assets of the entity were included in the receivership. Accordingly, parties-in-interest should carefully consider the structure of the receivership in order to define the property subject to the receivership in the most beneficial manner possible.

An order appointing a receiver should also incorporate protections for both the receiver and the receivership estate. The order should clearly define the duties and responsibilities of a receiver, require the receiver to file with the court periodic status reports and other updates regarding activity in the receivership, and include provisions that explicitly limit the liability of a receiver.<sup>52</sup> The order appointing the receiver can also set forth the basis for calculating the compensation of the receiver and require periodic fee applications and estimates of fees so that all parties are aware of the costs associated with pursuing actions at the time that the work is being done rather than only at the end of the case. The order may also require a receiver to post bond in an amount as determined by the court,<sup>53</sup> which could be important in instances where a receiver may not otherwise have sufficient funds to satisfy a judgment resulting from the misconduct of the receiver. Other protections to limit potential loss of value during the course of a receivership may be available based on the specific circumstances of a particular receivership, such as addressing insurance, environmental or regulatory concerns.

### III. Procedures During Receivership

Certain procedures during the course of a receivership, some of which may be established in the order appointing the receiver, can assist in limiting liability and loss of value in a receivership. Two helpful procedures are: 1) maintaining and building a record of the activity in



the receivership; and 2) requiring the receiver to provide adequate updates to keep the supervising court and any applicable government agency in an enforcement matter fully informed until the conclusion of the receivership. A clear record of the conduct during the receivership will help avoid confusion and be useful in the future should any conduct later be questioned. To establish a clear record for a reviewing court, a receivership can maintain procedures pursuant to which written orders are issued to document significant events, such as the disposition of property in receivership, entry of significant settlements, and the termination of the receivership.

Just as any employee is wise to update the party supervising them, the best interests of the receiver and the receivership estate are advanced when the court and any applicable government agency in an enforcement matter have sufficient and current knowledge regarding the conduct of the receiver and the status of the receivership. A receiver can further supplement the record and avoid surprises by filing regular reports, including all required reports,<sup>54</sup> and having such reports approved by the court. Since receiverships do not generally have routine hearings, regular reports are an important medium to provide adequate disclosure of: 1) the progress of the receivership without having to incur the expense of updating each interested party individually; and 2) proposed future conduct. Effective communication between creditors and the receiver is critical in any successful receivership. To enable ongoing access to receivership activities and to avoid surprises during or at the end of the case, in addition to filing reports, a receiver should also post reports, fee applications, and other docket activity on the website of the receiver. Websites maintained by a receiver are especially helpful for victims and creditors who do

not have electronic access to dockets through the Pacer system.

As an officer of the court, a receiver is subject to the direction and orders of the appointing court and is entitled to seek instructions from the court.<sup>55</sup> While prior court approval is not required for every detail in a receivership,<sup>56</sup> a receiver is ultimately responsible to the court and has a duty to keep the court informed and to seek instructions on important matters and in instances where the appointment order is unclear.<sup>57</sup> A receiver has a strong interest in remaining within the scope of the authority granted by the court since a receiver assumes the risk of liability for any act taken without court authority.<sup>58</sup> For example, a bankruptcy court held a receiver liable for the sum needed to pay all creditors and administrative claimants of the estate of the debtor where the receiver: 1) failed to follow the orders of the court; and 2) did not prevent investors from absconding with the assets of the debtor.<sup>59</sup> Accordingly, an experienced receiver will keep the court fully informed and obtain explicit court approval in instances where authority is unclear or where proposed future conduct may be questioned.<sup>60</sup>

Furthermore, upon completing the administration of the receivership, the receiver should continue communicating with the court to ensure that the court is fully informed as to the status of the receivership until the court that appointed the receiver formally discharges the receiver. Most importantly, the receiver should file a final report “to give account of his complete stewardship and at the same time lay the foundation for the receiver’s discharge.”<sup>61</sup> The receiver should ensure that all known creditors and all parties in interest in the receivership receive notice of the final account and report and request for discharge.<sup>62</sup> The receiver should also request and obtain from the appointing court an order of discharge and release of further obligations.

#### IV. Conclusion

Although not an exhaustive overview of receiverships or all potential issues that may be encountered in a receivership, this article advances several recommendations to avoid a potentially negative outcome in a receivership. The laws and regulations governing federal and most state court receiverships are vague and the ever-changing case law adds an additional layer of complexity. Since parties unfamiliar with receiverships are more likely to encounter a nightmare scenario, the importance of obtaining an experienced, neutral fiduciary who implements proper

procedures and is able to properly communicate with all key constituents in the case cannot be overstated. In contrast to the results that may be obtained by an inexperienced party, an experienced receiver will be cognizant of potential minefields throughout the course of the receivership and will be more readily and cost-effectively able to navigate around them for the benefit of creditors and/or victims of the receivership.

