A Publication of the California Receivers Forum

Fall 2007 • Issue 26

RECEIVERSHIP NEWS

In Custodia Legis

Inside

BANKRUPTCY CORNER

US Supreme Court Travelers Ruling May Allow Recovery of Post-Petition Attorneys' Fees Incurred in Litigating Pre-Petition Bankruptcy Claims

BY JEFFREY I. GOLDEN, ESQ.*

(Editor's Note: This issue marks the beginning of a new regular feature—Bankruptcy Corner—that will deal with an issue of interest to the insolvency community. There is a marked crossover between receiver and insolvency groups: many receivers also serve as bankruptcy trustees and many receivership professionals also provide services to the insolvency community. We hope these pieces will inform and educate without being lethally arcane.)

Suppose a pre-petition creditor owed $25,000 finds itself litigating aggressively with the debtor post-petition, perhaps defending itself against a preference action. The creditor prevails but incurs more than $50,000 in attorneys' fees in doing so. The agreement that created the underlying debt in issue had a broad attorneys' fees provision. Could that creditor add the additional $50,000 in attorneys' fees to the original $25,000 claim?

This is a significant issue to anyone who may file or deal with unsecured claims in a bankruptcy case based upon contractual agreements.

Until recently Ninth Circuit law was that the unsecured creditor's claim would be limited to the original $25,000. But a recent Supreme Court decision—Travelers Casualty & Surety Company of America v. Pacific Gas & Electric Company—may hold that attorneys' fees incurred post-petition can be recovered by the creditor as part of its unsecured claim, boosting our hypothetical claim to $75,000. Whether this recent ruling does or does not so hold sort of depends upon who you talk to.

The issue—simply put—is whether an unsecured creditor can recover attorneys' fees incurred post-petition based on a contractual agreement which provides that the prevailing party in any litigation over the contract may recover its reasonable attorneys' fees. If the correct interpretation of the Supreme Court ruling is that a creditor can recover such

Continued on page 3...

Publisher's Comments

By Robert Mosier, Publisher*

This issue introduces a new RN feature – Bankruptcy Corner – which will discuss emerging bankruptcy issues each quarter. Many of our readers have both receivership and insolvency practices (many California receivers also serve as bankruptcy trustees), and the RN circulates to more than 1700 members of the California Bankruptcy Forum as well in addition to our state-wide receivership community.

Our initial contributor is Jeff Golden, a partner in the Orange County firm Weiland, Golden, Smiley, Wang, Ekvall & Strok, who discusses the impact of the recent U.S. Supreme Court holding in Travelers Casualty & Surety Company of America v. Pacific Gas & Electric Company on allowance of claims for contractually authorized attorney's fees that are incurred by aggrieved creditors after the bankruptcy filing. Jeff, a leading California scholar on bankruptcy issues, already serves as co-editor of the California Bankruptcy Journal, the Bankruptcy Forum's oft-cited semi-annual scholarly review of bankruptcy law. We are pleased to have his contribution.

This issue profiles Richard Kipperman, a long-time San Diego Receiver and bankruptcy trustee. In keeping with our past profiles, Richard's colorful story is quite candid and personal, with a bit of humor tossed in for good measure. We think you will enjoy it and find it illuminating.

If you have ever been flummoxed in trying to obtain and preserve computer-stored data for litigation or administrative purposes, the article on computer forensics by Ron Kaplan is a must-read. His theme – for good reason – is to prepare thoroughly and carefully before entering this minefield to ensure recovery (and admissibility) of key data.

Peter Davidson has contributed another outstanding column in his regular Ask the Receiver feature. And what RN issue would be complete without more depressing tax information and tips from our expert Chuck Rosen?

We welcome your feedback. If you have a comment or wish to make your point of view known, please drop us a line and we'll try to respond to and/or include your view in our next issue. Please enjoy.

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.*

Kirk Rense

Mr. Rense is a lawyer specializing in insolvency and in representing court-appointed fiduciaries, with more than 20 years' experience. He was a journalist before attending law school at the University of Southern California Law Center. Kirk is a California Receivers Forum, LA/OC Chapter Board Member.

In Custodia Legis

Receivership News

Published by
California Receivers Forum
954 La Mirada St.
Laguna Beach, CA 92651
949.497.3673 x 200

Publisher
Robert P. Mosier
Rmosier@Mosierco.com

Editor
Kirk S. Rense, Editor
KRense@renselaw.com
Craig Collins, CPA
Associate Editor

Associate Publishers
Kenton Johnson
Beverly McFarland
Ron Oliner
Rob Warren, III

Contributing Columnists
Alan Mirman
Heard in the Halls
Peter Davidson
Ask the Receiver
Charles F. Rosen
Taxes and the Receiver

Officers
Marilyn R. Bessey, Chair
Martin Goldberg, Chair Elect
Ron Oliner, Treasurer
Robert Mosier, Secretary
James Lowe, Project Director

Receivership News is published quarterly by the California Receivers Forum, a not-for-profit association. Articles in this publication express the opinions of their authors and do not necessarily reflect the views of the directors, officers or members of the California Receivers Forum. Articles are intended as a source of general information and should not be construed as specific advice without further inquiry and/or consultation with professional counsel.

Continued from page 1.

attorneys' fees, the decision will result in significantly increased creditor claims and may affect litigation strategies (and decisions about whether to litigate) by debtors and creditors facing bankruptcy-related litigation.

Here is how it may change past practice. Typically, at the conclusion of the bankruptcy case, the debtor or the trustee liquidates the assets of the estate and distributes those assets to creditors with allowed proofs of claim. Such unsecured claims historically include all principal debt owing plus any accrued interest and/or attorneys' fees that are otherwise allowable under applicable non bankruptcy law (state law) up to the date the petition was filed. If an unsecured claim were based upon a contract that also entitled the creditor to recover its attorneys' fees as well as interest, such interest and attorneys' fees are calculated up to (and including) the date the petition was filed, but not past that date.[1] This was premised upon interpretation of several Bankruptcy Code provisions, including Section 506(c) found in prior cases on the subject.

The 2007 United States Supreme Court Travelers[2] decision arguably changes this reasoning. Many bankruptcy professionals believe that Travelers means that unsecured creditors can assert in their claim the full amount of post petition attorneys' fees incurred related to the bankruptcy issues if the underlying contract has an attorneys' fees provision. But other professionals read the Travelers holding far more narrowly.

