



# NEWS

*A Publication of the  
California Receivers Forum*



*Brietta R. Clark*

## Loyola Law School's Interim Dean, Brietta R. Clark

BY KEVIN SINGER\*

The California Receivers Forum ("CRF") has maintained a 20-year relationship with Loyola Law School, which has partnered with the CRF in the prestigious receivership symposium aptly named the Loyola Symposium. With the Loyola X Symposium just around the corner (January 18-19, 2024), we are pleased to share the following interview with Loyola Law School's Interim Dean, Brietta R. Clark (who is also the Interim Senior Vice President of Loyola Marymount University, and a Professor of Law & J. Rex Dibble Fellow).

**Kevin Singer (KS):** Where are you from and what were some of your fond memories growing up?

**Brietta R. Clark (BRC):** I'm from Chicago, Illinois. Believe it or not, some of my fondest memories growing up are from the long commutes I had to school or other activities, because of the fun and wide-ranging conversations that my dad and I would have during these trips. He was not only a loving and devoted father, but also my best friend.

*Continued on page 3...*



**JANUARY 18-19, 2024 / LONG BEACH, CA**

As the national economy continues to shift and we head into another potentially contentious election year, it's important for receivers to be up to speed on current issues and knowledge regarding receivership.

The Loyola X Symposium, taking place January 18-19, 2024 at the Long Beach Hyatt, promises to provide a robust program of knowledge for the experienced receiver as well as those newly entering the industry. Produced in cooperation with Loyola Law School, this year's event is not to be missed.

On Thursday evening, enjoy a delicious dinner with a presentation by renowned economic analyst, **Danielle DiMartino Booth**, global thought leader on monetary policy, economics and finance. Ms. DiMartino Booth spent nine years at the Federal Reserve Bank and is a regular contributor to financial publications such as Bloomberg, CNBC, Fox Business, Institutional Investor, Yahoo Finance, The Wall Street Journal, and more. Her book, *FED UP: An Insider's Take on Why the Federal Reserve is Bad for America* was published in 2017 and her presentation at Loyola X will provide insight into what is happening with today's economic issues.

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# Publisher's Comments

BY DOMINIC LOBUGLIO\*



Dominic LoBuglio

*\*Dominic LoBuglio is a CPA and has provided forensic accounting and taxation services to receivers for 40 years. He has served CRF since its inception as a board member and officer for LA/OC and the State.*

We are celebrating a twenty-year relationship with Loyola Law School as we announce our Loyola X Symposium to be held January 18-19, 2024 at the Long Beach Hyatt. A special thank you to **Ryan Baker**, who is both Chair of this event and the Sponsorship Committee, and to **Mia Blackler** and **Scott Sackett** for putting together a fantastic package of educational programs. **Kevin Singer** has provided us with a very interesting interview with **Brietta R. Clark**, recently promoted to Interim Dean of Loyola Law School after serving as Associate Dean for Faculty since 2015.

Our focus on education continues with our recent participation in the California Bankruptcy Forum's Thirty-fifth Annual Insolvency Conference and combined live and virtual education programs throughout California. Please let us know if there is a topic you would like us to address or a topic you would like to present.

We will all get to know more about **Richard Munro** who is profiled in this issue. It took a search halfway around the world to New Zealand to find Richard; he joined the CRF Board at the beginning of this year.

Our newest Board member is **Teresa Gorman** from Fiduciary Real Estate Services, an active sponsor of CRF. Teresa is a Broker Associate and in-house counsel. She has extensive experience as an attorney specializing in trust and estate issues and has participated in CRF symposiums as a vendor and an attendee of education programs and social events.

Our contributing columnists have once again done a stellar job. Thank you, **Peter Davidson**, **Chad Combs**, and **Ryan Baker**. We appreciate the contribution of informative and timely articles by **Dan Miggins**, **Amy Olsen**, **Ryan Griffith**, **Doug Wilson**, and **Ryan Baker**. The CRF Board of Directors recently approved public access *Receivership News* and the development of a search tool to facilitate research.

**Hollie Grimaldi-Flores** handles the important task of advertising placements as well as producing The List and Tombstones. Once again, our advertisers are supporting this publication and providing valuable services to the receivership community. For real estate services, we have The Seymour/Weinberger Group, Eric Sackler & Associates, Geffen Real Estate, Lee & Associates, ROI Properties, and Fiduciary Real Estate Sales. For legal services, we have Buchalter and Ervin Cohen & Jessup LLP. Nation Franchise Sales is in the franchise brokerage business and Perry Group International is in the hospitality management business. We appreciate your support and service.

Please enjoy this issue, let us know how we are doing, and consider writing an article for our next issue.



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**KS:** Did you know at an early age that you wanted to study law?

**BRC:** Yes, by my father's design. He only had a high school education, but he was one of the smartest people I've ever known. During that commuting time I mentioned, he would plant all sorts of seeds for the future, and his dream was for me to go into law. He never pressured me about it. Instead, he was masterful at using our conversations to prime me to think critically about the law and our legal system, and this nurtured my desire to learn even more about it. As a police officer, my father would also make connections with attorneys and judges, convincing them to mentor me or let me observe their work. I don't know the exact moment; but pretty early on in life, law became my passion.

**KS:** What drew you to healthcare law?

**BRC:** Serendipity. My first job out of college happened to be at a health care company, providing administrative support for nurse staffing, home health care, and mobile ultrasound services. Because it was such a small company, I was exposed to many different areas of health care, and I saw firsthand how healthcare law and policy impeded health care access for low-income families and children with significant health needs.

**KS:** In 1995, you worked for Legal Assistance Foundation ("LAF") of Chicago and represented children who were wards of the state in disability claims, what did you take away from this job?

**BRC:** This was a formative experience for a few reasons. First, it reinforced many of the lessons I learned at my prior healthcare job, deepening my interest in issues related to health equity. Second, it highlighted the importance of law as a social determinant of health. This is, in part, because of healthcare regulations that can either expand or restrict access to quality health care. But it's also because of how other laws shape access to other essential resources, such as safe housing, public utilities, other social supports, that directly and indirectly affect our health status. Finally, I developed such admiration for the passion and dedication of the public interest lawyers at LAF, and it helped me remain optimistic about the power of legal advocacy to promote health and equity.

**KS:** You went to work as a legal intern advocating for increased access to health services for Medi-Cal for uninsured consumers. Who were your clients and what kinds of problems did you see with the medical systems?

**BRC:** This was work I did as a volunteer at the National Health Law Program (NHeLP) in Los Angeles, and this organization has had a tremendous impact in safeguarding access to quality health care for people covered by Medicaid (known as Medi-Cal in California) and the uninsured. Two projects really stuck with me. One involved community engagement and advocacy to try to prevent the potential loss of essential hospital services in an otherwise underserved

*Continued on page 4...*

## Editor's Comments

MICHAEL MUSE-FISHER\*



Michael Muse-Fisher

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

Man, oh man, are the readers in for a treat. In addition to our regular experts, including **Chad Coombs**, **Peter Davidson**, and **Ryan Baker**, this Issue includes a myriad of wonderful articles. Whether it is a meet and greet with **Richard Munro**, who many of us know already, but who I am certain we will all learn something new in his personal profile article, or a fascinating interview with Loyola Law School's new Interim Dean, **Brietta R. Clark**, there is something for everyone in this Issue. Readers will gain insight into evaluating stalled construction projects, from **David Wald** of Wald Realty Advisors, as well as strategies and options for dealing with health and safety issues through health and safety receiverships, from **Ryan Griffith** of Bay Area Receivership Group.