Due to the importance of experience and education in this area, one of the goals of NAFER is to assist in providing education to receivers through certain meetings such as the recent national conference held in September, 2013, in Chicago that provided two days of excellent educational presentations by experienced professionals. The next conference is planned for October 23-25, 2014, in Washington, DC. For more information regarding membership, continuing education opportunities, and forums to discuss receivership issues and efficient case administration, consult the NAFER website available at [www.NAFER.org](http://www.NAFER.org).

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Tim is the chair of our firm's Commercial Litigation Practice Group and our Governmental Practice Group. He began his career with Heyl Royster in 1977 and has tried cases for both plaintiffs and defendants involving contractual breach, business torts, business break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, debtor-lender claims, bankruptcy (claim, discharge, and preference litigation), covenants not to compete, fraud and misrepresentation, eminent domain (condemnation), public and private nuisances, real estate, and zoning disputes. Tim has successfully argued cases before the Illinois Supreme Court and the Seventh Circuit Court of Appeals. Three of his cases have been included in legal textbooks for the principles of law which they established. He has been designated in the "Leading Lawyer" and "Super Lawyer" lists for Illinois and is included in "The Best Lawyers in America" (2010-2014).

Tim is a past member of the American Bar Association Board of Governors, representing Illinois and Ohio. He has served in the ABA House of Delegates for over 15 years. He is a past president of the Illinois State Bar Association. He chaired the ABA Standing Committee on Publishing Oversight for four years. He is presently chair of the United States District Court Advisory Committee on Local Rules (Central District, Illinois). He is President of the American Counsel Association and is on the board of the Illinois Bar Foundation. He is co-chair of the ABA Section of Litigation Membership and Marketing Committee and former co-chair of the Section's Business Torts, Minority Trial Lawyer, and Immigration Litigation Committees. He was co-chair of the Illinois Legal Needs Study II, and former President of the Illinois Equal Justice Foundation, Illinois Lawyers Assistance Program, Illinois Chapter of the American Judicature Society, Illinois Coalition for Equal Justice, and Illinois Township Attorneys Association. He was the first Chairman of the Diversity Committee of the Peoria County Bar Association. He has served as co-chair of the Prairie State Legal Services Campaign for Legal Services committee.

Tim has written articles and spoken on a wide variety of legal topics. In particular, he has written extensively over a period of 30 years in the field of economic loss and most recently is the author of an IICLE chapter entitled "Economic Loss—The Line Between Contract and Tort," (Contract Law, Illinois Institute for Continuing Legal Education).



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Prior to joining the firm, Ms. Hawes was a member of the team of attorneys that successfully petitioned the United States Supreme Court and argued to a 9-0 victory in the Union Bank v. Wolas (In re ZZZZ Best) decision, resulting in the protection from preference attack of ordinary course payments on long term debt. She was also on brief for the prevailing party in two other published federal circuit court decisions involving important issues in receivership law, Federal Trade Commission v. Assail, Inc., 410 F.3d 256 (5th Cir. 2005) and Federal Trade Commission v. Holibaugh, 609 F.3d 359 (4th Cir. 2010).

Ms. Hawes graduated Order of the Coif from the University of Southern California. She earned her undergraduate degree from the University of Southern California, where she was elected to both the Phi Beta Kappa and Phi Kappa Phi Honor Societies. Ms. Hawes has been a member of the St. Bernardine of Siena Parish Justice and Peace Committee since 2007.



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Mr. Ormond has tried cases before the Los Angeles Superior Court as lead trial counsel, the United States District Court, Central District of California and the Bankruptcy Court of the United States District Court, Central District of California, and has arbitrated before JAMS, Alternative Dispute Resolution and the American Arbitration Association. Mr. Ormond is a board member of the California Receivers Forum and former Chair of the Remedies Division of the Los Angeles County Bar Association. He teaches Continuing Legal Education courses on receivership law and practice, dispute resolution, intellectual property issues, considerations for complex litigation, and lender security in intellectual property. He is also a senior legal advisor for the LARTA Institute, a premier technology commercialization non-profit assistance organization.

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Rick also concentrates his practice in multi-jurisdictional litigation, specifically the recovery of foreign claims and assets. He is also well regarded for his knowledge of international legal systems and frequently serves as special counsel to the financial services industry, corporations, attorneys, accountants, trustees, receivers and high-net-worth individuals. He has handled complex international banking and fraud matters in more than 40 jurisdictions.