The Travelers Decision

On March 20, 2007, the United States Supreme Court unanimously issued its opinion in Travelers holding that it was not appropriate to disallow attorneys' fees solely because the proceeding had been the subject of bankruptcy litigation. The Court reasoned that bankruptcy law does not disallow claims for attorneys' fees based on contract solely because the fees related to litigating bankruptcy issues. The holding reversed the Nonth Circuit's earlier decision in In re Fobian[3], which held that attorneys' fees are not recoverable in bankruptcy for litigating issues unique to bankruptcy law.

In Travelers the debtor Pacific Gas & Electric Company ("PG&E") filed a petition for relief under chapter 11. PG&E had self insured its workers' compensation obligations. Travelers had issued a surety bond to guarantee payment of workers' compensation benefits. Travelers sought to assert a claim in the event the debtor defaulted on future workers' compensation obligations.

Travelers later amended its claim seeking attorneys' fees incurred in connection with the bankruptcy case. PG&E opposed this inclusion, relying on the Ninth Circuit's holding in Fobian, and the Bankruptcy Court agreed, disallowing the fees. Both the United States District Court and the Ninth Circuit Court of Appeals affirmed the trial court's ruling. The matter was then appealed to the United States Supreme Court.

The Supreme Court found that Bankruptcy Code § 502 requires that the claim must be allowed in bankruptcy unless the Bankruptcy Code expressly states to the contrary. It found no support for the Ninth Circuit's Fobian ruling, reasoning that the:

> ". . . absence of textual support is fatal for the Fobian rule . . . We generally believe that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."[4]

Because Bankruptcy Code section 502(b)(4) expressly disallows certain attorneys' fees, Congress (by implication) did not intend to bar other categories of attorneys' fees recoverable under state law that were not expressly disallowed, the Supreme Court held. Accordingly, claimants are allowed to claim post petition attorneys' fees on bankruptcy matters.

The Supreme Court premised its holding on the "plain language" of the Code rubric. This is consistent with some of the court's past bankruptcy decisions and inconsistent with others.[5] The Supreme Court declined to express an opinion on whether section 506(b) (or any other section) of the Bankruptcy Code could provide a basis for disallowing an unsecured contractual claim for attorneys' fees, however.

The debtor PG&E had argued that while Section 506(b) allows for reasonable attorneys' fees for oversecured creditors pursuant to agreement, but there is no similar section for unsecured creditors. PG&E concluded that unsecured claimants cannot collect attorneys' fees post-petition from the estate since Section 506(b) does not apply to unsecured creditors and is the only provision in the Bankruptcy Code that permits creditors to recover such fees from the estate. Others contend that because nothing in the Bankruptcy Code provides otherwise, such claims are allowable under Section 502, and Section 506(b) by its terms, does not preclude such recovery. In other words, Section 506 does not expressly state that attorneys' fees are impermissible. The Supreme Court did not reach this issue, leaving it for the Bankruptcy Court below to decide.

Pros and Cons

A Narrow Interpretation of Travelers

It may be argued that all the Supreme Court's Travelers decision holds is that the Bankruptcy Code does not generally prohibit attorneys' fees from being recovered in connection with litigating bankruptcy issues. The holding does not indicate at all whether attorneys' fees are truly allowable because of some other specific policy or statute in the Bankruptcy Code, such as Bankruptcy Code Section 506, some believe.

They argue that the Travelers decision has not changed the law at all, and contend that no post-petition attorneys' fees are permitted given the language and implications of Section 506 and various policies underlying bankruptcy law, such as equality of distribution.[6]

Continued on page 4...

Continued from page 3.

An Expansive Interpretation of Travelers

Others hold a more expansive interpretation of Travelers.[7] They argue that Travelers clearly allows unsecured creditors with contractual attorneys' fees clauses to include their fees as part of their claims. Nothing in the Bankruptcy Code expressly prohibits this, they argue. Even the Supreme Court suggests that the argument that Section 506 bars all such attorneys' fees appears inconsistent with the Fobian rule. If this were the case, the Supreme Court asserts, then all post petition attorneys' fees (not just those relating to the bankruptcy) would cease.

> "[Debtors'] new reading of the Code would prohibit all unsecured creditors from recovering contractual, post petition attorneys' fees in bankruptcy proceedings even if those fees were incurred while litigating issues of state law. . . The Fobian rule, by contrast, would allow such a recovery-even by unsecured creditors-so long as the litigation resulting in applying fees did not involve 'issues peculiar to federal bankruptcy law'. . . "[8]

The Supreme Court reasoned that such a narrow interpretation is inconsistent with even the Fobian rule, which the Supreme Court expressly struck down.

Another implication of the Travelers decision is that in a Section 365 context (which deals with the rights of lessors of real and personal property) Section 506 of the Bankruptcy Code may not apply at all, removing the impediment to collecting attorneys' fees on post-petition litigation over lessee's rights. Lessors own property while secured creditors may hold a security interest in property. Lessors of real and personal property (dealt with under Bankruptcy Code Section 365) are generally not "secured or unsecured creditors" within the meaning of Bankruptcy Code Section 506. The argument may no longer apply that since Section 506 expressly allows such fees only for oversecured creditors, it denies such fees to lessors (and others) by the implication of their omission. Travelers may open the door for lessors to argue that all post petition fees relating to bankruptcy matters in connection with lease default can and should be incorporated into the total amount of the unsecured claim, significantly increasing the dollar amount of lease rejection damages that the estate may face.

Conclusion

More questions were raised than were answered by the Supreme Court's Travelers decision. What is clear is that the Ninth Circuit's holding in Fobian is reversed. And what is certain is that there will be more litigation on these post-petition attorneys' fees issues.

[1]This article only addresses post petition attorneys' fees relating to bankruptcy matters.

[2]127 S.Ct. 1199 (2007).

[3]951 F.2d 1149 (9th Cir. 1991)

[4]127 S.Ct. at 1206.

[5]See Howard Delivery Service, Inc. v. Zurich American Insurance Co., 265 S.Ct. 2105 (2006).

[6]Equality of distribution is implicated because claims with attorneys' fee provisions would have advantages over unsecured claimants who do not.

[7]See In re Qmect, Inc., 2007 WL 1463846 (Bankr. N.D. Cal. 2007) (bankruptcy court allows unsecured creditor post-petition attorneys' fees and costs).

[8]127 S.Ct. At 1207, n. 4.