Also, learn about past California Receiver's Forum events, and—as a reoccurring theme in this Issue—the California Receivership Forum's upcoming Tenth Annual Loyola Symposium – Loyola X. In fact, if by the end of this Issue do not put Loyola X into your calendar, I will personally come to your place of business and input it into your calendar myself.

community. The other involved surveying Medi-Cal beneficiaries with disabilities to better understand the barriers to care they were facing. NHeLP used this information to equip legal advocates and policymakers with tools for dismantling existing barriers and improving access to care.

**KS:** Did you ever encounter or hear about Court Receiverships or a Court Receiver to protect a medical business that was not operating well or had to be protected from closing down? If so, what were your thoughts or experiences?

**BRC:** As I mentioned above, I've definitely encountered the problem of hospitals that are financially struggling and are in danger of closing or being taken over by another hospital, resulting in a reduction or loss of essential health services. But I have not had direct interaction with court receiverships in this context.

I don't know if this is directly responsive to your question; but it caused me to reflect on one of the most high-profile and

compelling examples that I recall of the vital role that court receivers can play in safeguarding healthcare resources. It did not involve a private hospital or traditional medical business. Rather, it involved a court receivership of the California state prison system. The prison's healthcare system was so inadequate, and resulted in such devastating preventable suffering and death, that it was found to violate the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual treatment. Judge Thelton Henderson appointed a receiver to manage its resources and improve healthcare access and quality. (I believe that was around 2005, and the case was *Plata v. Brown*).

**KS:** What made you want to switch from private practice to full-time teaching?

**BRC:** First, I've always loved teaching. I even had the opportunity to teach legal writing to first years during my second and third years as a law student, an experience I still treasure! I also love thinking deeply about the law—what it claims to do, what it should do, and how it shapes reality on the ground. As a law professor, I am incredibly privileged to have the time and space to study and wrestle with these questions.

**BRC:** For the record, many of the lawyers who are members of the California Receivers Forum are alumni of Loyola Law School and one is currently a faculty member—Richard Ormond.

**BRC:** Oh yes, I know Richard and think he's fantastic! When I was the associate dean for faculty, he taught a wonderful course in Cannabis Business Law for us as an adjunct.

**KS:** I see one of your areas of expertise is "Reproductive Justice." Could you please explain, what this involves?

**BRC:** The dominant framing of reproductive rights in the U.S. has centered around the theory of a right to prevent or terminate pregnancy. But certain groups, especially racial and ethnic minorities, people with disabilities, and people living in poverty, have been disproportionately denied the right to have children and parent with dignity. These groups are more likely to have been subjected to forced or coerced sterilization or other birth control. They are the least likely to have access to essential resources to help ensure a safe and healthy pregnancy. And they are disproportionately represented among those targeted for punitive state action when they



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experience poor pregnancy outcomes or parenting challenges arising out of economic instability or certain health conditions.

Reproductive justice is a more holistic approach to critiquing government regulation of reproduction. It identifies the essential conditions and resources for ensuring that each person has not only the legal right, but also the practical ability, to make reproductive decisions that are best for them and their families, including the right to give birth and parent with dignity.

**KS:** Recently you were promoted to the Interim Dean of Loyola Law School. Congratulations! Although you have been an Associate Dean for Faculty since 2015 was this promotion something you saw coming?

**BRC:** Absolutely not! I'm still processing this intriguing turn of events.

**KS:** You have been teaching at Loyola Law School since

2001, what makes it stand out from other law schools? Also, as the new Dean of Loyola Law School, what would you like to accomplish?

As a member of Loyola Law School (LLS) since 2001, I know what a very special place it is. Some schools focus on teaching; others focus on research. At LLS, we demand excellence in both, viewing them as mutually enhancing and both vital tools for advancing our mission of social justice.

Our faculty members are recognized as innovative, thought leaders who shape law and policy through their scholarship and public service. Through the growth of the Loyola Social Justice Clinic and other centers of excellence, collaborations between faculty, students and staff have expanded our impact in new and exciting ways.

We also have the well-deserved reputation of graduating students who are practice ready. This is due in part to our longstanding focus on experiential learning and skills

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development. But it is also due to on-going curricular innovation, such the integration of technology, like artificial intelligence (AI), that is transforming the practice of law.

We also have a proud tradition of offering flexible educational programming to expand legal education to non-traditional students. Our law school started as an evening program over 100 years ago, and we just recently changed this program to a hybrid format that incorporates both in-person and remote learning. This creates even more flexibility so that students who are working full-time or managing other significant responsibilities can pursue a legal degree part-time.

Finally, the people here also care deeply about each other – it feels like a real community.

Of course, we should never stop asking what more we can do to promote academic excellence, advance our social justice mission, and create an environment that supports the well-being, and even flourishing, of everyone in our community. And, as Interim Dean, I am committed to fortifying our

existing strengths, and continuing to support our outstanding family of students, faculty, staff and alumni.

Final note:

As we discussed, the California Receivers Forum Loyola Symposium X is set for January 18-19, 2023, in Long Beach, California. This will be the 10th symposium with hundreds of participants, including judges, attorneys, court receivers, professionals and students from around the country, once again convening for this one of a kind educational and social event. We hope to see you and many of your students in attendance.

I will put it on the calendar and be sure to help promote it to our students!

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



Kevin Singer

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Friday's schedule provides powerful morning general sessions with an offering of choices for experienced or beginning receivers in the afternoon.

Thank you to those sponsors who are partnering with CRF to present this decade anniversary Symposium.

THURSDAY	EVENT
6:00-7:15pm	Welcome Dinner at Hyatt Long Beach
7:15-8:15pm	Presentation by Economic Expert

FRIDAY	EVENT
7:00am-4:00pm	Registration and Exhibits
7:30-8:30am	Breakfast
8:30-8:45am	Visit Exhibitors
8:45-9:45am	Welcome and Keynote Presentation: <i>A Retrospective of California Receiverships with Robert Mosier</i>
9:45-10:00am	Break
10:00-11:00am	<i>Receiver as Detective: Working With a Receiver to Uncover Fraud and Other Bad Behavior</i>
11:00-11:15am	Break
11:15am-12:30pm	Luncheon with Hosted Table Top Discussions

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FRIDAY	SESSION A	SESSION B
12:40-1:40pm	Step Into Liquid: <i>Types of Receiverships</i>	Bad Vibrations: Partnership Disputes and Dissolutions
1:40-2:00pm	Break	
2:00-3:00pm	<i>Surf's Up! First Day Issues</i>	<i>Chasing Mavericks: Commercial Real Estate Momentum</i>
3:10-4:10pm	<i>Shooting the Tube: Getting Out and Getting Paid</i>	<i>Cannabis: A "Growing" Landscape?</i>
4:20-5:20pm	<i>The Rogue Wave: Avoiding Receiver Liability</i>	<i>Point Break: Stump the Experts</i>
5:30-8:00pm	Beach Blanket Bingo Party	

A special thank you to this year's Symposium co-chairs, **Ryan Baker** (Douglas Wilson Companies), **Mia Blackler** (Lubin Olson & Niewladomski LLP) and **Scott Sackett** (Fiduciary Management Technologies) and the team of volunteer professionals producing this event.

Registration and sponsorship opportunities are now available. Visit [Receivers.org](http://Receivers.org) for more information.



**LOYOLA SYMPOSIUM**

**JANUARY 18-19, 2024 / LONG BEACH, CA**



# A Receiver's Challenge: Evaluating Stalled, Distressed Construction Projects

BY DAVID WALD\*

Most lenders and many investors do not want to complete a distressed construction project without the insulation from liability afforded by a court-appointed receiver completing the project prior to sale. That is because the owner/builder is exposed to potentially significant long-term liability for construction defects, particularly on condominiums, apartments mapped for sale as condominiums, and tract housing projects where there are homeowners' associations to prosecute claims long after the construction is complete.

