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RECEIVERSHIP

NEWS



SPECIAL REAL ESTATE MARKETING ISSUE

Commercial Real Estate Dispositions 101: A Primer for Receivers

By KEVIN P. CAVANAUGH, CPA*

In the course of administering a receivership estate, a receiver may be granted power by the appointing order to dispose of a commercial real estate asset. Even absent authority to market and sell the property, the receiver can always enhance the prospect of the property's ultimate sale or accelerate the timing of a sale by preparing and organizing information for ultimate delivery to prospective purchasers or real estate brokers. Both groups will benefit from the receiver's knowledge gleaned from operating the property. What information will be helpful to the marketplace?

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Auctions: Resolving the “Distressed Receiver’s Dilemma”

By MIKE WALTERS AND STEPHEN KARBELK*

Having worked with many receivers around the country, and having occasionally served as receiver, we have come to identify what we call the “Distressed Receiver’s Dilemma.” Like being the fifth person on a double date, a receiver sometimes has trouble becoming comfortable in certain situations because of the high level of scrutiny afforded a receiver’s actions and the actual and potential liabilities every receiver takes on.

A commonplace distressed situation arises where a lender seeks and the borrowers contest appointment of a receiver over a sub-standard and mostly vacant apartment building, for example, or over a shopping center that has lost its anchor and the smaller tenants have

vacated. The borrowers/defendants think they can turn the property around, but the lender/plaintiff no longer trusts the borrowers and wants an independent agent to take control. Add to this contentious situation the fact that potential purchasers of the property already smell blood in the water and want to try to steal the property at a bargain price through a quick, non-competitive sale.

In addition to these competing agendas, there is also the compensation dilemma. If a receiver facilitates a quick sale, he or she may be criticized for insufficient marketing.

But if the receiver takes his or her time in marketing the property, incurring fees in the interim to maintain the property, she or he may

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Publisher's Comments

BY ROBERT MOSIER, PUBLISHER*

This issue features two excellent articles on sale of real properties by receivers - both how to prepare a property for marketing, and sale by auction as an alternative to a traditional commercial listing. Both articles will conclude in our Spring, 2006 issue. We also focus on recent seminars sponsored by the LA/OC Chapter of the Forum. Current, topical seminars on important issues are a principal benefit of CRF membership, along with receipt of the Receivership News.

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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.



Kirk Rense

Commercial Real Estate...

Continued from page 1.

Every property has distinctive, idiosyncratic features. From retail shopping centers to hotels and for every kind of commercial property in between, what information is required by the marketplace will depend on each property's attributes. A non-exhaustive list of information that may satisfy a prospective purchaser's informational needs (although additional data may be needed to evaluate a particular property) includes:

- Site plan;
- Lot size and zoning information;
- Architectural drawings;
- Photographs (both aerial and ground level);
- Legal description;
- Title commitment;
- Narrative portions of an appraisal;
- Capital expenditures (details of last 3 years, current and planned);
- Real property tax bills (last 2 years and current);
- Governmental inspection reports (description and status of any violations);
- Utility bills (one year);
- Licenses (description and name of licensed entity);
- Lease(s), sublease(s) and/ or operating agreement(s);
- Service agreements (cancellation rights/penalties);
- Occupancy information (current YTD and last two full years, both detail and summary information);
- Competitive market analysis;
- FF&E inventory;
- Environmental study - Phase 1;
- Life and safety information/inspections;
- Flood plain information;
- Income Statements (current YTD and last two full years, both detail and summary information);
- Balance Sheet (current and last two year-ends, both detail and summary information);
- Ground Lease.

This information should be well-organized and saved electronically for ease of transmission to the interested parties. It is useful to provide a detailed checklist of such items as a record of what was sent, including columns (a) with brief descriptions of each item and (b) identifying whether the information is available from a public source (tax assessor, recorder, superior court, etc). This column should also include the source contact information, including web site/email address, physical address together with both telephone and facsimile numbers. In the event that an item is described on the checklist but not transmitted, an explanation as to why it is omitted will help reduce further inquiries from prospects.

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Continued from page 2.