[9]For an excellent analysis of the implications of this decision, please see the next edition of the California Bankruptcy Journal, in an article entitled An Analysis of the Supreme Court's Travelers Decision and the Implications on the Availability of Post-Petition Attorneys' Fees for Unsecured Creditors, written by Jennifer M. Taylor and Christopher J. Mertens, currently law clerks for the Honorable Leslie J. Tchaikovsky, United States Bankruptcy Judge for the Northern District of California.

**Jeffrey I. Golden, a founding partner of Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP, is a bankruptcy trustee of the Central District of California and Co-Editor in Chief of the California Bankruptcy Journal. He formerly served as a law clerk to the Honorable Peter M. Ellliott and to the Honorable Calvin K. Ashland, Judges of the United States Bankruptcy Court and the Bankruptcy Appellate Panel, and is a past President of the Orange County Bankruptcy Forum.*

Jeffrey I. Golden, Esq.

Chuck Does Taxes

Are Receivers Their Brothers' Keepers? Must A Receiver Recharacterize An Entity's Tax Assumptions / Practices?

(Editor's Note: This concludes a Q & A piece by Chuck Rosen on difficult tax issues facing receivers.)

Q A receiver is appointed over an operating company that is treating all of its employees as independent contractors. The Receiver is a tax whiz and believes that most of these individuals are properly classified as employees, and not as independent contractors. Can the Receiver continue the practices of prior management in order to preserve and protect the business, or is the Receiver required to treat the "independent contractors" to employee status for tax purposes?

A If a receiver continues the (potential) mischaracterization of employees as independent contractors he or she does so at his or her own peril, as an action outside the scope and authority of his or her office and of the limited immunity a receiver may have as an officer of the court. The IRS takes the position that foreknowledge of a violation of law does not countenance a continuance of that action. It may constitute a fraud and could constitute a crime under both the Federal Crimes and Criminal Procedure codes and under state law.

If the receiver is quite sure that the vague rules in this area make a reclassification mandatory, the receiver should immediately cease the prior improper booking of employees as independent contractors, secure appropriate and signed W-4 withholding forms from the employees and commence to withhold.

The more important question is does the receiver have an obligation to file proper payroll tax returns with the IRS and EDD for all employees for current and for prior taxable quarterly periods and/or to amend previously filed returns to include all of those persons who should have been included as employees for such prior periods?

The receiver is under such a duty. Normally, the IRS will only require amended returns for the immediately preceding 12 quarters, i.e. three years. But if fraud is identified the Service may elect - and often does - to extend an audit back for a full six years. If fraud is identified, the Service may seek a federal indictment for tax crimes. The only manner in which a receiver may avoid the burden of filing amended returns is to prove to the taxing authorities (if asked) that each independent contractor filed his/her income tax returns, declared the self-employed income, and paid the obligated income tax, Social Security tax and the Medicare tax. This, of course, is an almost insurmountable process.

An existing inappropriate characterization provides a receiver with no defense for failure to file and pay correct future payroll tax returns. To fail to do so could expose a receiver to personal civil and criminal liability.

There are also associated questions. Assuming that back tax is owing, who must pay this additional tax? When? Is prior management exposed to potential criminal tax prosecution? Is prior management subject to personal assessment for unpaid payroll taxes? Perhaps we'll treat these questions in a future column.

Q A receiver is appointed over an operating company and discovers that the entity in receivership has been paying employees one-half via payroll (with proper withholdings and proper tax returns) and one-half in cash, with no reporting or withholding. What are the Receiver's responsibilities with regard to the cash payments made and unreported prior to the appointment of the Receiver?

A The same as above. Need you even ask? However, should the receiver (wrongly) elect not to file the appropriate amended/corrected payroll tax returns, at a minimum, a Form 1099 should be given to each employee for the total amount of wages paid in case. It might also be appropriate to attach a brief letter to the 1099's indicating that it is the responsibility of the employee to declare the income on their own income tax returns and to pay the taxes.

**Charles F. Rosen is an attorney with the firm Law Offices of A. Lavar Taylor and is an expert in receivership and bankruptcy tax law. Mr. Rosen served as bankruptcy advisor for the Special Procedures Branch of the Internal Revenue Service for more than twenty years.*

Charles F. Rosen

When, Why and How Should Receivers Use Computer Forensic Experts to Build an Administrative Base and Prevail in Litigation?

By Ronald E. Kaplan*

Can a receiver appointed over a business rely upon the integrity of records seized? Can he or she rely upon the truthfulness and candor of the principals and employees of the company? Sadly, the answer to both questions is "Usually not." This creates a need for computer forensics experts to vet the business records and create a trustworthy financial foundation for the receiver's administration.

Virtually all businesses use computers for record keeping and correspondence. Many businesses faced with failing finances and imposition of a receiver modify or delete damaging material, leaving little or no audit trail. In this way the computer becomes a tool for fraud and deception. But a computer forensic expert can often find and reconstruct the modifications and deletions — and in a manner that is easy to understand and will pass evidentiary hurdles.

Lawyers are learning the value of thoroughly searching electronic data. Searches by skilled experts may turn up missing documents, pertinent email messages, drafts of deleted documents, internet search activity, and a host of additional information and activity that may have a major impact on a case (or on a receiver's administration).

"...potential treasure trove..."

This potential treasure trove can't be properly accessed without the assistance of an expert. The challenge is greater than just finding the smoking gun – the expert must also locate and preserve all the data that still exists before it is (intentionally or unintentionally) made irrecoverable.

One case I worked on illustrates this. My examination of company computer records revealed that a second set of books was kept by the company, hiding on the hard drive. The records that had been produced at the request of counsel up to that point had been screened and sanitized, showing only a fraction of the real ongoing activity. My team resurrected the real, complete records and produced accurate reports and transaction logs. This allowed my client to make (and prove) a more accurate assessment of the damages caused by defendants.

Courts recognized that electronic record keeping is ubiquitous, and reported decisions have established case law governing electronic discovery procedures, cost sharing, privileges, and discoverability. For example, in adversarial discovery situations it is nearly impossible to prevent discovery of electronic data. The law is clear that employees do not have any right of privacy with respect to the information stored on company-owned computers they utilized. Further, if a personally-owned computer is used to conduct company business, that computer is also subject to discovery. New federal discovery and preservation rules instituted at the end of 2006 create additional obligations for litigants in terms of electronic data.