Rick is a well-sought-after interview source on the topic of international asset recovery and is frequently called upon by the media. He also has authored several articles about the nuances of international litigation for numerous legal publications. Past speaking engagements include presentations to the Association of Certified Fraud Examiners, Turn-around Management Association, International Bar Association, American Bar Association, LawLine.com and the Florida and New York Bar Associations.

Rick further publishes the "International Asset Recovery Blog", ([www.internationalassetrecovery.com](http://www.internationalassetrecovery.com)), where he writes about recovery claims/assets around the world.



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Most recently, in addition to complex litigation and receivership matters, Mr. Wachtell has been lead counsel in film finance disputes for clients involving amounts in dispute well over \$100M, has been lead counsel for a Federal Court appointed Receiver in a major mortgage fraud case and is advising several clients and/or serving as lead counsel on several significant trademark, patent and entertainment finance cases. Mr. Wachtell is also currently serving as a Receiver in a state regulatory receivership and as corporate counsel to several privately held companies.

Mr. Wachtell has and continues to serve as a Court appointed receiver, referee, provisional director, arbitrator and mediator in connection with complex business cases. He also is on the Mediator/Arbitrator panel of Alternative Resolution Centers in Los Angeles and formerly served as an arbitrator for the American Arbitration Association. He cur-

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Mr. Wachtell is a member of the Los Angeles County and American Bar Associations and various other trade organizations related to his fields of practice. He serves as an active member of the American Bar Association Real Property Section, Hotel and Hospitality Subcommittee. He also lectures extensively in his areas of practice and actively participates in various charitable and civic organizations. Mr. Wachtell is AV Preeminent rated and recognized as a 2013 Top Rated Lawyer in the area of Bank & Finance by Martindale Hubbell, and has been selected as one of Southern California's Super Lawyers five times from 2006 to 2010.

Mr. Wachtell is admitted to the State Bars of California, Nevada and Virginia, the Bar of the District of Columbia, and is licensed to practice before the United States Patent and Trademark Office. He also holds a California real estate broker's license.

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The majority of Mr. Pugsley's work involves securities arbitrations, investment advisor disputes, and SEC receivership cases for parties on all sides of these matters. He also frequently assists companies, individuals, investment advisors, brokerage firms and registered representatives with investigations, administrative actions and civil litigation brought by the Securities and Exchange Commission, the Utah Division of Securities, and the Financial Industry Regulatory Authority (FINRA, formerly NASD). He has been involved in many shareholder disputes, class actions, derivative actions and internal investigations for publicly-traded companies, and frequently advises investment advisors and brokerage firms on compliance issues.

Mr. Pugsley maintains an AV Preeminent (5.0) rating with Martindale-Hubbell, which is the highest rating awarded to attorneys for professional competence and ethics. Mr. Pugsley has been listed in The Best Lawyers in America Tier 1 in Utah for Securities Law since 2008, and he was selected as their "Lawyer of the Year" for Securities Regulation in 2013. Mr. Pugsley is listed in Mountain States Super Lawyers (2010-2013) in the category of Securities Litigation and was ranked as one of the "Top 100" attorneys in 2012. Benchmark Plaintiff lists Mr. Pugsley as "Highly Recommended" for securities litigation, and he has appeared in Utah Business Magazine's "Legal Elite" listing in the category of Civil Litigation in every year since the list's inception in 2004.



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In March 2010, Judith Wagner was honored in Washington DC with the FBI Director's Community Leadership Award and Ms. Wagner is the recipient of the 2010 PNM Award for Individual Excellence in Ethical Business Practice.

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BMS Trustworks is the only no cost software & consulting service within the industry that has in-house bonded bankers on staff, 24/7/365 support, and software that thoroughly accounts for reserve funds while helping to prevent mistakes. We typically work with fiduciaries who see the benefit of using a free customized solution, versus a work-around combination of Excel and QuickBooks.

BMS is a client-focused technology company providing SAAS case administration solutions to the restructuring and insolvency community. For more than 20 years BMS has been the market leader, meeting the needs of an ever-changing industry through innovative technology and proven commitment to superior client service.