As any receiver can attest, information is often either hard to come by or of dubious reliability (at best), so the source of all information should be clearly indicated on the document(s) and should agree with the source identified on the detailed checklist. As an additional precaution, this checklist should include many of the disclaimers discussed below.

Though the receiver will disclaim the accuracy of the information and will make no representations or warranties, the disclosure of and accuracy of all relevant property information and facts will (a) limit post-closing issues and (b) save both time and money. Obviously, there are heightened risks to a buyer purchasing distressed real estate. Any inaccuracies in the information provided to potential purchasers will cast doubt on all of the information provided, leading to even greater uncertainties. Increased uncertainty equates to increased perceived risk, leading to increased return expectations and, consequently, a lower sale price.

A similar result occurs where a prospect receives incomplete information: the later discovery of undisclosed relevant information inevitably prompts the unanswerable question "what else has not been disclosed?" This uncertainty also exerts downward pressure on property value.

Inaccurate or incomplete disclosures inevitably result in the prospective purchaser spending more time in fully evaluating the property, which results in additional expense to the seller (additional expense of funding of the property's operation and/or the opportunity cost of the non-working capital). This raises the next topic – the importance of making detailed disclaimers about the information provided to prospects.

DISCLAIMER

Precautions should be taken to protect the receiver from liability that could result from disclosure of information about the property even where the receiver retains the services of a professional real estate

broker to market the property. The receiver's primary precaution and first line of defense is the inclusion of a disclaimer in the body of the information transmittal cover letter and on every page of the information provided, if feasible. If placing a disclaimer on every page of the information provided seems excessive or hyper-cautious, much the same effect may be accomplished by placing the disclaimer in the transmittal letter and the document checklist. Each receiver's perceived exposure and risk tolerance will decide the issue.

Disclaimer language can be tailored to a particular property, but the following basic elements to be included in a disclaimer are unchanging (my commentary on the crux of the disclaimer language is in parentheses):

The information provided was obtained from sources believed to be reliable (however the difference between what we believe and reality could be enormous);

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Seminar on Receivers, Provisional Directors and Special Masters Draws 50 in Downtown LA

By ALAN M. MIRMAN*

How to choose the optimal equitable remedy for a given corporate or partnership dispute – appointment of a receiver, of a provisional director or of a special master – was the subject of a special luncheon seminar produced by the CRF's Los Angeles/Orange County Chapter in downtown Los Angeles on November 14, 2005.

More than 50 attorneys and receivers attended the program, which examined the comparative benefits and detriments of each type of quasi-judicial officer in a given setting. David J. Pasternak, Esq. of Pasternak, Pasternak & Patton moderated the panel, squeezing a great deal of material into the hour-long program.



Equitable Remedies Panelists – Providing their expertise to the assembled attorneys and receivership professionals were (L-R): The Honorable Anthony J. Mohr, LA Superior Court; Michael Wachtell, Esq.; Cynthia Cohen, Esq. Moderator David Pasternak, Esq. is at far right.

The distinguished panel included: The Honorable Anthony J. Mohr, Los Angeles Superior Court Judge; Cynthia Cohen, Esq. of Paul, Hastings, Janofsky & Walker; and Michael Wachtell, Esq. of Buchalter Nemer, which also hosted the program in its new Los Angeles offices.

Points stressed and program highlights included:

- Mr. Pasternak made the importance of a case-by-case evaluation of which of these remedies (or other provisional remedy) will most likely lead to the desired litigation outcome, given the particular facts and economics of each case.
- The panel noted that the receivership remedy enjoys a major benefit in the degree of judicial immunity conferred upon the appointed person by statute. Provisional directors

do not have the benefit of such statutory immunity. Another unique aspect of the receivership remedy noted is the right of the receiver to seize assets (if such right is included in the appointing order). Should a party block or interfere with a receiver who is carrying out her or his duties set out in the appointing order, the receiver's remedy is to seek special instructions from the appointing Judge. The receiver can recommend a contempt citation be brought against the offending person or entity.