Most computer users cannot even remember everything they created and viewed on their computer in the last week, much less last month or last year. Users feel secure that a deleted document or email will never resurface. Wrong. The fact that virtually all computer activity is date and time stamped and retained in a computer's hard drive memory makes computers an invaluable resource for pinpointing details that are often lost or forgotten. Deleted information that still resides on the hard drive can neither be easily located and produced by a user who needs it nor wiped by a user trying to cover his tracks.

Continued on page 10...

ASK THE RECEIVER

By Peter A. Davidson, Esq.*

**PETER A. DAVIDSON, with Moldo Davidson Fraioli Seror & Sestanovich LLP located in Los Angeles, is a receiver and an attorney who specializes in representing receivers in state and federal court.*

Peter A. Davidson

Despite all the news about sub-prime lenders and single family home foreclosures or short sales, things seem to be pretty slow in the receivership world. No one has posed any questions to "Ask the Receiver". As a result, instead of answering questions I will highlight a few recent opinions dealing with receiverships which, although not earth shattering, highlight a number of well established receivership concepts.

In In re Zayas, 347 B.R. 466 (Bankr. M.D. Fla. 2006) the issue was whether the receiver was the agent for the creditors who had the receiver appointed, under Texas law, so that notice of the debtor's bankruptcy proceeding sent to the receiver would be sufficient notice to the creditors to bar any complaints by the creditors objecting to the debtor's discharge.

The court held that under Texas law, like in California, a receiver does not act as the agent of the party that had him appointed or any of other party, instead the receiver is an "officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership". Id. at 448-49. The court went on, citing an Ohio case, that "a receiver is not an agent, but an officer of and controlled by the appointing court, and subject alone to its directions. Wholly independent of, and not subject to the control of the either debtor or creditor, entirely indifferent as between the parties to the cause, he exercises his functions under the order of the court appointing him, for the common benefit of all parties in interest". Id. at 449. As a result, the bankruptcy court held the receiver had no duty to the creditors who had him appointed to inform them of the debtor's bankruptcy filing and, hence, notice to the receiver of the filing was not notice to the creditors. The creditors were, therefore, given additional time to file a complaint objecting to the debtor's discharge.

In In re Wayne Engineering Corp., 2007 WL 704521 (Bankr. ND. Iowa). The issue was the obligation of the debtor to pay on a contract the receiver had entered into with a consultant and the priority of the consultant's claim in the debtor's bankruptcy case. The receiver had entered into an agreement providing that the consultant would take steps to sell the entity in receivership or find an alternative loan to take out the existing lender and would act as the receiver's exclusive sales agent in connection with any transaction. The consultant was to get a fixed fee of $15,000 and a 5% success fee. Prior to the bankruptcy the bank, which had the receiver appointed, sold its debt to a third party. The consultant was not involved in the sale of the bank's debt. Both the bank and the receiver refused to pay the consultant under the agreement. In resolving the issue, the bankruptcy court acknowledged that under 11 U.S.C. §543(c)(1) where a custodian (i.e. a receiver) is superseded by a bankruptcy filing, the court, after notice of a hearing, shall protect all entities to which a custodian has become obligated which respect to such property of the debtor or of the estate. "Thus, the court is required to provide for the payment of all the receiver's unpaid bills". However, the court noted, "An entity providing services to a receiver, which were beneficial to the succeeding estate in bankruptcy, is entitled to an administrative expense only to the extent the receiver would be entitled to such treatment under §503(b)(3)(E). The burden is on the claimant to show entitlement to an administrative expense priority". The court held that because the bank sold its debt, the consultant was not entitled to a fee under its contract with the receiver, because the receiver received nothing from that transaction and, hence, there was no tangible benefit to the succeeding bankruptcy estate. As a result, the consultant was not entitled to an administrative claim in the bankruptcy case.

In a prior Ask the Receiver column, the issue of allocating the costs of a receivership was discussed. It was there pointed out that although normally the costs of a receivership are paid out of the property under the receiver's custody and control, the court has the discretion to allocate the costs to either the plaintiff, the defendant or both. In a slightly unusual application of that rule, the Ninth Circuit, in an unreported decision, affirmed the district court's adding the costs of a SEC receivership to a disgorgement judgment obtained by SEC against the defendant. In SEC v. Presto Telecommunications, Inc., 2007 WL 1695875 (9th Cir.) the defendant argued the district court erred in imposing these costs on him, citing the Supreme Court's decision in Atlantic Trust Co. v. Chapman, 208 U.S. 360, 375-76 (1908) which recognizes the general rule that liabilities a receiver incurs are chargeable to the property under the receiver's custody and control. The Ninth Circuit, however, held that the district court did not abuse its discretion in imposing the fees and costs of the receivership on the defendant, reasoning that the investors the defendant defrauded should not, in effect, be liable for the receiver's fees and costs. Instead, it would be more equitable to impose those costs on the defendant. The Ninth Circuit held the district court's ability to allocate the receiver's fees and costs "derives from the inherent power of a court of equity to fashion effective relief."

David L. Ray
Saltzburg, Ray & Bergman LLP
Tel: 310-481-6700
dlr@srblaw.com

is pleased to announce
his appointment as

Receiver for Prestholt & Fidone, LLP
A law firm dissolution receivership

Superior Court
County of Los Angeles

David J. Pasternak
Pasternak, Pasternak, & Patton, A Law Corporation
Tel: 310-553-1500
djp@paslaw.com

is pleased to announce
his appointment in
Comerica Bank v Lexington 800, LLC

as Special Master of the 79 unit apartment/condominium complex 800 Lexington, El Cajon California

Superior Court
County of San Diego
(East County)

David J. Pasternak
Pasternak, Pasternak, & Patton, A Law Corporation
Tel: 310-553-1500
djp@paslaw.com

is pleased to announce
his appointment in
Comerica Bank v 520 Mollison, LLC

as Special Master of the 68 unit condominium development at 520 Mollison, El Cajon California

Superior Court
County of San Diego
(East County)

Robert P. Mosier
Mosier & Company, Inc.
Tel: 714 432-0800 x222
rmosier@mosierco.com

is pleased to announce that,
in his capacity as President and CEO of

McGaw Property Management, Inc., a 38,000 sf warehouse has been sold for $5.6 million to facilitate the wrap-up of a related bankruptcy case

U.S. Bankruptcy Court,
Central District of California
Santa Ana Division
James J. Joseph Chapter 7 Trustee