However, stepping in from a cold start to secure, evaluate and complete a stalled, distressed construction project can be among the more challenging assignments a receiver can take on. That includes evaluating the construction in place, the underlying project approvals, and the probable cost and anticipated time to complete the project.

Typically, beyond simply completing the construction, the receiver is faced with the complex task of quickly and carefully identifying - and correcting - a myriad of construction issues that the architect, developer, contractor, subcontractors and suppliers were unable or unwilling to address, or, worse, that they may have intentionally caused or created as both time and money finally ran out.

A building or other construction project is not 'complete' until it has received a certificate of occupancy or similar approval from the public agency with primary jurisdiction over the project. Typically it is the city or county where the project is located, although it could also be a state, federal or even tribal agency. There may also be separate and significant tenant improvements or other project modifications necessary for the project to start generating income or otherwise be put into service for its intended use.

Unfortunately, time is the enemy on a stalled construction project: project permits and underlying approvals may expire, key design and construction team members may leave, completed construction may deteriorate from weather, theft and vandalism, and security and insurance costs can soar.

The good news is that with sufficient time and money, almost anything can be fixed. However, for distressed, stalled construction, the old saying, 'it always takes longer and costs

more' usually applies, for the cost to complete a stalled project is almost invariably higher than if the project was completed by the original developer without interruption.

## Some Initial Priorities, Issues and Considerations

After being appointed, early priorities include walking the project job site to ensure that it is properly secured, and to get familiarized with the general condition and status of the project. Confirm that insurance policies are current, and that the receiver is named as an endorsed, additional insured on the policies. Determine what materials, if any, have been purchased and stored off-site or with suppliers.

Particularly if the borrower/developer and general contractor are still cooperative after the receiver is appointed, then the receiver should also make it a high priority to quickly compile as much information about the project as possible. Among other things, this includes contact information for everyone involved in the design, approval, construction, and inspection of the project, as well as the agency stamped, approved set of construction plans and specifications, the original inspection record card and the most current set of as-built drawings from the job site, as these are often updated from the original permit set.

'Invasive' inspections such as assessment of potential soil and groundwater contamination are often necessary and appropriate to fully evaluate the condition and status of construction. Those inspections may include mold, asbestos, structural, mechanical, electrical, low voltage, plumbing and roofing. However, invasive inspections - particularly environmental - can be problematic given the possibility that the results may have a negative impact on project value. If the court's order appointing the receiver does not already address invasive inspections, the receiver may be well advised to consider obtaining an additional order from the court expressly authorizing those inspections.

Borrowers in distress often cut corners and make poor decisions. They will use cheaper materials, less skilled and/or less supervised contractors, and overlook mistakes and substandard construction - all in an effort to complete the project as quickly as possible with whatever funds are remaining.

*Continued on page 9...*



## A RECEIVER'S CHALLENGE...

*Continued from page 8.*

Below is a list of some of the typical construction issues that can arise on a stalled project:

- Expired project approvals and construction permits
- Incomplete plans and/or permit applications for design/build work
- Design professionals, subcontractors or suppliers that are no longer in business or uncooperative and/or restrict access to permitted plans due to nonpayment
- Longlead materials, fixtures and equipment not yet ordered, significantly delayed or unavailable
- Inadequate, improperly located, installed and/or delayed public utility installations
- Use of substandard, substituted or uncertified materials and fixtures
- Substandard or improper construction
- Incorrect clearances, setbacks, building height and other dimensional issues
- Construction extending past property lines, both above and below ground
- Low voltage access, communication, security and fire/life safety systems not designed, installed, inspected or operating properly
- Major building components damaged or compromised by prolonged exposure to weather such as wood framing, weather resistant barriers, insulation, drywall and flooring
- Compromised or voided warranties
- Theft of high value building materials and equipment stored on-site or installed such as copper electrical wiring, electrical switchgear, heating and air conditioning equipment and appliances

In addition, stalled projects often require 24/7 on-site security – and larger projects may need two or more security guards to properly secure the job site. Insurance policies may also need to be extended or converted to ‘vacant building’

*Continued on page 10...*



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## A RECEIVER'S CHALLENGE...

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policies. As a result, the receiver should be prepared for both security and insurance to be unexpectedly costly.

If the borrower/developer was 'self-performing' as the project architect and/or the general contractor – and to the extent that the borrower/developer has close relationships with the project's subcontractors – it is likely that these 'related' project team members will, at a minimum, be reluctant to talk, and often will be uncooperative and adversarial.

### The Construction Evaluation Process

Once the receiver has secured the job site and readily available project documentation, this is the time to engage appropriate third-party consultants who specialize in construction evaluation, unless this capability already exists within the receiver's own staff.

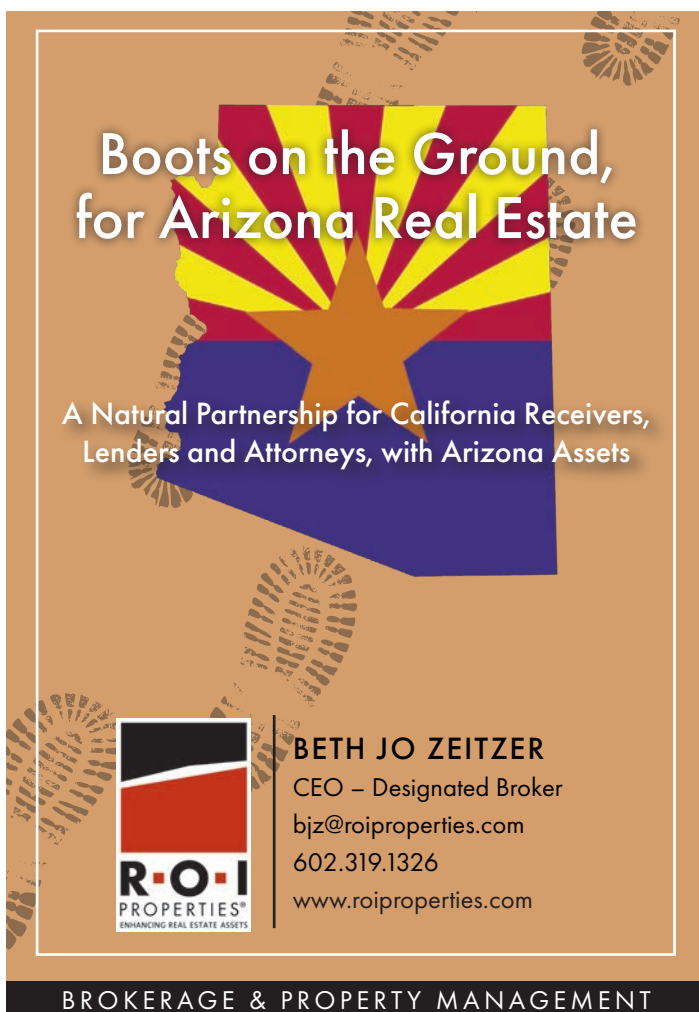
First, compile and review the project's approvals, the construction and consultant contracts, the building department inspection record card comments, other inspection reports (i.e. architect, structural engineer, accessibility, building envelope, acoustical, insurance carrier, deputy inspectors and loan disbursement inspector), the contractor's pay applications and logs, and a current title report to identify mechanics liens and other documents of record. Look for issues that may have arisen during construction – and to what extent the architect, the general contractor, and their respective insurance carriers, may be contractually obligated to resolve those issues.