- A less intrusive equitable remedy appropriate in some circumstances is the appointment of a special master. Instead of directing the special master to take control of the property or business in dispute or affected by the litigation, the order appointing a special master may charge him or her to investigate certain issues, and then report the findings to the court.
- Judge Mohr pointed out that receivership is considered a drastic remedy, and that the probable costs of a receivership must be carefully evaluated and considered before an appointment is made. He said that he often explores whether a less drastic remedy would be appropriate or effective when appointment of a receiver is sought by a litigant. Michael Wachtell commented that one potential alternative, an injunction proceeding, is too time-consuming, complex, and expensive.
- The panel said that the statutory scheme governing resolution of corporate disputes or dissolutions does not expressly apply where the entity involved is a limited liability corporation. The panelists noted that there are no cases on point, and that a counsel's best approach would be to argue by analogy that the procedures appropriate for resolving corporate disputes, dissolution or liquidation should also apply to LLC's.
- Michael Wachtell said that if maintaining control over real property, a business or other personal property during litigation is the court's goal, then receivership may be the best approach – regardless of the desires of the warring factions. A receiver controls the checkbook, and puts an immediate halt to any wasting of the corporate assets.
- David Pasternak made the point that an equity receiver or a provisional director must always comply with laws related to the operation of the affected company (timely payment of taxes, complying with all labor laws, etc.), a burden not normally encountered in performing the duties of a special master.

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We have not verified the information and do not guarantee, warrant or represent that it is accurate (verify all information yourself);

It is your responsibility to independently confirm the information's accuracy and completeness (we may have overlooked something);

Any projections, assumptions, estimates or opinions furnished or utilized are for illustrative purposes only and in no way represent the current or future performance of the property (we're not certain about the source of the information so we aren't making any representations regarding anything derived from that information);

The value of the property depends on each prospective purchaser's tax and investment factors and should be carefully reviewed by each potential purchaser's

tax, financial, legal and investment advisors (our asking price may have absolutely no basis); and

This correspondence does not constitute an offer, and does not create or give rise to any agreement or contract, express, implied or in any other manner. Nothing in this correspondence creates any right or obligation. Only a written Purchase and Sale Agreement executed by all necessary parties will create any binding agreement (if it's not in writing and fully executed, we don't have a deal).

With these elements in place, the disclaimer should provide the protection necessary to defeat any allegation of liability arising from the information the receiver will be providing. This leads to the next principal question arising in the marketing of commercial property: how to protect the information that is being provided to brokers or prospective buyers?

(This concludes Part I of "Commercial Real Estate Disposition." The concluding portion will appear in the Spring, 2006 issue of Receivership News.)



Kevin P. Cavanaugh

*KEVIN P. CAVANAUGH, CPA is the Managing Director of Douglas Wilson Companies' San Francisco office. He is also a licensed real estate broker in the states of California and Florida and has participated in more than \$1 billion in commercial real estate sales.

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be accused of milking the estate. Hence, the Distressed Receiver's Dilemma is born. How can a receiver avoid these pitfalls?

In his *Receivership News* article in this issue, Kevin Cavanaugh, a CPA with the Douglas Wilson Companies, explains how a receiver can facilitate marketing of a property by (a) assembling a detailed property information package (with plenty of disclaimers), (b) extracting confidentiality agreements from prospective purchasers and brokers, and (c) vetting qualifications of prospective buyers.

An interesting aspect of this article underscores the Distressed Receiver's Dilemma – the cautionary tone Mr. Cavanaugh adopts with respect to the receiver's marketing actions, which is essentially to protect thyself first, and rightly so. The potential for a receiver being sued when thrust into a tinderbox of litigation is significant. We all know that no receivership appointment is worth making one's life miserable.

The Distressed Receiver's Dilemma will never go away because it is the essence of being a receiver – occupying the middle ground between disputing parties. There are certain important choices the receiver of a distressed property can make to minimize his or her legal exposure, however, while doing what is best for the property and all interested parties.

PRIVATE OR PUBLIC SALE?