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Joel Schneider has been with Hilco Real Estate since 2011 and leads the disposition group, assisting clients with monetizing owned real estate with a focus on industrial, retail and special use assets. In his almost thirty years of real estate experience, he has developed a broad range of expertise, covering the areas of sale transactions, asset and portfolio management, valuation and investment analysis, development, financing, and strategic planning. Joel specializes in assisting clients who are generally not in the real estate business—usually in the context of a bankruptcy, liquidation, or corporate restructuring—with implementing strategies to create liquidity from their surplus real estate assets. Some of his recent clients include Wells Fargo Capital Finance, Executive Sounding Board Associates, American Capital Strategies, Phoenix Management, American Blue Ribbon Holdings, and Huron Consulting.

Prior to joining Hilco, Joel was a Principal at Atlas Partners, a Chicago-based boutique real estate advisory firm where he focused on asset disposition for his clients which included attorneys, lenders, and turnaround firms. Prior to Atlas, Joel was Senior Manager in the Midwest practice of Ernst & Young's Real Estate Advisory Services group. There he led assignments for clients including Best Buy Co., Equity Office Properties, and CMD Realty. Much of the focus of his consulting work was devising and implementing cost saving and improvement strategies related to his clients' real estate holdings.

As Vice President for Portfolio Management at American Express' internal corporate real estate department, Joel was responsible for strategic programming and transactional support with regard to the company's 18 million square foot real estate portfolio it occupied around the world.

At the Balcor Company, an institutional owner of real estate, Joel was Managing Director of Portfolio Management, where he was involved with creating, underwriting, and supporting workout strategies for many of the company's real estate assets, including retail, office, industrial, multi-family, and vacant land.

Joel earned a B.S. degree from Indiana University and a Masters in City Planning from Harvard University. He holds real estate sales and auction licenses in numerous states and is a member of several professional organizations, including the Turnaround Management Association, the Commercial Finance Association, the American Bankruptcy Institute and the Chicago Real Estate Council where he previously served as its president. In 1995 he was elected into Lambda Alpha, an honorary land economics society.

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## Members on the Move

Many congratulations to Robert Wing for his recent move to Ray Quinney & Nebeker P.C. Mr. Wing—in addition to his already impressive list of professional accomplishments—is also credited with being the “founding father” of NAFER. We wish you continued success and look forward to following your many future endeavors with Ray Quinney & Nebeker P.C. Please join us in congratulating Mr. Wing at:



Ray Quinney & Nebeker P.C. | 36 South State Street, Suite 1400 | Salt Lake City, Utah 84111 | Direct: 801-323-3666 | Facsimile: 801-532-7543 | [www.rqn.com](http://www.rqn.com)

## NAFER Associate Member Eduardo Espinosa qualifies for Full Membership



Former NAFER Associate Member Eduardo Espinosa recently qualified for full membership in NAFER when the U.S. District Court for the Southern District of Texas appointed him as the receiver in the SEC v. Marco Ramirez, et. al. Ramirez and his wife ran USA Now, LLC, a designated regional center under the USCIS EB-5 Visa Pilot Program. The EB-5 Visa Program reserves thousands of permanent residency visas per annum and encourages foreign nationals to invest \$500,000 and create 10 full time jobs in the US. EB-5 fraud victims are doubly aggrieved in that their capital is squandered and their hopes of legal immigration are trampled. No amount of monetary recovery appeases the latter loss.

Eduardo Espinosa is a businessman's legal advisor. Eddy combines legal transactional skills and business acumen to structure pragmatic legal solutions that maximize value and promote dispute avoidance/resolution. His broad business practice covers a commercial enterprise's life cycle: from formation, capitalization and governance, to mergers, acquisitions, dispositions, and liquidations.

Eddy obtained his Juris Doctor and Masters of Business Administration from Tulane University in 1995. He began his legal career investigating and prosecuting violations of the federal securities laws with the U.S. Securities & Exchange Commission. For over 15 years, Eddy has been a “deal-lawyer,” representing private clients in commercial transactions ranging in significance from the enterprise-wide to operational levels. He's been General Counsel to a multi-million

dollar food distribution company and Sr. Transactional Counsel for a billion dollar, multi-national telecommunications company. He has also represented various market participants in enforcement proceedings before the SEC, the Texas State Securities Board (TSSB) and FINRA and participated in multiple receiverships, both as defense counsel and the court-appointed receiver.

Eddy was first appointed as a securities receiver in connection with the TSSB's enforcement action against Retirement Value, a company selling fractionalized interests in life settlements through a multi-layer marketing network. If liquidated, the assets on hand would have yielded distributions of about \$0.43 per \$1.00 invested. Eddy reorganized the assets into a single portfolio; converting a series of undercapitalized assets into a viable, self-sustaining portfolio that is expected to yield distributable cash flow of about 100% of the investors' initial investment. The portfolio's maturity horizon is more than 20 years, but the Estate has already made interim distributions of approximately 10.5% of the investors' initial investment.