Robert P. Mosier
Mosier & Company, Inc.
Tel: 714 432-0800 x222
rmosier@mosierco.com

is pleased to announce his appointment as

Receiver in the matter of Awanda vs. Western Development to manage a medical office building pending resolution of litigation over encumbrances

Superior Court
County of Orange

David Wald
Wald Realty Advisors, Inc.
Tel: 310-979-3850
Dwald@waldrealtyadvisors.com

Is pleased to announce
the firm's engagement

To market and sell the note for the 52 unit Atlantis Townhomes in Northern California

James H. Donell
Jalmar Properties, Inc. AMO
Tel: 310-207-8481
james.donell@jalmar.com

is pleased to announce
his appointment as

Receiver of Real Property
Parviz David Mehrabi vs. Elias Rochel, et al

Superior Court
County of Los Angeles

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

is pleased to announce
his appointment as

Receiver for Belaire Boca, a 562 unit condominium conversion

Circuit Court of Florida
County of Palm Beach

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

is pleased to announce
the completion of his duties as

Receiver for San Ramon, a 280 unit condominium conversion

Superior Court
County of San Diego

Donald G. Savage

Donald G. Savage. Receiver

Tel: 510-547-2247

donald.savage@comcast.net

is pleased to announce
the successful marketing and sale of

Decker Island, Solano County

Superior Court
County of San Francisco

Edythe L. Bronston

Law Offices of Edythe L. Bronston

Tel: 818 528-2893

ebronston@bronstonlaw.com

is pleased to announce
her appointment as

Provisional Director for
MSMR, Inc., an Operating Company

Superior Court
County of Los Angeles

Michael A. Grassmueck

Grassmueck Group

Tel: 213-999-7821

mgrassmueck@grassmueckgroup.com

is pleased to announce changes
in his appointment from

Corporate Monitor to Full Equity
Receiver for Securit

District of Georgia
Atlanta Division

Robert C. Greeley

Greeley, Lindsay Consultant Group

Tel: 916-484-4800

RGreeley@Greeley-Group.com

Is pleased to announce
his appointment as

Receiver for Wolf Ranch 160 LLC,
a 160 Unit Condominium Project

Superior Court
County of Sacramento

Theodore G. Phelps

Phelps Consulting Group

Tel: 213-629-9211

tphelps@phelpsconsulting.com

is pleased to announce
his appointment as

Operating Company Receiver for
Bodice 'N Knit, Inc.

Superior Court
County of Los Angeles

Continued from page 6.

When is Forensic Searching Cost Effective?

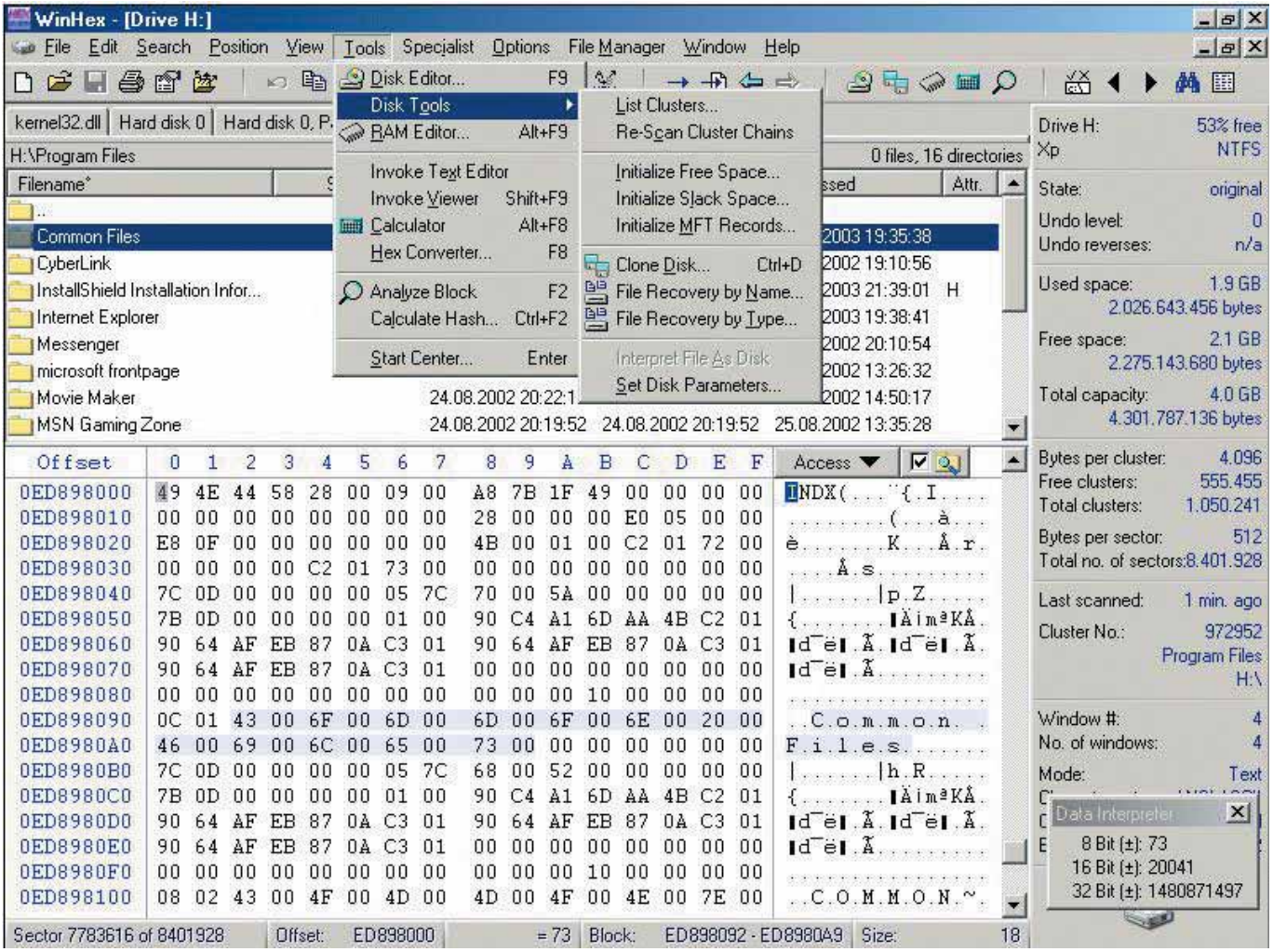
Cost is always a factor when conducting computer investigations. All the potential "hardware suspects" must be identified, evaluated and prioritized. Consideration should be given to searching file servers, email servers, hard drives of local machines, and Blackberry or other PDA (personal digital assistant) devices, depending upon what is in issue. It can be very expensive (if even possible) to obtain data from third party service providers like AOL, Yahoo, Gmail and host of others. Gaining access to and locating relevant data is far more likely in hard drives under the litigant's control.