For some reason, there is a general misconception that a general brokerage transaction is the safe way to sell real property. One assigns a listing price, places the property in the multiple listing services, and waits for the offers to come streaming in. While this process does work when the broker has only one client to satisfy, such as where a non-distressed seller wants to sell an asset at a particular price, the process does not work especially well in contentious receiver's sale situations. There are several reasons why this is so:

1. The Listing Price Dilemma. If the Receiver has market knowledge and authority to market and sell the property, the first step is to decide on the listing price. This is fairly easy for a stabilized property with an easily

identifiable cap rate. But where the property is in distressed condition, lacks any relevant income, and is hemorrhaging monthly losses, the Listing Price Dilemma becomes much more serious. The lender unwillingly funding the monthly losses may want a low listing price to get the property sold quickly, but the borrower, who may be exposed on a personal guaranty, will want a high listing price. If the lender's arguments prevail, the property may sell for too little, leaving a substantial amount of equity on the table. If the borrower's arguments win out, the listing price may be set too high and the property will not sell, resulting in a stagnant listing and ever-mounting losses.

Mr. Cavanaugh writes that "market knowledge equals power" as it relates to deciding whether to accept an offer. The dilemma lies in deciding whether or not the price offered is a market price. Was an appraisal done? Were multiple offers received? What is the receiver's market knowledge and why is that knowledge better than someone else's idea of the "market value" of the property? It might sound heretical to assert such questions but the reality is that any claim to possession of all market knowledge necessary to make an absolute judgment as to market value is probably an exaggeration.

In a hotly contested litigation situation,

"THE DISTRESSED RECEIVER'S DILEMMA WILL NEVER GO AWAY BECAUSE IT IS THE ESSENCE OF BEING A RECEIVER – OCCUPYING THE MIDDLE GROUND BETWEEN DISPUTING PARTIES."

2. The Preservation Dilemma. Receivers are generally prohibited from improving property under their care, but they may take steps necessary to preserve it. A leaking roof may need to be repaired to keep the property from deteriorating during the receiver's possession. On the other hand, maybe the best way to remedy the deficiency is to put on a new roof. The Receiver must often decide what needs to be done, and to what extent, to preserve a property's value. I imagine all receivers have lain awake at night worrying whether he or she made the right decision to not incur an expense as necessary for property preservation. Should the receiver remediate actual or suspected mold? Should the receiver remove the potentially/ actually leaking underground storage tank? Should the receiver perform a build-out as a condition to attracting a tenant? And, if so, will the receiver be able to recover the amount spent? Should the receiver leave the work to be done by any subsequent buyer?

3. The Sales Price Dilemma. If the receiver receives an offer to purchase, the receiver then has to decide if the offered price is defensible. In his article,

privately marketing and selling a property may actually increase the potential liability of a receiver. He or she could list the property at the wrong price, could choose to make changes to "preserve" the property later deemed to be improvements where the costs are never fully recovered, and might imprudently decide to accept a purchase offer that proves demonstrably below true market in hindsight or by way of a selling process later claimed to be not competitively driven.

There is an alternative way of selling that avoids some or most of these problems. Selling a property by auction avoids these imponderables and, if done properly, assures that the maximum market value will be achieved.

SALE STRUCTURE

Employing a professional auction firm to assist in developing comprehensive bidding procedures enhances a competitive sale. A level playing field is necessary to create a competitive bidding environment. When the terms of the sale are pre-defined, potential buyers do not have an opportunity to independently

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First Ever Panel Seminar Presented For Inland Empire Receiver Professionals



Receivership counsel (L-R) Matthew Taylor, Esq. (moderator) and Mark Easter, Esq. added insights.



Panelists included Receivers (L-R) Richard Weissman, Esq., Mr. Michael Myers and Mr. Steven Speier.



San Bernardino County Superior Court Judge Peter Norell provided expert candid commentary.

The LA / Orange County Chapter of the CRF presented a six-person panel discussion titled "Receiverships in the Inland Empire" to 25 attorneys, receivers and receivership professionals on November 9, 2005. The Inland Empire is a fast-growing area comprised roughly of Riverside and San Bernardino counties, situated due east of Los Angeles and Orange counties.

This first-ever CRF seminar for the Inland Empire receivership community provided an overview of receivership law and procedure with special emphasis on issues of note in the region. Program panelists included: the Honorable Peter Norell, San Bernardino County Superior Court Presiding Judge; Richard Weissman, Esq., Mr.