Talk with the architect, the other design and engineering consultants, the deputy inspector(s), the general contractor, subcontractors and major material suppliers. A great deal can typically be learned from the people actually working on the project. This includes whether they are interested in and/or capable of completing the project, the remaining issues, as well as who will need to be paid and how much they will need to be paid before restarting work. Ask about upcoming decisions, alternatives, and the cost and time to complete the project. Be aware, however, that the architect and other design professionals in particular may be reluctant to cooperate if they have unpaid invoices for their work on the project.

Initiate a series of project job walks. The initial review of project documents and reports will provide some indication of what to initially focus on. Each subsequent job walk will further inform the assessment of the status of the project. If possible, it is better to do separate job walks, first with the design and inspection teams, followed by the construction team. The design team often has a different perspective than the construction team. Project team members may be reluctant to be candid when both the design and construction team are together in the same room.

Once it is clear what is known and what is unknown about the project from the existing project team, it is time to separately talk with one or more third-party architects and general contractors who are 'experts' in this specific type of construction in the same city as the project is located. They may identify issues that the existing team may be reluctant to talk about or may not be aware of. Assume

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that the existing project team will find out about discussions with new consultants and contractors, since subcontractors all tend to travel in the same circles.

If the project has been stalled for some time, and many of the team members are gone, uncooperative or adversarial, it may be necessary to pay a third-party general contractor to prepare a cost-to-complete estimate and a completion schedule. Unless there's a strong existing relationship with the contractor, they will often be reluctant to do this work without compensation.

It's often best to delay talking with the city or any of the other public agencies involved with the oversight and approval of the project until later in the evaluation process. These conversations are certainly important, and often critical, but better to have after becoming fully informed as to the condition and status of the project – including the potential need to reinstate expired project and construction approvals and/or eliminate or modify burdensome conditions of approval, including costly required off-site construction requirements.

At this point it should be possible to develop a reasonably accurate 'best-guess' project completion budget and schedule, relative to the original project costs and status of completion, bearing in mind that material and labor costs have probably escalated from initial pricing. There may be significant additional costs and schedule delays to account for protective measures, corrective work, material lead times and soft costs incurred in evaluating and completing the project.

### Conclusion

It is important to remember that regardless of how much due diligence is performed beforehand, with construction comes surprises – the 'unknown unknowns' that inevitably arise in any construction project. This is particularly the case in a distressed, incomplete project, where it is probable that the quality, fit and finish of the work has suffered as project funding has run out. Moreover, once things have become adversarial, existing team members no longer have the incentive to help identify and solve construction issues. The best 'insurance' against surprises is a thorough assessment, healthy contingencies for both budget and schedule, and a great deal of persistence and patience.

### Project Completion Checklist

- ✓ Public Agency Project Approvals & Permits
- ✓ Building Permit Inspection Record Card
- ✓ Permit Set of Construction Drawings
- ✓ Architect
- ✓ Civil Engineer
- ✓ Structural Engineer
- ✓ Mechanical, Electrical & Plumbing Consultants
- ✓ Waterproofing Consultant
- ✓ Acoustical Consultant
- ✓ ADA Access Consultant
- ✓ Utility Consultant
- ✓ Elevator Consultant
- ✓ Low Voltage Access, Security & Emergency Communications
- ✓ Other Consultants
- ✓ Special / Deputy Inspector Reports Deputy Inspector Reports
- ✓ Insurance – Property & Liability / Owner or Contractor Controlled
- ✓ General Contractor – 3rd Party or Self Performed
- ✓ Loan Draw Inspections
- ✓ Loan Draw Applications – Payment Status & Change Orders
- ✓ Subcontractors
- ✓ Stored Materials
- ✓ Status of equipment, finishes and fixtures not yet installed
- ✓ Environmental Reports – Phase 1 & 2
- ✓ Asbestos & Mold Inspection
- ✓ Utility Status – Electricity, Water, Sewer, Gas, Storm Drains, Internet, Telephone
- ✓ Mechanics Liens
- ✓ Stop Notices

*\*David Wald is President of Wald Realty Advisors. He has more than 35 years of commercial, multifamily, tract housing, and other specialty real estate and related operating business experience. He has been a receiver for over 25 years and has closed over 190 real property sales in receivership, including judicial foreclosure sales. Mr. Wald has significant experience with the completion, leasing & sale of distressed construction, and development projects in receivership.*



David Wald



# CRF's Great Turnout at the California Bankruptcy Forum's 35th Annual Insolvency Conference

BY DANIEL MIGGINS\*

We hope you were able to attend this year's 2023 California Bankruptcy Forum's 35th Annual Insolvency Conference at the LaQuinta Resort and Club in LaQuinta. For those who were not able to attend. The California Receiver's Forum was proud to participate on three panels at the Insolvency Conference and is grateful to the CBF for including the CRF as part of the Conference. the remainder of the article provides a summary and recap of all three panels:

CRF kicked off CBF with a bang, leading this conference with a morning cup of coffee and an informal gathering of attorneys, receivers, service providers, and everyone in between, discussing what practitioners are seeing in the market, new receivership assignments that participants were recently asked to submit proposals for, and even a recent receivership of interest. Mia Blackler, the moderator of the first panel and Dominic Lobuglio, the producer looked into the receivership "Crystal Ball" and aptly named the panel "Rise of Receiverships." As many of us are now seeing, receiverships, along with interest rates and bankruptcy filings, are trending up. Conversations overheard included new equity receiverships over operating companies, real estate receiverships stemming from broken construction projects, monetary defaults, and maturity defaults as well as partnership disputes. The panel echoed the conversations during the morning meet-and-greet, and gave a useful glimpse into some of the recent receivership matters the panelists have been handling.

Day 2 of a conference is always tough to draw a crowd, especially if you are the first panel of the day. However, due to the nature and topic of this panel – cannabis receiverships – and the nuances associated with the cannabis industry from a legal perspective (as well as the lack of bankruptcy protection ... for the time being), the "Roll the Dice" Cannabis panel was very well attended and took on a life of its own. Produced by Daniel Miggins and Aram Ordubegian, and moderated, by Michael Muse-Fisher, this panel brought together a series of professionals with a wide variety of backgrounds within the cannabis sector. The panel included war stories, disagreements, banter, addressing hypotheticals and "what if" scenarios. Audience participation was robust and the consensus was that it was an exciting and useful panel. The panelists, included: (i) Iran Hopkins, who advised on corporate structuring issues,

potential liabilities that exist from a tax perspective, and the need to adhere to regulatory compliance at both a state and local level; (ii) Tim Bossidy, who provided his exceptional expertise and explained "synthetic bankruptcies" as he calls it, and interim CEO or CRO issues and strategies for practitioners; (iii) Jason Rosell explained in detail the cannabis workouts he has been a part of on behalf of both secured and unsecured creditors and strategies and pitfalls in successfully resolving workouts; and (iv) Kevin Singer, the guru of cannabis receiverships, represented CRF well by reminding the audience of the benefit of running a cannabis business through a receivership and the tips and recommendations he has learned from his considerable experience.

The California Bankruptcy Forum's *Alternatives to Bankruptcy Panel* at this year's CBF Conference was well attended by many Young Insolvency Professionals as well as other conference attendees. Produced by Mo Kebeh, the panel explored various approaches to insolvency, such as Article 9 Sales, Assignments for the Benefit of Creditors, Receiverships, and Out-of-Court Workouts. Panelists Kyra Andrassy, Jake Diiorio, Molly Froschauer, and Veronica Rocha utilized hypothetical scenarios, including one involving a malfunctioning robotic pet to demonstrate which strategies are most effective in different circumstances. Led by their engaging moderator, Benjamin King, the panelists were each able to share how their career experiences have helped them advise clients to successfully navigate insolvency issues.