Eduardo serves on the Newsletter Committee for NAFER.

## Making the Most of Your NAFER Membership

As a benefit of your membership, you are entitled to utilize NAFER's online forum and e-mail list service through which members can easily and effectively exchange information.

NAFER Needs is an online forum and email list-service through which members of NAFER can easily and effectively exchange information. Need a Fifth Circuit case on *in pari delicto*? Need local counsel in Chicago? Need a sample 754 filing for the Western District of Kentucky? Simply post your "Need" on the NAFER website (www.NAFER.org) and it will be automatically uploaded to each members' login home page. In addition, weekly emails will be distributed to all members with a list of the most recent Needs posted to the website and the contact information for the person in "need."

### How It Works

Simply log in to the Members Area of the NAFER website. Your home page already has a section entitled "Recent NAFER Needs" embedded on the left column. To view a Need, click the red hyperlink. Contact informa-

tion for the person who posted the Need is displayed, as well as a detailed description of the Need and its status.

To post a new Need, click on the "Needs" link on the Taskbar; then click the "Add Need" button. Add a Title, Description, and the Date Range you would like the Need to be visible to other members. A default date range of 30 days will automatically be uploaded, but this date range can be changed by the user.

Click "Add Need" and you are done! The ten most recent Needs will appear on every members' home page, and your Need will be included in the weekly email sent to all members.

Responding to a Need is even easier through the email service. Each week you will receive with the most recent Needs posts and the contact information for the person responsible for the post. The Website Committee is very excited about the launch of NAFER Needs, and confident it will be a valuable tool for you.

NAFER NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS

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Needs  Active  Fulfilled  Expired  Search  Posted by

Need	Posted By	Start Date	End Date	Status
<a href="#">Sale of Life Estate?</a> In settlement of a fraudulent transfer claim, a receiver-client of mine accepted ownership of a residence subject to a life estate. The defendant	Jared Parrish	9/9/2013	10/9/2013	Active

**Add Need**

Submit your news, announcements or articles to  
The RECEIVER c/o Maureen.Whalen@NAFER.org.  
Next issues: Summer 2014 (August 2014).

## NAFER Board of Directors: 2012-2014 Term

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## NAFER Newsletter Committee

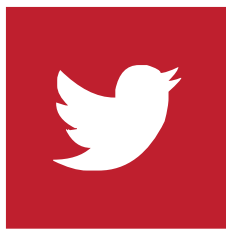
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Benette Zively	Attorney-at-Law Austin, Texas
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## Connect with other NAFER Members

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Like the Facebook page, follow the Twitter feed, and join the LinkedIn Group.  
Click on the images below:





# Citations

## American Greed Executive Producer Mike West Joins NAFER 3rd Annual Conference

<sup>1</sup> [http://en.wikipedia.org/wiki/American\\_Greed](http://en.wikipedia.org/wiki/American_Greed)

## If You Think That It Is Expensive To Hire An Experienced Receiver, Wait Until You Hire An Amateur

<sup>1</sup>Robert G. Wing and Katherine Norman, *SEC Receivers: What Are They and What Do They Do?*, Utah State Bar Journal (Nov. 2007), available at [http://webster.utahbar.org/barjournal/2007/11/sec\\_receivers\\_what\\_are\\_they\\_an.html](http://webster.utahbar.org/barjournal/2007/11/sec_receivers_what_are_they_an.html).

<sup>2</sup>Non-enforcement federal equity receiverships have increased in number since the Great Recession, but many non-enforcement business restructuring cases with complex debt and capital structures continue to be administered as bankruptcy cases despite initial concerns regarding the impact of BACPA. See J. Michael Levengood, *Intersection of Receiverships and Bankruptcy*, State Bar of Georgia Bankruptcy Law Section Consumer and Business Bankruptcy Seminar (October 28, 2010).

<sup>3</sup>*SEC v. Bernard L. Madoff Investment Securities LLC*, S.D.N.Y., Adv. Pro. No. 08-01789-BRL.

<sup>4</sup>*SEC v. Stanford International Bank, LTD, et al.*, N.D.T.X., Case No. 3-09CV0298-N.

<sup>5</sup>*SEC v. Byers, et al.*, S.D.N.Y., Case No. 1:08-cv-07104-DC.

<sup>6</sup>The filing of a bankruptcy case for an entity in receivership will cause a variety of issues for a receiver in state court cases that are outside the scope of this article.