Steven Speier and Mr. Michael Myers, all receivers active in the Inland Empire; and two attorneys specializing in receivership practice, Matthew Taylor, Esq. and Mark Easter, Esq. The program was moderated by Mr. Taylor and presented at Rosa's Italian Restaurant in Ontario, California.

The event was part of an ongoing effort to expand LA/OC Chapter membership and services to professionals working primarily in San Bernardino and Riverside counties. Many current chapter members already have business and take assignments in the area, according to Mr. Speier, a receiver with the Orange County accounting firm Squar Milner Reehl & Williamson.

Judge Norell, a member of the San Bernardino bench since 1989, provided his special knowledge garnered in overseeing numerous receiverships, including business receiverships, rents and profits receiverships, post-judgment receiverships, and Health and Safety Code receiverships, to the audience.

Sample receivership orders and pleadings, including orders for "rents and profits" receiverships, business receiverships, post judgment receiverships, and a sample "Health and Safety Code" receivership, were provided. Panelists discussed the appropriateness of using certain orders in certain situations, and key provisions to be included. ■



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• 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.

Auctions: Resolving...

Continued from page 7.

negotiate responsibility for the myriad costs, expenses and closing items that often make evaluating competing private sale offers a comparison between apples and oranges.

Having the appointing court approve the auction procedures in advance of sale, including terms of sale, deposit requirement, closing period, allocation of escrow and title charges and other costs ensures a level playing field, the unquestionable legitimacy of the sale process and protects professionals against liability that may result from the potential infirmities of a traditional sale process.

CAVEAT EMPTOR (BUT HERE IS EVERYTHING WE KNOW)

Everyone knows the three most important elements of value in real estate:

location, location and location. For the receiver selling a distressed asset the three most important elements of avoiding potential liability are: disclosure, disclosure and disclosure.

Part of a true competitive bidding environment is for every participant to be provided the same information. By employing a professional auction firm to develop (and assist in developing) a Property Information Package ("PIP"), a receiver can be certain that full and uniform disclosure has been made. It is customary prior to the bidding process to have auction buyers acknowledge in writing receipt of all PIP documents and, again in writing, to accept responsibility for their own due diligence. This shifts accountability from the receiver to the buyer, unless some pertinent information known to the receiver has been withheld.

(This concludes Part I of "Auctions: Resolving the Distressed Receiver's Dilemma"! The concluding portion will appear in the Spring, 2006 issue of Receiverhip News.)

*MIKE WALTERS, senior partner of Tranzon Asset Strategies, a financial company specializing in real estate sales, is also a member of Tranzon, LLC, an auction marketing company with 20 offices nationwide.



Mike Walters

*STEPHEN KARBELK is a partner of Tranzon Fox, a Tranzon, LLC affiliated company specializing in real estate marketing and sales in the mid-Atlantic region.



Stephen Karbelk

EDYTHE L. BRONSTON

Law Offices of Edythe L. Bronston
Tel: 818-528-2893
ebronston@bronstonlaw.com

Is pleased to announce
her appointment as

State Court Receiver to sell
distribution rights to completed film
"Love Stinks" and to sell rights to
incomplete film "Beautiful Dreamer"

Superior Court of California
County of Los Angeles

ROBERT C. GREELEY

Greeley, Lindsey Consultant Group
Tel: 916-484-4800
RGreeley@Greeley-Group.com

Is pleased to announce
his appointment as

Receiver for
D & M Cabinets
An Operating Company

Superior Court of California
County of Sacramento

BEVERLY N. MCFARLAND

KEVIN J. WHELAN
The Beverly Group, Inc.
Tel: 916-783-3552
beverlygroup@att.net

Is pleased to announce
the completion of their duties as

Receiver for Diamond Radio, Inc.
an FCC regulated operating business

Superior Court of California
County of Sacramento

ROBERT P. MOSIER

Mosier & Company, Inc.
Tel: 714-432-0800 x222
Rmosier@Mosierco.com

Is pleased to announce
His appointment as

Referee/Court's Expert Witness
To perform a tracing for 7 rental
properties For a 28-year period and
a related accounting
in the matter of Hipp vs. Hipp