## Conclusion

The California Receivers Forum greatly enjoyed participating in this year's CBF conference and after conferring with Michael Sweet, CBF's current President, we will look to keep this tradition going at CBF's conference in 2024.

We hope to see you next year at Loyola X in January and at CBF in May.

*\*Daniel Miggins spearheads the business development and client relations efforts at Hilco Real Estate. Mr. Miggins engages with creditor's rights and debtor's counsel, special asset groups at banks, private credit lenders, and special servicers within commercial mortgage-backed securities with a particular focus on commercial real estate assets.*



Daniel Miggins

# Receiverships are a Viable Remedy to Community Eyesores Receivership Before/After

BY RYAN GRIFFITH

Health and Safety (“H&S”) receiverships are codified at California H&S sections 17980.6 & 17980.7. These statutes allow municipalities to address major nuisance properties that burden city departments. Properties that require H&S receiverships must substantially endanger public health and safety. However, certain situations require the receivership remedy to abate nuisance properties. The Ghostship case in Oakland is a scenario where a nuisance property became so entrenched with code enforcement violations that thirty-six people were burned alive while trapped in the property. Major nuisance properties like the Ghostship property cause tragedies, decrease property values, and hurt neighborhood morale. Municipalities want to address these properties but may not know about H&S receivership. However, H&S receiverships are the remedy to abate substantially dangerous properties.

Receivership is an equitable remedy that results in a state or federal court taking control of assets and/or property through a neutral receiver. In California, specific rules of court for receivers are outlined,<sup>1</sup> and federal courts have specific rules as well.<sup>2</sup> Three practical examples of receivership include Bernie Madoff’s Ponzi scheme being put into receivership by the SEC, the FDIC being named the receiver of the former Washington Mutual Bank and transferring all its assets and liabilities to JP Morgan Chase Bank, and the California Supreme Court allowing a city to appoint a receiver and granting him permission to demolish a nuisance property.<sup>3</sup>

City attorneys usually petition the court to appoint a receiver over nuisance properties, but local criminal prosecutors may also use receivership as a tool. As noted above, where a building violates the H&S Code, to the extent that the health and safety of residents or the public is substantially endangered, the municipality must issue a notice requiring repair and/or abatement. After such a notice has been issued, California law requires that two legal elements be satisfied for a Court to appoint a receiver over a nuisance property pursuant to H&S 17980.6 & 17980.7: (1) the owner must have been given a reasonable time to abate the nuisance; and (2) the receiver must be qualified to serve as a receiver.<sup>4</sup>

A common question that arises is why do properties end up needing a receiver? Major nuisance properties arise for a variety of reasons, but three of the most common are:

- (2) Deceased property owners without heirs, or heirs that are unable or unwilling to care for the property: Occasionally, the heir of the owner is the source of the blight. If this occurs, it is usually due to the relative of the deceased owner having substance abuse issues. The heir will never initiate probate leaving the deceased owner on title. However, the property will turn into a drug house, but with the deceased owner on title, the troublesome heir cannot be responsible for property they do not legally own. However, this matter can be resolved through a H&S receivership.

*Continued on page 14...*



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## RECEIVERSHIPS...

*Continued from page 13.*

- (2) Zombie foreclosure properties: this is when a bank initiates a foreclosure but never forecloses. The owner having not made payments on their mortgage and receiving a notice of foreclosure from the bank often voluntarily leaves, believing the bank is responsible. However, the bank claims the owner is responsible (and in most cases the bank is right) because they are not required to foreclose.



The property remains in a state of limbo without anyone caring for it, which causes it to fall into disrepair. To resolve the finger pointing between an owner and bank, a H&S receiver can be appointed to take control of and abate the nuisance property.

- (3) Owners with hoarding issues or other mental health conditions: These are difficult cases because the owner is often a kind person that is unable to properly care for their property. These owners may have rodent infestations, fire hazards, and other nuisances that endanger public health and safety, but the owner is unable to comprehend the dangers.

Now that some common scenarios giving rise to H&S receiverships have been explained, how does a receivership resolve a nuisance property? The answer is that, for all intents and purposes, the receiver becomes the owner of the property. Therefore, the receiver can remove anyone improperly occupying the property, borrow money against the property, and hire contractors to clear debris and repair the property. Thereafter, the receiver can sell the property to a responsible owner, to the extent that no responsible party comes forward to pay the costs of remediation.<sup>5</sup>

One of the most common questions asked regarding receivership is how do receivers get paid and what happens to the proceeds from the receivership sale? In many cases, a receiver is paid through the issuance of receiver certificates, which become a super-priority lien against the property pursuant to court order. The general rule is that funds from the sale of real property are required to be distributed according to the principal of first in time first in right.<sup>6</sup>

However, receiver certificates are typically assigned super-priority status over existing liens.<sup>7</sup> This is because most lenders are unwilling to provide funding to remediate nuisance properties absent a guarantee of priority of payment. The funds borrowed by the receiver pursuant to a receiver certificate are used to remediate the property and, where appropriate, pay the receiver's fees and costs, subject to court approval.<sup>8</sup>

In the end, H&S receiverships are an excellent tool for any municipality to understand and utilize for nuisance properties. This is because every municipality has properties that cause major headaches and appear unsolvable. However, local leaders can look to H&S receiverships to abate major nuisance properties.

<sup>1</sup> California Rule of Court<sup>1</sup> 3.1175-3.1184.

<sup>2</sup> Federal Rule of Civil Procedure 66

<sup>3</sup> *City of Santa Monica v. Gonzalez* (2008) 43 Cal. 4th 905, 928-929.)

<sup>4</sup> *City of Desert Springs v. Valenti* (2019) 43 Cal. App. 5th 788, 793-794.

<sup>5</sup> California Code Civ. Proc., §568.5

<sup>6</sup> *Bear Creek Master Assn. v. Southern California Investors Inc.* (2018) 28 Cal. App. 5th 809, 817.)

<sup>7</sup> *City of Sierra Madre v. Suntrust* (2019) 32 Cal. App. 5th 648, 661; see also *County of Sonoma v. Quail* (2020) 56 Cal. App. 5th 657, 672-673.)

<sup>8</sup> California Rule of Court 3.1184

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Ryan Griffith



# A Growing Need for Receivers: Commercial Office in Distress

BY DOUGLAS WILSON AND RYAN BAKER

As receivers, we've all seen a variety of financial and economic factors over the years that have created market distress and demand for our services. Many of us lived through the Savings and Loan Crisis in the late 1980s and early 1990s, the Dot Com market collapse in the early 2000s, the Great Recession, and most recently, the COVID-19 pandemic.

Yet few have been as poised for a perfect storm of problems as the commercial office sector is today. Office real estate has been hit hard by a number of known elements: a widespread shift to remote working and "work from home" arrangements dictated by the pandemic; a period of historically low interest rates, followed by a fast-rising interest rate environment; and more than a trillion dollars in commercial loans coming due in the next three years. The commercial office sector has been a slow-motion car crash we've all seen coming, but has been impossible to avoid.

With this backdrop comes a very strong demand for receivers and problem resolution expertise — an uptick we are already starting to see in mid-2023.

## The Perfect Storm

The impending doom for office real estate is caused by a confluence of the above factors, all of which are escalating in tandem.

First, there was a major flight from city centers at the onset of the Covid-19 pandemic, and the trend continued as many employers shifted permanently to remote-work and hybrid office policies.

In Q1 2023, this phenomenon led to vacancy rates in excess of 20% on average for office real estate, according to JLL's Office Outlook report for the first quarter of 2023. The "impact is felt primarily among older, commodity assets," JLL noted. The situation is more pressing in some cities; in Dallas, for example, the vacancy rate topped 25% in the first quarter, likewise the Houston, New Jersey, and San Francisco markets also experienced vacancy rates over 25%.