<sup>7</sup>See Greg Hays, Ira Bodenstien, and Kathy Bazoian Phelps, *Top 10 List of Issues for Receivers in Administering a Case in Bankruptcy*, National Association of Federal Equity Receivers, Fort Worth, Texas September 13-14, 2012.

<sup>8</sup>See *NAFER Code of Conduct* (adopted July 29, 2011).

<sup>9</sup>NAFER has attempted to fill the void to provide seminars and educational opportunities regarding receivership matters as discussed in another article in this issue of *The Receiver* by Robert Mosier regarding the 2013 NAFER Annual Conference.

<sup>10</sup>See *In re Golden Grove Pecan Farm, et al.*, 2010 Bankr. LEXIS 2776 at \*2-3 (Bankr. M.D. Ga. Sept. 2, 2010); *Newton v. Golden Grove Pecan Farm, et al.*, 711 S.E.2d 351, 351-353 (Ga.App. 2011).

<sup>11</sup>See William Hoffman, *Troubled Assets: Commercial Real Estate in Receivership*, Commercial Lending Review (Nov-Dec. 2010).

<sup>12</sup>See *Am. Bridge Prods. v. Decoulos*, 328 B.R. 274 (Bankr. D. Mass. 2005).

<sup>13</sup>See *PNC Bank v. OCMC*, 2010 U.S. Dist. LEXIS 98368 (S.D. Ind. 2010) (noting in order regarding motion for leave by interested party to file complaint against the receiver that “A court-appointed receiver ‘may be held liable in negligence when he has breached a duty owed either to creditors or others with whom the receiver is in privity, or held liable for other misconduct in the administration of the receivership.’”).

<sup>14</sup>*Court Receiver Marika Tolz Begins Serving Prison Sentence*, South Florida Business Journal (Sept. 19, 2011).

<sup>15</sup>212 Fed. Appx. 811, 812 (11th Cir. Fla. 2006).

<sup>16</sup>See *United States v. Bradley*, 2009 U.S. Dist. LEXIS 36465 at \*6 (S.D. Ga. Apr. 29, 2009) (indicating the substitute receiver shall recover all fees accrued due to the misfeasance of the prior receiver).

<sup>17</sup>See *In re Charter First Mortg., Inc.*, 56 B.R. 838, 849 (Bankr. D. Or. 1985) (“If the creditor has allowed his proceeds to be commingled in the debtor’s deposit accounts, the creditor may receive only that amount determined under the formula”).

<sup>18</sup>See *In re Receivership Estate of Indian Motorcycle Mfg., Inc.*, 2006 U.S. Dist. LEXIS 52182, at \*28-29 (D. Colo. 2006) (finding that, to ensure that compromised priority claims against the receivership estate are paid, both law and equity weigh in favor of recovering windfall paid to claimants who received 100% payment ahead of claims of greater priority).

<sup>19</sup>See *Ohio Director of Transp. v. Eastlake Land Dev. Co.*, 177 Ohio App. 3d 379 (Ohio Ct. App., Cuyahoga County 2008) (reversing approval of sale by receiver of real property free and clear of liens where receiver did not: 1) present evidence of marketing or sale efforts; 2) provide notice or obtain approval of lien holder; or 3) indicate whether the property would be sold free and clear of the liens of the senior lienholder).

<sup>20</sup>See Andrea Levin Kim, *Strategic Considerations in Seeking Recovery From Directors and Officers*, ABI Bankruptcy Litigation Committee Newsletter, Vol. 10, No. 1 (Feb., 2013) (“Although a claim against a director or officer suspected of breaching duties of loyalty is a viscerally inviting target, the price for filing claims against such D&Os may be a complete bar to all other claims against professionals—even in case where the D&O misconduct was crippling to the company”).

<sup>21</sup>See *FTC v. Certified Merch. Servs.*, 126 Fed. Appx. 651 (5th Cir. Tex. 2005) (requiring the receiver to disgorge portion of compensation due to breaches of fiduciary duty by the receiver involving misrepresentation, self-dealing, and causing the company to pay certain fees and expenses incurred by the receiver without first reporting such fees to the court).

<sup>22</sup>See *F.T.C. v. Think Achievement Corp.*, 2007 WL 3286802, at \*7 (N.D. Ind. 2007) (finding that an inexperienced receiver who failed to procure insurance on an asset that was damaged was entitled to have jury determine whether the receiver was liable for damages for failing to confirm his conduct to the applicable standard of care and recognize that the receivership had an insurable interest in the property that was damaged).