Superior Court of California
County of Orange

ROBERT P. MOSIER

Mosier & Company, Inc.
Tel: 714-432-0800 x222
Rmosier@Mosierco.com

Is pleased to announce
the completion of his duties as

Receiver for The Birch Tree Golf
Course where the lender's note
was brought current

Superior Court of California
County of Imperial

LEON J. OWENS

Maximum Asset Recovery Services, Inc.
Tel: 310-826-9838

leonjowens@aol.com

MDC Holdings:

Restructure \$11 million

Amays Bakery & Noodle Co., Inc.:

Provisional Director

DAVID J. PASTERNAK

Pasternak Pasternak & Patton
Tel: 310-553-1500
djp@paslaw.com

Is pleased to announce
his appointment as

Receiver for Doctors Urology Group
Dissolution Receivership

Superior Court of California
County of Los Angeles

THEODORE G. PHELPS

Phelps Consulting Group
Tel: 213-629-9211
tphelps@phelpsconsulting.com

Is pleased to announce
the completion of his duties as

Receiver for
H & C Electric Company, Inc.
An Operating Company

Superior Court of California
North Valley Division- Chatsworth
County of Los Angeles

DAVID L. RAY

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

Is pleased to announce
his appointment as

Receiver for
Su v. Yang
An operating company

Superior Court of California
County of Los Angeles

ROBERT C. WARREN III

Investors' Property Services
Tel: 949-660-7978
rob@investorsHQ.com

Is pleased to announce
his appointment as

Receiver for
Hope Pico Rents
& Profits Receivership

Superior Court of California
County of Los Angeles

RICHARD WEISSMAN

Richard Weissman, Inc. PC
Tel: 818-226-5434
rweissman@rwreceiver.com

is pleased to announce
his appointment as

Referee for the sale of
Commercial Real Property

Superior Court of California
County of Los Angeles

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
Pacific Southwest Construction and
Equipment, Inc.
An Operating Company

Superior Court of California
County of San Diego

DOUGLAS P. WILSON

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

Is pleased to announce
his appointment as

Receiver for
McKinnon Publishing Company
An Operating Company

Superior Court of California
County of San Diego

ANDREW R. ZIMBALDI

Alden Management Group
Tel: 714-751-7858
azimbaldi@aldenmanagement.com

is pleased to wish

All of the members of the
California Receivers Forum
and the expanded judicial
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a healthy and prosperous
New Year

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Samira Kermani
is pleased to announce the successful completion of her duties
as Real Estate Broker
for Richard Weissman, Esq., Receiver
In Re Leon Jordan, et al., a Securities Fraud receivership
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ASK THE RECEIVER

BY PETER A. DAVIDSON, ESQ.*

Have a receivership question you want answered? E-mail it to pdavidson@mdfslaw.com and your question and the answer may appear in an upcoming column.



Peter A. Davidson

Q

I have been asked to be a receiver and was thinking of having the plaintiff nominate my corporation, rather than me, to take on that role. Is this okay?

A

If you review the receivership sections in the Code of Civil Procedure, starting at C.C.P. §564 et seq., or the Rules of Court relating to receiverships starting at Rule 1900 et seq., you might assume that having a corporation appointed as receiver would be okay; because there is no express prohibition in those sections. However, buried in the Financial Code there is a prohibition on a corporation acting as a receiver unless it is qualified to engage in the trust business. Section 106 of the Financial Code defines “trust business” as the “business of acting as executor, administrator... receiver...under the appointment of any court, or by authority of any law of this or any other state or the United States, or as trustee for any purpose permitted by law”. Section 1500 of the Financial Code provides no corporation shall engage in the trust business unless it has qualified as required by that section. Therefore, unless your corporation has qualified to act in the trust business, pursuant to the provisions of Financial Code §1500, it cannot be appointed or act as a receiver in California.

Q

I am a receiver appointed by the Orange County Superior Court in a contentious case. One of creditors has threatened to sue me in Nevada where he is located. How can this creditor sue me? I am a receiver appointed by the Court!