Net absorption, similarly, continues to struggle in most markets, with the worst cases being San Francisco and

Boston. While there are several exceptions in metro areas including Nashville, Charlotte, and Miami the overall picture is bleak.

"Despite continued office-using job growth, Q1 saw 16.5 million sq. ft. of negative net absorption—the weakest quarter for office demand in two years—due to recession fears and hybrid work arrangements," writes CBRE in its Q1 U.S. Office Figures report, published in May.

Further, as the number of interest-only commercial loans made in recent years increased steadily, borrowers are beginning to face significant payments in today's rapidly rising interest rate environment.

With many indicators pointing to distress ahead, Colliers International sums up the situation in the North American commercial office market in its June 2023

*Continued on page 16...*

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“Insights and Outlook: Office” report:

“The softening of key U.S. office market fundamentals accelerated in the first quarter of 2023. Net absorption remained negative, occupancy losses increased, vacancy rose at a faster pace, and available sublease space hit a new record high.”

Having served many roles as both a receiver and as a principal developer of mixed-use real estate including office properties for the past three decades, DWC anticipates there will be continued trouble in major cities and elsewhere for office buildings.

From extend-and-pretend activity during the Great Recession to the pandemic-era forbearance policies and massive amounts of liquidity in between, we now have a new reality: as interest rates and cap rates rise, values fall. Those servicing the billions of dollars in commercial real estate loans aren’t going to extend-and-pretend any longer, particularly for B and C Class properties. Those companies that are signing new leases today desire newly built or newly renovated spaces, which they can demand given the state of today’s market. With values plummeting as a result of these factors, it will be an environment ripe for receivers, evidenced by several recent projects that already have receivers in place.

### **The Role of the Receiver in Today’s Office Market**

Those of us well known in the commercial real estate sector will be very active in the months ahead as we step into these situations to act as a neutral party to preserve value. We are already seeing such assignments in the market, notably a recent default in Los Angeles: Brookfield’s Gas Company Tower at 555 West 5th Street, which went into receivership in April following the borrower’s default on a \$350 million commercial loan and failure to pay a property tax advance.

**Management and operations.** As receivers, there are several measures we will take to help lenders and owners in the many distress scenarios we will encounter like this one. In most cases, we will bring in new management and leasing operations and we will oversee rent collection when a borrower is no longer able – or cannot be trusted – to take care of and look out for the best interest of the asset. In others, we will also oversee the sale of the



property through a receivership sale. By employing the services of a receiver and neutral third-party fiduciary, lenders are able to remain unencumbered and out of the chain of title – a strategy that is becoming increasingly common among lenders.

**Partial construction.** In some of these instances, we will also face incomplete construction, as was the case in Half Street, a partially completed 400,000 square foot office building with three levels of subgrade parking and ground floor retail in Washington, D.C. There, the receiver was tasked with preserving, protecting and eventually completing the construction of the collateral, including the settlement of numerous mechanics’ liens and claims on the property.

In yet another broken construction example, the partially-complete 268,000-square foot Opus East National Oceanic and Atmospheric Administration (NOAA) office and research facility was placed under receivership, and was in need of completion. In this case, the receiver was responsible for coordinating the construction, settling an existing GSA lease dispute and settling mechanics’ lien claims on the property.

In these “broken construction” scenarios, this might mean taking a number of steps, such as negotiating with contractors and subcontractors owed for work completed prior to the receivership; renewing and maintaining insurance policies; drying in, water-proofing and overseeing other measures to protect the existing

*Continued on page 17...*

## A GROWING NEED...

*Continued from page 16.*

structure; working with the court to allow for the receiver to sell the property; and marketing the property for sale, as well as navigating the receivership sale process through the court system.

**Environmental hazards.** In other instances, distressed properties may need environmental remediation due to hazards such as asbestos, or those that are introduced due to mismanagement. In these cases, receivers are especially important so as to protect the lender from being involved in the chain of title and/or becoming responsible directly for the abatement.

### The Future Ahead

In today's commercial market, conditions will get worse before they get better. Newer large scale office buildings typically aren't candidates for repositioning because of their infrastructure, and today's regulations won't allow for cost-effective repurposing or new

permitting. While we may see changes long-term in the viability of these types of solutions, as of today receivers will be a critical element toward resolution. Office real estate owners and lenders moving through these tumultuous times would do well to consider receivers as a tool with which to preserve value.



*Douglas Wilson*

*\*Douglas Wilson is CEO and Chairman of DWC*

*\*Ryan Baker is Vice President of DWC*

*Douglas Wilson Companies is based in San Diego, CA with offices in Orange County, Los Angeles and throughout the U.S. The company provides services in real estate development or completion, maximizing asset value in receiverships, advisory consulting, and as a specialized broker.*



*Ryan Baker*

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## PROFESSIONAL PROFILE:

# Richard Munro:

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*Richard Munro*

During his primary school years, Richard Munro grew up on a farm with his parents and sister in a tiny rural town southeast of Christchurch, New Zealand. His mother was a homemaker and his father worked in several occupations including as a tailor, dry cleaner, and farm manager prior to

buying the farm, on which he raised milking cows and pigs. Richard's father was an independent, self-reliant, can-do individual whose influence was instrumental in Richard's future professional career. His parents instilled in him a sense of making do with the resources available and making the best of any situation. No matter how difficult, intimidating, or insurmountable the circumstances might first appear, nothing was impossible in the Munro household if approached with common sense and the knowledge that hard work might be required to overcome the challenge.

From an early age, Richard always respected a good sense of humor and an inquisitive curious mind. These traits were important factors in his later career success. He liked taking clocks apart to see how they operated, and he tried to put them back together albeit not always successfully much to his parents' dismay.

He always wanted to know how things worked and why they worked, so that he could make them work better. His sense of humor began with Richard mimicking local farmer behaviors, and later developed into a very typical English style self-deprecating and sarcastic humor. In school, he was inquisitive and asked a lot of questions to sate his curiosity.

His father had a variety of trade jobs and Richard learned a lot from him. Including being able to turn his hand to building, repairing, and fixing things around the house. Richard learned how to do carpentry and woodworking and when he got married, he made most of their first furniture, which is still standing today. His traits of self-reliance, sense of humor, and being curious and inquisitive, have served him well in often tense and time-sensitive leadership, restructuring, and court fiduciary appointments during his international professional career.

After high school, Richard attended the University of Canterbury where he graduated with a Bachelor of Commerce degree in accounting and management information systems. He was curious about computer programming in Fortran and the emerging world of IT and desktop computing. He also took several law classes as part of his degree including a class on US antitrust law learning the Sherman Act and the Robinson Patman Act—which would serve him well when he emigrated to the United States in 2002.

While at University, he met his wife and life-partner, Andrée (now married 41 years). After graduation, Richard married and moved to Wellington where he worked for the New Zealand government. This afforded him the time to study and qualify as a Chartered Accountant (CA), the equivalent of an American CPA. Immediately upon becoming a CA, he left his government job and grew his career as controller with Jantzen, then as CFO at Nabisco, and then as CFO at Fujifilm.

Joining Fujifilm was pivotal in his expanding career. At Fujifilm he had a great mentor by the name of David Wright, who helped develop Richard's business and financial acumen and who had Fujifilm pay for Richard to complete an MBA program. Not long after he graduated with his MBA, David created the opportunity for Richard to become CEO of the NZ Fujifilm Group. In this role, Richard interacted with other business leaders in many countries around the Pacific Rim, and in the UK.