Determining what to search can be very difficult, especially if you don't know the precise object of your searches. I have been involved in cases where the contract at issue was believed to be fraudulent. We identified the computers where the document could have been produced and searched using words believed to be unique to the document. We found multiple copies of the document on a single hard drive – not an unusual result.

Where the search is of a more nebulous nature, like finding activity documenting intellectual property theft, structuring and executing the search is much more difficult. These searches are often an iterative process, where the list of search terms grows as initial search results are reviewed. The best places to start are local hard drives of any individuals who might have created or received any relevant documents or email. Hard drives from these PCs must be preserved at the earliest possible time. It may also be very important to preserve other network devices like firewall machines, DHCP servers, file servers, etc., depending on the goals of the forensic examination.

"...spoliate hard drive data."

I recall a matter where we fought hard to force the plaintiff to produce the hard drive from his laptop computer. While we were unable to get the plaintiff to produce the hard drive to us, we were able to have the drive examined and data recovered by a third party expert. This produced a report listing all recoverable files on the drive — several thousand pages of file names with associated file dates and times. Our analysis of the report led to the conclusion that the plaintiff lied in his deposition about when the laptop was last used and about his efforts to spoliate hard drive data. We presented our evidence to the Court, and shortly thereafter the plaintiff changed his demands and agreed to a settlement.



This is the view a forensic expert might see when a search for the characters "Common Files" is executed—the view of computer data as it is stored on a hard drive, called hexadecimal and found in the columns labeled 0 through F, and the more human readable equivalent of the data, called decimal format, on the right. Notice that "Common Files" is highlighted in the upper section and below it is highlighted in both hexadecimal and decimal formats.

Continued on page 11...

Continued from page 10.

What Is the Cost of a Forensic Search?

There are three categories of search cost: preservation, examination and reporting. In the preservation step, computers are forensically imaged and the entire disk is digitally copied. In other words, the entire 100GB of a 100GB source drive is placed onto a destination drive, even if the source drive shows only partial use. It is very important that all potentially valuable drives are imaged (preserved) as soon as possible. The cost of preservation, i.e. the difficulty and time required to create a valid image, depends upon the number of drives, the size of each drive, the drive interface technology (e.g. SCSI interface, RAID, IDE) and the reliability of the data on the drive. A good rule of thumb is 2 to 4 hours per drive.

Drive examination costs are even more difficult to anticipate because of the variety of applications and data formats that may be present. This requires the following steps:

- Loading the preserved image into the appropriate search software;
- Defining and loading the loading terms;
- Launching the search;
- Reviewing the results;
- Review of the results may involve manual filtering of the search hits.

The final cost category is reporting. The purpose of the report must be considered. If, as is often the case, the report is to go to opposing counsel for privilege/privacy review, a report which enables the recipient to review and mark privilege/privacy items must be created. It must be done in a format consistent with the software available and must be simple to use. The amount of data selected for the report, the purpose of the report, and the format(s) of the data reported all contribute to the cost.

Hourly rates for services vary between $100 and $500 per hour, depending on the testifying experience, technical expertise, and geographic location of the forensic experts involved. It is imperative that the processes utilized do not compromise the value of the data under examination when dealing with electronic data. A documented chain of custody and use of proper, defensible tools and procedures are critical to establish and preserve the credibility of the information found.

Computer forensics experts are expensive, trying to save a few dollars by using a computer technician as a substitute can be a mistake. A technician may find what you are looking for but, in the process, may contaminate the hard drive and render the evidence inadmissible or invalid. Be assured that the validity or authenticity of the "smoking gun" data discovered will be challenged.

What Is the Admissibility of the Discovered Data?

Electronic data and the associated metadata (generally defined as "data about data") can make electronic evidence more valuable than hard copy evidence. Multiple versions of a single email or word processed document often can be located on a hard drive. The date and time stamp on the electronic file can validate the date and time the document was created. Attempts to manipulate the system data or time stamp can be found in system files. The date of hard copy documents is far more difficult to crosscheck. Further, electronic data may make it possible to establish the context of a single document.

Computer forensic information can be misinterpreted. In a recent case experts for opposing council interpreted the presence of a very large amount of zeros (or blank space) as evidence of data spoliation. While it was unusual to see such a large amount of unused disk space, a careful examination of the data on the drive and a few questions to the user of the computer established a provable and entirely innocent explanation for all the blank space.

Often the subject of the dispute is the date when an agreement was made, when correspondence was sent, or when funds were paid or received. If electronic records are maintained the computer's method of logging, organizing and sequencing information can provide an option for independent validation. Email or other computer records when printed can be manipulated to support the position of one party. But the electronic version of the very same record contains information

Continued on page 12...

Continued from page 11.

not available in the printed form, information that may enable validation of the record or document.

What Is the Likelihood of Success?

One can't establish a likelihood for the success of electronic discovery – it is as variable as the likelihood of success in non-electronic discovery situations. But estimates are that as many as 90% of documents created on a computer are never printed. Not looking for electronic evidence may mean you are looking at only 10% of the documents created. Information on a computer hard drive may establish when an employee was at work, what he or she was working on on a particular day, whether they were using company time for non-work related activities and an array of other information not available elsewhere.

When Should One Contact the Forensic Expert?

The first rule of evidence is to preserve. Since electronic data is very volatile, the best time to preserve is immediately. You may not get everyone to agree on what is relevant and how to screen out privileged or private data, but that should not stop a preservation effort. Hard drive data can be preserved and handed over to a neutral to hold until a procedure for extracting relevant data can be established. The courts recognize the criticality of preserving electronic data at the earliest point possible. Preservation must be done properly, documented and a chain of custody established. If this is not done by an experienced professional, expect your findings to be flawed and/or challenged. An experienced professional can also be helpful in providing guidance on what to examine, providing questions for technical personnel, and to help in establishing a discovery plan and priorities.

To Summarize...