A

Welcome to the gritty world of receiverships. While you are a court appointed receiver, and may personally have quasi-judicial immunity, you can still be sued. Your question is unclear as to why the creditor wants to sue you and whether he intends to sue you in your official capacity as receiver or individually. Generally, receivers do have quasi-judicial immunity for any actions brought against them in their individual capacity, unless their activities exceeded the scope of their order of appointment (the distinction between personal liability and official liability will not be discussed here). Assuming the creditor wants to sue you in your official capacity, the creditor needs to first obtain permission to do so from the court which appointed you. McCarthy v. Poulsen, 173 Cal. App. 3rd 1212, 1219 (1985); Ostrowski v. Miller, 226 Cal App. 2d 79, 83 (1964). C.C.P. §568 used to provide that a receiver cannot be sued without the permission of the receivership court. The statute was amended in 1982 and the express prohibition was deleted. However, the courts have subsequently held that this deletion did not affect the rule requiring court permission to sue a receiver. Vitug v. Griffin, 214 Cal. App. 3rd 488, 493 (1989). It has been repeatedly stated that the purpose of the rule is to promote judicial economy by prohibiting the receiver and the receivership estate from a multiplicity of lawsuits and because, in most cases, claimants can obtain appropriate relief within the receivership case. If you are sued without permission being obtained, you need to raise that at the first opportunity, either by demurrer or motion to dismiss; otherwise this requirement can be deemed waived. Vitug supra. A creditor cannot evade the permission requirement by suing outside the receivership court. Merryweather v. U.S., 12 F. 2d 407, 408 (9th Cir. 1926) [“The court which holds the estate and administers must decide whether it will determine for itself all claims against the receiver, or will permit suits to be brought and determined in other courts. And as said by Justice Gray in Porter v. Sabin, supra. * * * No suit, unless authorized by statute, can be brought against the receiver without the permission of the court which appointed him.”]. Some courts require an evidentiary showing that the claims have merit before permission will be granted. See, for example, Federal Deposit Insurance Corp. v. J.D.L. Assoc., 866 F. Supp. 76 (D. Conn. 1994). Other courts, however, merely require allegations. Although you can never stop someone from suing you, you may be able to convince the court that any action brought against you should be litigated in the receivership court, before the judge who appointed you, who is most familiar with the receivership proceeding. ■

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Dan Close's EDR Valuations, Inc. Serves Local, National and International Legal and Business Communities From a San Diego Base

(The subject of this issue's receivership professional profile is Mark Daniel Close, who wears many hats — receiver, CPA, forensic accountant to name a few. The son of two high school teachers, he is a second-generation San Diegan, where he operates his business EDR Valuations, Inc.).

These days most people know me as Dan, but I grew up as Danny and later as M. Daniel (suggested by friend Michael Gilligan in college). The only time I would hear the name Mark was on the first day of school and, lately, every time I testify (i.e. "Please state your full name and spell it for the court.").

Growing up in San Diego meant always having something to do or somewhere to go after school, on the weekends and during the summer. We had the beach, the mountains and desert as our playgrounds. Mexico was an easy weekend camping and surfing destination, and if we wanted a taste of the "Big City," Los Angeles was 2 hours up the road. I spent my summers life guarding at San Diego city beaches, and would try to get in as many days of skiing and snowboarding in California and Utah as possible during the winter in between classes at San Diego State University.

Since my father was a biology teacher, and still raises orchids, grows oranges, avocados and wine grapes, I gravitated towards a science career in college. It was only after talking with a friend while working part time as a respiratory therapist that I found out about the "CPA" business. I took an accounting class, found I had a mind for business and switched majors from zoology to accounting.

Thank goodness I did. It was in the business college that I met my wife of 25 years, Donna. Not only is she good looking, but she is smart as well (her score on the CPA exam was higher than mine). We were compatible. She liked to cook and I liked to eat. So I snagged her before someone else did. My wedding anniversary is easy to remember.



Close Quarters - This vintage woody has plenty of room for the entire Close household (L-R): Dan, Donna, Rocky (big ears), Garrett and Kristin Close. Dan lists surfing among his many hobbies.

May 17th 1980 was the day before Mt. St. Helens erupted. I'm not sure what the significance of this is.