Richard later left the corporate world and started his own consulting business solving problems in distressed

*Continued on page 19...*

## PROFESSIONAL PROFILE

*Continued from page 18.*

businesses and receiving workout referrals from major banks. Richard truly enjoyed solving business problems and restructuring operations to generate cash. Moving into consulting also enabled him to develop the necessary life skills to immigrate and survive in the US.

Richard and his wife won the US Green Card Lottery, so his family left for the US in April 2002 on immigrant visas, not knowing one single person, and just six months after 9/11. Since that time, Richard has been fortunate to build an incredible network of corporate directors, leaders and professionals, served as a public company CEO, served on public, private equity, private, not for profit, and multinational subsidiary boards. After immigrating, Richard also entered the world of receivership, fiduciary, and bankruptcy appointments.

His knowledge, business leadership, restructuring experience, and personality are a natural fit to being a receiver, provisional director and restructuring advisor. Richard successfully networked and promoted his experience and skills effectively in his new home country, thereby building a name for himself and his business.

To this day, Richard loves the creativity and flexibility afforded receivers in the court of equity. Richard excels at corporate receiverships, complex business disputes, and other business-related fiduciary appointments and engagements. He is known for his creativity, his sensible no-nonsense approach to situations at hand, and for being cost-effective and efficient.

Richard is never one to be idle. He is also the President & CEO of the National Association of Corporate Directors (NACD) Pacific Southwest Chapter, providing around 40 corporate director education programs to approximately 2,000 corporate directors annually. Many may not be aware, but in addition to being a receiver and fiduciary, Richard has been producing corporate director education programs for nearly 15 years, which is a whole different professional universe than his restructuring, insolvency and fiduciary practice.

His wife Andrée and their two daughters Diana and Sacha keep him grounded and appreciating family life together, despite the daily stresses that his cases can generate. Diana and Sacha have pursued successful careers in medicine and risk management, respectively, with major organizations. Andrée, is a keen gardener and apart from keeping the family together, also looks after children for professional parents during the day and after school. She finds it extremely rewarding, and it's fun for Richard and Andrée to watch these young children grow into adults and go on to college.

On his desk is one of the best gifts he's ever received. It's an ornament that says, "Of all the names I've been called I like Dad the best", and that about sums it up for Richard. His family is the key to his hard work and diligence in all that he does. His friends can attest to the fact that Richard's proudest achievements, despite his long professional resume, is his family.



*Richard with Andrée, and Diana & Sacha, at Mother's Day lunch.*

# Ask The Receiver

BY PETER A. DAVIDSON\*

**Q** In a receivership I just wrapped up, the court approved my final account and report and awarded me final fees. Because there were insufficient funds in estate to pay my fees in full, the court ordered the defendant to pay my outstanding approved fees. The defendant, however, has not paid me. Am I entitled to interest on my outstanding fees even though I don't have a judgment?

**A** Actually, you do have a judgment and you are entitled to interest on your unpaid fees. As explained in a prior *Ask the Receiver*, “judgment” is defined differently in different sections of the Code of Civil Procedure. Code of Civil Procedure § 557 defines “judgment” as: “The final determination of the rights of the parties in an action or proceeding.” Because you, as receiver, were not a “party” in the underlying action, the court’s direction that the defendant pay your fees would be an order, which is defined in C.C.P. §1003 as: “Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.” The Enforcement of Judgments Law (C.C.P. § 680.010 *et seq.*), however, has its own definition of “judgment”. Code of Civil Procedure § 685.010 states: “‘Judgment’ means a judgment, order or decree entered in a court of this state.” Therefore, the court’s “order” that the defendant pay your fees is a “judgment” for collection purposes. This means it can be enforced like any other judgment.

As for interest, the California Constitution, Article XV, Section 1 (2) states in part: “The rate of interest on a judgment rendered in any court of this State shall be set by the Legislature at not more than 10 percent per annum...In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the State shall be 7 percent per annum.” The Legislature did act by providing in C.C.P. §685.010 (part of The Enforcement of Judgments Law): “Except as provided in paragraph (2), interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.” Therefore, you are entitled to 10



percent per annum interest on your unpaid fees, from the entry of the court’s order (“judgment”).

Paragraph (2) referred to in the statute was added, effective January 1, 2023, for judgments added or renewed on or after that date, reducing the interest accrual to 5 percent for judgments under \$200,000, remaining unsatisfied, for a claim related to medical expenses or for a money judgment under \$50,000, remaining unsatisfied, for a claim related to “personal debt”. These reductions only apply to debtors who are a “natural person”. C.C.P. § 685.010 (c)(1). “Personal debt” means money due or owing from a transaction “primarily for the debtor’s personal, family, or household purposes.” C.C.P. § 685.010 (c)(111). It is unlikely either reduced rate would apply to awarded receiver’s fees.

The way the amendment to the statute is written, it appears the 10 percent interest rate applies to medical or personal debts, so long as the amount of the judgment remains in excess of the indicated dollar amounts (\$200,000 and \$50,000) and then drops to 5 percent once the “remaining unsatisfied” amount falls below those dollar amounts.

When money is collected on your “judgment” it is to be credited first, for specific costs that go to the levying officer or for court fees, then first toward accrued interest and then toward the judgment principal. C.C.P. § 695.220.

*Continued on page 21...*





I am a receiver for a corporation, in a case arising out of fraud allegations. I have asserted claims against various insiders. They are willing to settle with me for a significant sum, but only if the court bars investors, customers and vendors from suing them. Can the court issue such a bar order?



Maybe. It will depend on the types of claims the third parties possess. The issue of third party releases is a hot topic in bankruptcy. It recently arose in the infamous Purdue Pharma bankruptcy, where the Sackler family agreed to pay \$4.55 billion, but only if they were released from any third party civil suits. After the settlement, with such a bar order, was approved by the bankruptcy court, the approval was overturned by the district court, which ruled that the bankruptcy court cannot bar litigation against parties who themselves are not in bankruptcy. *In re Purdue Pharma LP*, 635 B.R. 26 (S.D.N.Y. 2021). While an appeal of the district court's order was pending, the Sacklers agreed to increase their payment to \$6 billion. At the end of May 2023, the Second Circuit reversed the district court and approved the settlement and bar order. This issue, however, may ultimately end up in the Supreme Court, because the circuits split on whether such releases are enforceable. The dispute focuses on specific bankruptcy provisions, not equitable principles or receivership law. Some circuits hold that because 11 U.S.C. §524(c) provides a discharge does not affect the liability of any other entity, or the property of any other entity, from such debt, third party releases are not allowed. Other circuits rely on 11 U.S.C. §105(a), which permits a court to issue any order necessary to carry out the bankruptcy laws, so such releases are permitted. The Second Circuit, *supra*., relied on 11 U.S.C. §§105(a) and 1123(b)(6). The issue of third party releases, however, is not confined to bankruptcy. It occasionally arises in receivership cases.

In a new case, the Sixth Circuit Court of Appeals held that receivership courts lack the power to issue such bar orders. *Digital Media Solutions, LLC v. South University of Ohio, LLC*, 59 F.4th 772 (6th Cir. 2023) (“Digital”). In doing so it had to distinguish, and criticize, decisions from

two other circuits, which permitted such orders. *Zacarias v. Stanford International Bank, Limited*, 945 F.3d 883 (5th Cir. 2019) (“Zacarias”); *SEC v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017) (“DeYoung”).

The Digital decision is an interesting read, because it focuses on what power a court of equity has to issue releases. It notes that, in federal court at least, “Receivers must administer the debtor’s property in accordance with the ‘historical practice’ of courts of equity. Fed. R. Civ. P. 66.” *Digital* at 774. And this rule “codifies the Supreme Court’s repeated admonition that, absent legislative change, a federal court’s exercise of its equitable powers must fall within the traditional principles of equity exercised by the High Court of Chancery in England at the founding [i.e 1789].” *Digital* at 778.