<sup>23</sup>*Id.*

<sup>24</sup>See 31 U.S.C. § 3713; See also, Phillip S. Stenger, RECEIVERSHIP SOURCEBOOK, P. 103-4 (2013) (indicating that the receiver of an insolvent entity must pay the claims of the Government of the United States, including taxes, before the payment of other debts).

<sup>25</sup>*In re American Marine Holdings, LLC, et al.* Case No. 12-11354-EPK, Doc 72 (Mot. to Dismiss) (S.D. Fla. Feb. 2, 2012); but see *In re Statepark Building Group, Ltd., et al.*, Case No. 04-33916-hdh-11 (finding that a state court appointed receiver had authority to initiate a bankruptcy proceeding without an express grant of such authority in the order appointing the receiver).

<sup>26</sup>The duties, rights, and powers of a federal receiver are governed by paragraph (b) of 28 U.S.C. § 959.

<sup>27</sup>*Am. Bridge Prods. v. Decoulos*, 328 B.R. 274, 332-3 (Bankr. D. Mass. 2005) (citations omitted).

<sup>28</sup>See Amended Complaint, *Michael Alonso et al. v. Leslie J. Weiss et al.*, case number 1:12-cv-07373 (N.D. Ill. 2012) (alleging that the receiver and the attorneys for the receiver intentionally breached their fiduciary duties, committed malpractice, were reckless and grossly negligent and intentionally, recklessly or with gross negligence, disregarded their fiduciary duties of care and the best interests of parties in interest).

<sup>29</sup>See Andrea Levin Kim, *Strategic Considerations in Seeking Recovery From Directors and Officers*, ABI Bankruptcy Litigation Committee Newsletter, Vol. 10, No. 1 (Feb., 2013).

<sup>30</sup>See *Am. Bridge Prods. v. Decoulos*, 328 B.R. 274 (Bankr. D. Mass. 2005) (quoting 1 Clark on Receivers, § 53, at 58-59).

<sup>31</sup>See *United States v. Bradley*, 2009 U.S. Dist. LEXIS 36465, at \*5-6 (S.D. Ga. Apr. 29, 2009) (removing receiver due to misfeasance, appointing new party as receiver, and ordering that old receiver to retain fiduciary responsibility until the property in receivership is delivered to the new receiver); *Cavanagh v. Cavanagh*, 118 R.I. 608, 375 A.2d 911 (R.I. 1977) (indicating that the selection and removal of a receiver is a matter for the discretion of the court appointing the receiver).

<sup>32</sup>See *Dinsmore v. Barker*, 212 P. 1109, 1111 (Utah 1923) (“The court may appoint any proper person not prohibited by law.”).

<sup>33</sup>See *Herzfeld v. Herzfeld*, 285 S.W.3d 122, 131 (Tex.App.–Dallas 2009) (finding that the failure to hear appeal regarding appointment of receiver did not result in improper judgment even though receiver had no prior receivership experience, “did not understand the transaction she was to undertake, prepared erroneous documents, improperly joined motions filed by appellee in the trial court, and caused or contributed to delay in resolving the parties’ dispute”).

<sup>34</sup>See *First American Development Group/Carib, LLC v. WestLB AG*, 2010 WL 1552320, at \*13 (V.I.Super. 2010) (indicating an intent to “order the parties to brief the question of who ought to serve as a receiver and what powers that receiver should have.”).

<sup>35</sup>See *NAFER Code of Conduct*, Canon 1 (adopted July 29, 2011).

<sup>36</sup>See *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681, 685 (Cal. App. 4th Dist. 2012) (citations omitted); *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998); *Sec. Pac. Nat’l Bank v. Geernaert*, 199 Cal. App. 3d 1425, 1431-1432 (Cal. App. 5th Dist. 1988).

<sup>37</sup>See *NAFER Code of Conduct*, Canon 1 (adopted July 29, 2011).

<sup>38</sup>See Kathy Bazoian Phelps, *Is the SEC Here to Help Defrauded Victims in a Ponzi Scheme, Or Not?*, The Ponzi Scheme Blog (Oct. 24, 2013) (available at <http://theponzibook.blogspot.com/2013/10/is-sec-here-to-help-defrauded-victims.html>).

<sup>39</sup>*KeyBank Nat’l Ass’n v. Michael*, 737 N.E.2d 834, 850 (Ind. Ct. App. 2000).

<sup>40</sup>See *Shannon v. Superior Court*, 217 Cal. App. 3d 986, 998 (Cal. App. 5th Dist. 1990).

<sup>41</sup>See *Clear Creek Power & Development Co. v. Cutler*, 79 Colo. 355 (Colo. 1926).