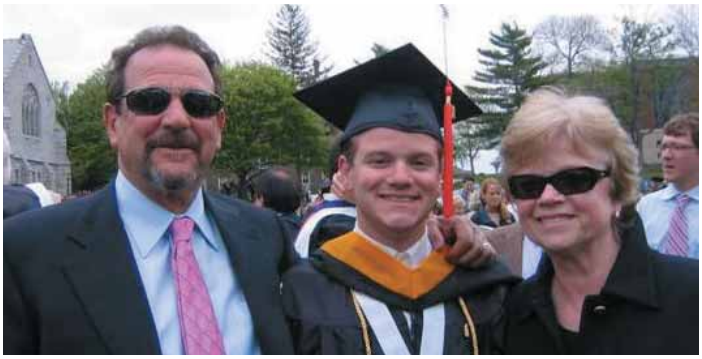
In summary, computer forensic investigations are combinations of art and science. The art involves how to get to the core documents, to the smoking gun. Individual disk drives are very large reservoirs of information. The investigator's job is to assist counsel in establishing priorities for searching drives, directories and document types. This is where the experience of the examiner and the art of forensic examinations come in.

The science aspect encompasses the tools used to capture, sort and select the data for review by counsel. An expert brings a wealth of knowledge about how computers operate and where programs and operating systems store data or encode information about where and when information was placed on a computer's hard drive. Those experts who excel at combining the art and science of forensic searching are most helpful in supporting and assisting counsel in making those arguments that win cases.

**Ronald E. Kaplan, a nationally-published management consultant and computer forensic expert with SICons in Los Angeles, holds an MS in computer science and an MBA in business administration from UCLA. He has been involved in computer forensics for more than 10 years, has testified and performed expert examinations for a wide range of industries and many law firms. He is frequently quoted in publications such as Forbes and PC Week. His testimony was cited by name by California Appellate Judge J. Epstein in a 1999 precedent setting case related to terminating sanctions for computer data spoliation, R.S. Creative, Inc., vs. Creative Cotton, Ltd., 75 Cal. App. 4th 486 (1999). Mr. Kaplan can be reached at (310) 551-0400 ext. 527 or at rkaplan@sicons.com.*

Ronald E. Kaplan

Vicissitudes of Fate led Richard Kipperman to a Career as Business Consultant, Receiver and Long-time Bankruptcy Panel Trustee



Richard and his wife Bonnie Kipperman, who also provides professional services in bankruptcies and receiverships, flank their son Sean at his recent graduation ceremony from Hobart College, located in Geneva, New York. Their other son, Jamie (not pictured), lives and works in West Los Angeles.

BY RICHARD M. KIPPERMAN*

"I am not an adventurer by choice but by fate."

~Vincent van Gogh (1853-1890)

This seems to be a common refrain running through the professional profiles in the Receivership News. It does not appear that any of us thought about becoming a receiver or representing receivers while we were in college. I am not aware of any receiver training courses in undergraduate or graduate school. It was not an early career goal.

Like (it seems) everyone else, I have come to this work by accident. I became involved with a family retail business that went through some troubles, and then helped a friend in the construction business by assisting in a partnership buy-out and debt restructuring. This led me to a working relationship with Ken Henry, creating and developing a turn-around business, Corporate Management, Inc.

Most of the attorneys we talked to in connection with forming our business said they recommended obtaining the appointment of bankruptcy trustees to their clients with financial troubles. So naturally, after learning to spell bankruptcy, our company jumped into the process of becoming a bankruptcy trustee. Fortunately for me Mickey Fredman, an old family friend, was deeply involved in the bankruptcy arena. He introduced Ken and me to the clerk of the Bankruptcy Court for the Southern District of California in San Diego, and we later met with the bankruptcy administrator. Fortunately for us, our new firm was selected as the next panel trustee for the Southern District of California. That was in September 1986.

One of the first documents that came across my desk was an ex parte motion for relief from stay. Remember, I had just learned how to spell bankruptcy and knew little more. I did not understand Latin or know the difference between Chapters 7, 11, and 13. So, I called the attorney who filed the motion – Marty McGuinn – with a few questions. He asked me what I didn't understand. I started with "ex parte" and the rest is history. I am not an attorney or a CPA. I am a "generalist" who knows a little about a lot of things – most importantly, I know when to get help.

Aside from my background in business, my most fruitful learning grounds were at home around the dinner table and during my service in the Marine Corps. My parents operated a very successful clothing store. Business was not an unusual topic at the dinner table. I learned an important business principle: "No sale is complete until the customer is satisfied."

I like to think Corporate Management has built its success by always being responsive. I understand that whether acting as a receiver or as a bankruptcy trustee I am in the service business. No, the persons I work with are not all customers, but they all have questions or comments that need my attention. Whether they are out of the money, are way out in left field, or the person that got me employed, each deserves my attention and a return call.

One of the other important influences on Corporate Management's business model was my time in the service. I ended up in the Marine Corps trying to avoid going to Vietnam. I rushed into graduate school at San Diego State University when President Johnson said that even if you were married and had one child, you would still be drafted – I was single with no kids, and school looked good to me. Then the government took away deferments for nonessential majors. Working on an MBA did not qualify me for a deferment any longer, but the Marine recruiter told me I could finish out my degree or two more semesters, whichever came first. I signed up. I thought "Hey, this is not a war! It will be over in a year, and I'll never have to serve in Vietnam."

Wrong! I had to report to the Marine Corps in February, 1967, for the most interesting three years and twelve weeks of my life.

My time in the Marine Corps has had a great influence in my life and business. I learned there are two really important things in life (at least after three weeks in the bush without a change of clothes and not enough water to drink, forget bathing). They are a hot shower and a cold beer. Maybe it is an over simplification, but it certainly makes dealing with the day-to-day problems of debtors and creditors less difficult.

One of the theories of leadership that has helped me in the performance of my duties as receiver is what I was taught at the Marine Corps Basic School: "Make a decision Lieutenant." I watched, first hand, many men die because the company commander did not make a decision. So I make decisions. If they are wrong, I change them.

The Marine Corps uses many acronyms in its training. One of the most memorable and meaningful for me is the "7 Ps" – proper prior planning prevents piss poor performance.

I like to say Corporate Management comes in after the suits leave. We sweep the stuff out of the corners, put it in cute little plastic bags, and take it to the dump.

Continued on page 14...

Continued from page 13.