I was lucky to receive offers from several of the "Big Eight" accounting firms in San Diego after graduation. Donna accepted a job with Touche Ross and I signed on with Coopers and Lybrand. After earning my CPA license I left public accounting and served in a variety of accounting management positions in private industry. My experience in the computer software, real estate development and construction industries as controller and chief financial officer helped hone my understanding of business management and exposed me to a variety of business styles and cultures.

I broke into the business valuation and forensic accounting field in 1992, and I haven't looked back. No more do I have to suffer through a busy tax season, slaving away indoors in the middle of ski

season. Instead, as the owner of my own business, EDR Valuations, Inc., I am busy year-round. But the variety and challenges of the assignments, and the flexibility owning my business gives me to spend time with my family make it well worth the effort.

My day job as a forensic accountant/receiver/business appraiser is never dull. I work on a variety of cases, including complex divorce matters, valuation assignments (including estate and gift tax), business merger, acquisition and dissolution, receiverships, antitrust cases and also provide analyses of economic losses in injury, employment and complex business matters. For example, I recently participated in a valuation of the advertising contract for the Beijing Metropolitan Subway line that will serve the new Olympic Stadium for the 2008 Olympics. Of course it was necessary to

Continued on page 14...

Continued from page 13.

travel to China for a first-hand look. I also frequently serve as a special master and a referee on cases involving economic or financial issues.

My first experience as a receiver was when I was appointed by the court to take over an OB/GYN doctor's practice for the "limited" purpose of ensuring that the doctor paid his spousal and child support. My "pre-med" training and experience as a respiratory therapist were useful in understanding the doctor's business and compliance with the court's order.

A post-judgment appointment was my first business receivership. I went into the debtor business with "guns blazing" – I had an army of assistants, including a locksmith, a computer specialist and two sheriffs' deputies — only to find out that there were so few assets in the business that the

subsequently-appointed bankruptcy trustee, Dick Kipperman, (the owner filed for bankruptcy after I took over), handed the business back to me with a "Good luck, Dan." I proceeded to liquidate what few business assets there were for the creditors.

I am most fortunate to have a wonderful partner and spouse in life, Donna, as well as two fantastic children, Kristin and Garrett. Kristin, now 21, is wrapping up her senior year at the University of Colorado at Boulder, where she has been interviewing for jobs in the sales and marketing area (thanks, Kristin for graduating in four years!). Garrett, age 14, is entrenched in high school, where he hopes to take engineering and architecture classes after completing his core requirements at Canyon Crest Academy in Carmel Valley, California (near Del Mar).

Donna assists me with the business and enjoys the challenge of solving the various puzzles that our valuation assignments offer. I count myself very fortunate that my business allows me to work with some very articulate and intelligent colleagues, attorneys and other professionals.

I enjoy my hobbies of surfing, biking and car collecting. The nature of my business is such that I do not ever see retirement as an option, however. This business is truly worldwide in scope and opportunity, with past and future assignments necessitating travel to New Zealand/Australia, Europe, Asia and South America. The more experience I garner (and the grayer my hair turns), the more opportunities arise to assist in valuing significant economic events. ■



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Continued from page 5.



Rapt audience members ponder advantages of different equitable appointments to resolve particular corporate or partnership disputes at the Downtown Los Angeles luncheon program.

- It was asked whether an order appointing a receiver over a corporation and setting the receiver's duties can expressly deny that corporate defendant the right to file a bankruptcy petition. A roundabout solution suggested was that the proposed order be written to provide that the receiver will possess all the powers of the corporate board. This would allow the receiver to block such an attempted filing since, under applicable Ninth Circuit law, a bankruptcy petition cannot be filed without the corporate board's (in this case, the receiver's) authorization.

This was just one of many issues raised that merited significant discussion, but which could not be explored because of time constraints. The program, described as excellent by the attendees, may be the first of a series of lunchtime programs in downtown Los Angeles tailored to meet the information needs of interested litigators, receivers, and other members of the receivership professional community. ■

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*ALAN M. MIRMAN, a partner in the Calabasas law firm of Horgan, Rosen, Beckham & Coren, LLP, and specializes in creditor's rights, provisional remedies, and related fields.



Alan M. Mirman



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