<sup>42</sup>See *Hendricks v. Emerson*, 199 Ga. App. 208, 209 (1991).

<sup>43</sup>See *Georgia Rehabilitation Center, Inc. v. Newnan Hosp.*, 284 Ga. 68 (Ga. 2008) (“A ‘receiver’ is an officer of the court which appoints him, and his duty upon his appointment is to take possession of the

assets of the insolvent debtor for the court and to preserve those assets so that upon distribution of the assets to the creditors they will be fully available to pay the claims of the creditors.”); *Clark v. Clark*, 58 U.S. 315 (1885).

<sup>44</sup>See *In re Yellow Cab Co-op. Ass’n*, 185 B.R. 844, 852-53 (Bankr. D.Colo. 1995).

<sup>45</sup>See O.C.G.A. § 9-8-8 (“The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than the court, and must in all things obey its direction.”).

<sup>46</sup>See *Wolfe v. Illinois Fed. Sav. & Loan Ass’n*, 158 Ill. App. 3d 321, 323 (Ill. App. Ct. 5th Dist. 1987) (finding that a mortgage holder who commenced a foreclosure action and then obtained the appointment of a receiver was not liable for damage to the property when the receiver subsequently allowed insurance coverage to lapse and the property was damaged).

<sup>47</sup>Bill Hoffman, *‘Low or No Charge’ Receiverships: A Very Costly Mistake?*, California Real Estate Journal (March 29, 2010).

<sup>48</sup>Kirk S. Rense, *Illegal Agreements Between Receivers and Foreclosing Lenders*, Receivership News, page 3 (Fall 2009).

<sup>49</sup>A forthcoming article by the author will address in greater detail the liability of a receiver.

<sup>50</sup>See O.C.G.A. § 14-2-1432; *Federal Home Loan Mortg. Corp. v. Tsinos*, 854 F. Supp. 113, 115 (E.D.N.Y. 1994) (“The court that appoints the receiver determines the scope of that receiver’s authority”); Kelly M. Crawford and Charlene C. Koonce, *Unlocking A Receiver’s Arsenal: A Receiver’s Best “Weapons”* Chap. 5, p. 1 (Nov. 4, 2011).

<sup>51</sup>The NAFER Best Practices Committee is currently in the process of drafting a model federal district court order of appointment that will be posted on the NAFER website in the near future.

<sup>52</sup>See *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. Ohio 2006) (“receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained.”).

<sup>53</sup>See O.C.G.A. § 14-2-1432(b); Minn. R. Gen. Pract. 137.03 (2011) (requiring a receiver to post a bond); see also *Belk’s Dep’t Store, Miami, Inc. v. Scherman*, 117 So.2d 845 (Fla. 3d DCA 1960) (indicating that a receiver should be required to post a bond).

<sup>54</sup>See Mass. R. Civ. P. 66(b).

<sup>55</sup>See *Am. Bridge Prods. v. Decoulos*, 328 B.R. 274, 331 (Bankr. D. Mass. 2005) (citations omitted).

<sup>56</sup>See *Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554 (U.S. 1894) (finding that a receiver of a railroad who filed reports that referenced the payment of reasonable rent under a lease was not subject to sanctions even though the receiver did not receive express authority to enter a lease because: 1) the rents were reasonable and were shown on monthly reports approved by the court; and 2) the lease was a contract proper for the receiver to make and would not have been disapproved if brought to the attention of the court).

<sup>57</sup>See *Haw. Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 468 (Haw. 2007) (citations omitted); *Am. Bridge Prods. v. Decoulos*, 328 B.R. 274, 331 (Bankr. D. Mass. 2005) (citations omitted).

<sup>58</sup>See *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Utah 1985) (stating that a receiver “has only very limited powers and should apply to the court for advice and directions [since a receiver assumes the risk of liability for]...acts without court authority”).

<sup>59</sup>See *Am. Bridge Prods. v. Decoulos*, 328 B.R. 274 (Bankr. D. Mass. 2005).

<sup>60</sup>See *Fauci v. Mulready*, 337 Mass. 532, 538, 150 N.E.2d 286, 290 (1958) (“Where his judgment is likely to be questioned by creditors, prudence will dictate recourse to the court for a decree authorizing the particular action which will afford protection against later claim

that the action was disadvantageous to the estate or beyond his authority.”).

<sup>61</sup>*Clark on Receivers* § 383.1(a), Vol. 2, pg. 644.

<sup>62</sup>See *Farmer’s Savings Bank of Shelby v. Pomeroy*, 211 Iowa 337, 233 NW 488 (1930)