We do that and we take the leadership role in the cases to which we are appointed. We perform most of the administrative tasks, and we employ professionals as needed to deal with the tasks we feel are best handled by specialists. My support staff holds everything together. I am blessed with people who know and care.

Over the past twenty years I have held appointments as Chapter 7 trustee, Chapter 11 trustee, as examiner, a post confirmation liquidating agent, a liquidation trustee, a litigation trustee, a responsible natural person, a receiver in municipal, state, and federal courts, a "quasi receiver," a special master, a referee and a provisional director, to name only a few.

My personal life has been great, although it probably blends in too much with my business life. My wife Bonnie and I have been married twenty-five years. She has been a great supporter. She keeps me on track, providing invaluable insights and thoughtful advice. Bonnie is a residential real estate agent who has provided services in bankruptcies and receiverships. My step-son, Jamie, lives and works in West LA, and our son, Sean, recently graduated from Hobart College and is currently evaluating a career as a doctor. He has attended at least ten California Bankruptcy Forum conferences with me over the years.

I like to travel, cook, golf, and ski. Through the years I was fortunate to serve in many organizations, including as a founding director of the San Diego Receivers Forum, as a director of the California Receivers Forum, as director of the San Diego Bankruptcy Forum, as a director of the California Bankruptcy Forum, as a founding director of the Coalition for Consumer Bankruptcy Debtor Education, and as president of the National Association of Bankruptcy Trustees.

As Robert F. Kennedy said, "Like it or not, we live in interesting times." I like it.

Reevaluating his priorities, U.S. Marine Richard Kipperman hones his business education in An Hoa Valley, Republic of Vietnam, in the summer of 1968.

Richard M. Kipperman is the President of Corporate Management, Inc., a business consulting firm based in San Diego, and is a receiver and long-time member of the panel of trustees of the United States Bankruptcy Court, Southern District of California.

THE LIST

While there is no court-approved list of Receivers, the following is a partial list of Receivers who are members of the California Receivers Forum and have contributed to this publication.

AREA	PHONE	E-MAIL
Bay Area		
♦ David A. Bradlow	415-206-0635	bradlow@davidbradlow.com
♦ Dennis P. Gemberling	415-434-0135	dpg@perrygroup.com
■♦• Beverly N. McFarland	916-783-3552	beverlygroup@att.net
• Donald G. Savage	510-547-2247	donald.savage@comcast.net
♦ Kevin Singer	415-848-2984	Kevin@receivershipspecialists.com
David A. Summers	925-933-2875	davidsummers8@aol.com
Douglas P. Wilson	619-641-1141	dwilson@douglaswilson.com
Sacramento Valley		
■♦• Marilyn Bessey	916-930-9900	Marilyn.Bessey@eFMT.com
Robert C. Greeley	916-484-4800	rgreeley@greeley-group.com
■♦• Scott Sackett	916-930-9900	Scott.Sackett@eFMT.com
♦ Kevin J. Whelan	916-783-3552	kwhelan.beverlygroup@att.net
Fresno Area		
♦ Clifford Bressler	559-298-1089	cliffordbressler@earthlink.net
♦• Steve Franson	559-930-8119	steve@stevefranson.com
♦ James S. Lowe II	559-269-0484	jslowe@lemoorenet.com
♦• Hal Kissler	559-435-1756	hkissler@mancoabbott.com
Los Angeles/Orange County/Inland Empire		
■♦• Edythe L. Bronston	818-528-2893	ebronston@bronstonlaw.com
Robert Crane	949-646-2903	rcrane6586@aol.com
■♦ James H. Donell	310-207-8481	james.donell@jalmar.com
■♦ Steve Donell	310-207-8481	steve.donell@jalmar.com

AREA	PHONE	E-MAIL
Los Angeles/Orange County/Inland Empire		
♦• David A. Gill	310-277-0077	dag@dgdk.com
Michael D. Myers	909-398-4200	mmyers3395@aol.com
♦• George R. Monte	626-930-0083	montegr@aol.com
■♦• Robert P. Mosier	714-432-0800	rmosier@mosierco.com
■♦• David J. Pasternak	310-553-1500	djp@paslaw.com
♦• James L. Peerson, Jr.	323-954-7575	peergroupcrop@sbcglobal.net
♦ Theordore G. Phelps	213-629-9211	tphelps@phelpsconsulting.com
■♦ Gary A. Plotkin	818-906-1600	gplotkin@prnlaw.com
John Rachlin	310-552-9064	John@receivershipspecialists.com
■♦• David L. Ray	310-481-6700	dlr@srblaw.com
♦ Thomas A. Seaman	949-222-0551	tom@thomasseaman.com
♦ Kevin Singer	310-552-9064	Kevin@receivershipspecialists.com
♦• William E. Turner	714-228-9153	wturner145@aol.com
■♦ David D. Wald	310-979-3850	dwald@waldrealtyadvisors.com
■♦• Robert C. Warren III	949-585-7660	rob@investorsHQ.com
♦• Adrian Young	909-945-4586	adrian@delmar1.com
Andrew R. Zimbaldi	714-751-7858	azimbaldi@aldenmanagement.com
San Diego Area		
■♦ M. Daniel Close	858-792-6800	closeedr@msn.com
• William J. Hoffman	858-720-6701	bill.hoffman@trigild.com
Douglas P. Wilson	619-641-1141	dwilson@douglaswilson.com
Ventura County Area		
Robert Gonzales	805-445-9182	robert@sedquaere.com

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

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

■ The square indicates those who facilitated the October 2004 Loyola Law School course.

U.S. Trustee approved course

•

Use 24 hours a day

•

Log in, log out and return to where you left off

•

$39.95 includes 2nd course and certificates for co-debtors

•

All of our students pass

www.SmartMoneySense.com

Smart Money Sense...

Pre-Discharge Internet Debtor Education

"I was more than pleased with the program, its information and your exceptional service. Thank you for your kindness and care. I will be giving my attorney the information regarding your course."

— Carri, California

- Smart Money Sense is a U.S. Trustee and Bankruptcy Court approved Financial Education Course required for a discharge certificate
- Just log on at ww.SmartMoneySense.com, register and take the course
- Certificates issued via email, fax or mail within 24 hours of completion
- Course cost is $39.95 and includes certificates of completion for both individual and co-debtor cases
- Students pay on-line with a debit card or send a money order

A Better Financial Education, Inc.
One Capital Mall, Suite 200
Sacramento, CA 95814
Tel: 877-930-9600