Dream Center Foundation was a non-profit that purchased three university systems. The sellers overestimated the revenues and underestimated the expenses. As a result, it was deluged by litigation from vendors, landlords and a class action by certain art students who alleged they had been defrauded. It considered bankruptcy, but was afraid it would lose its main source of income: federal student loans. When one vendor, Digital Media Solutions, sued and asked for a receiver, Dream Center consented, hoping the receiver could turn things around. Among the assets were two officer and director insurance policies. The receiver contended Dream Center had claims against the officers and directors and, eventually, negotiated a settlement for \$8.5 million. However, it was contingent on a bar order prohibiting third parties, including the art students, from pursuing any claims against the officers, directors and the insurers.

The court, after examining historic receivership practices, stated that a receiver can only assert claims that the entity in receivership could. If a different party held the claim, the receiver could not pursue it. And if he could not pursue the claim, he could not settle it. It gave as an example, that a receiver cannot pursue claims a debtor’s customers have against third parties. *Digital* at 780.

Because the art students’ claims for fraud against the officers and directors were owned by the students based on injuries specific to them, and the receiver under traditional

*Continued on page 22...*



## ASK THE RECEIVER

Continued from page 21.

equity practice could not assert those claims, the court had no power to bar the students from pursuing their claims, just because it might crater the receiver's settlement. The court analogized to defrauded investors suing brokers who defrauded them into investing – claims a receiver would not assert. "This type of suit seeks to recover for *personal* injuries to the investors based on their *individual* causes of action. The investors' personal ownership of these claims again has relevance for equity-receivership proceedings. This personal ownership means that the receiver lacks the authority to litigate them under the traditional principle of equity that bars a receiver from pursuing claims owned by others. The Supreme Court made this same point concerning the authority of a bankruptcy trustee, who may not pursue claims personally owned by a bankruptcy entity's creditors." Digital at 783 (citations omitted, emphasis in original).

The court distinguished both *Zacarias* and *DeYoung* on the ground that in both cases the investors and the receiver were pursuing claims for the same injury and neither case examined the pivotal issue: who owned the claims being asserted. The touchstone, according to the court, in determining whether a bar order is permissible is: "What party...would have possessed the right to assert their respective causes of action outside the receivership context?" Digital at 785. If the entity in receivership could not assert the claim outside of the receivership, then the court cannot bar third parties from doing so.



*\*Peter A. Davidson is a Partner of Ervin Cohen & Jessup LLP a Beverly Hills Law Firm. His practice includes representing Receivers and acting as a Receiver in State and Federal Court.*

Peter A. Davidson

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# Put the California Receivers Forum Events on Your Calendar

By AMY OLSEN, CRF ADMINISTRATOR



The CRF has a full calendar of education and networking events. Make sure to visit [Receivers.org](https://www.Receivers.org) for information and registration and mark your calendar.

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September 19 – Noon to 1:00pm

*Complex Equity Receiverships*  
San Diego

October 17 – Noon to 1:00pm

Los Angeles

November 14 – Noon to 1:00pm

Los Angeles

Learn more about the  
Loyola X Symposium by  
scanning the QR code



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County of Los Angeles

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Michael Kasolas & Company  
Office: 415-992-5806  
Email: mike@kasolas.com

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In re: *Twila McEachin Lankford*  
for the administration and sale  
of the bankruptcy estate

United States Bankruptcy Court  
Northern District of California  
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Email: mike@kasolas.com

is pleased to announce  
his acceptance of appointment as

Successor Manager  
In re: *EJ Williams Trust, et al*  
*vs. Stephanie Nazzisi, et al*  
to manage, operate and administer  
the assets of the EJ Williams Trust  
real property portfolio

Superior Court of California  
County of Santa Clara

# THE LIST

WHILE THERE IS NO COURT-APPROVED LIST OF RECEIVERS, THE FOLLOWING IS A PARTIAL LIST OF RECEIVERS WHO ARE MEMBERS OF THE CALIFORNIA RECEIVERS FORUM AND HAVE THE INDICATED EDUCATIONAL EXPERIENCE. INCLUSION ON THIS LIST SHALL NOT BE DEEMED AN ENDORSEMENT OF ANY OF THE NAMES LISTED BELOW BY THE *RECEIVERSHIP NEWS*, THE CALIFORNIA RECEIVERS FORUM, OR ANY OF ITS REGIONAL COUNCILS. THIS IS A PAID ADVERTISEMENT.

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- ◆ This symbol indicates those who completed up to 14 hours of advanced receivership education at the Loyola V, Complex Case Symposium in January 2013.
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Loyola I-IV symbols have been deleted.



# Heard in the Halls: NOTES, OBSERVATIONS, AND GOSSIP RELAYED

BY RYAN BAKER\*

Welcome to the latest edition of Heard in the Halls. Please provide your snippets of news, questions or comments about receivership issues or the professional community by telephone, mail, fax, or email to: Ryan C. Baker at Douglas Wilson Companies, 19200 Von Karman Ave, Suite 400, Irvine, California 92612; Phone (213) 550-2242; Fax: 800-757-3668 (800-pls-don't), Email: rbaker@douglaswilson.com.

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

- **Loyola X – Riding the Economic Wave:** On January 18-19, 2024 the California Receiver's Forum will be hosting the biennial receivership Conference Loyola X. This year's theme, Riding the Economic Wave, aptly fits where the economic tides appear to be rolling as well as with this year's location: The Hyatt Regency in Long Beach. Mark your calendars to be sure to attend this event, get up to date with all of the latest in receivership education, and enjoy seeing friends and colleagues from around the receivership industry. The conference will feature many evocative and interesting panels. It will also include a dual track approach in the afternoon presenting a Receivership 101 track for newer members as well as a secondary track with more advanced panels on all our favorite topics.
- **Sponsorship Opportunities:** The Sponsorship Committee invites you to become a Sponsor of Loyola X! There are many options to choose from to best get your message in front of members. The distress industry is picking up in activity and the conference will be the perfect spot to spread your firm's name to the distressed community. Visit <https://receivers.org/loyola-x-symposium/> and click the "Sponsor/Exhibit" link at the top to review the many options available.
- **Passing of the Torch in Downtown LA's Writs and Receivers Department** – Hon. Mary Strobel, one of three dedicated Writs and Receivers Department judges in the Stanley Mosk Courthouse, has officially retired. After a long and distinguished career, presiding over a number of landmark cases, **Judge Strobel's** official retirement date was June 12, 2023. Judge Strobel has passed the Department 82 baton over to **Judge Curtis A. Kin**. Judge Kin has big shoes to fill, but appears ready for the task with an impressive resumé including obtaining his J.D. with distinction from Stanford Law School, then joining Cravath, Swaine & Moore as an associate, becoming a law clerk to a future Supreme Court Justice the Honorable Sonia Sotomayor, thereafter joining the US Attorney's Office for the Central District of California as an assistant U.S. attorney—becoming Chief of the Criminal Appeals Section in 2012, before ultimately being appointed to the bench in 2013 by Governor Jerry Brown. We give many thanks to Judge Strobel's service to downtown LA's Writs and Receiver's Department, and look forward to being before Judge
- **Up In Smoke** – Cannabis receiverships in California have been in the news a lot of late, with two in particular catching the eyes of yours truly just in terms of sheer size. The first, HERBL, is a major marijuana distribution company licensed in California. It is now in receivership under our own **Kevin Singer** after defaulting on a key loan. The company handled \$700 million worth of product sales in 2022, and represents just the most recent prominent collapse in the cannabis industry which is experiencing extreme levels of distress. The second, WeedGenics, had a receiver appointed over it in May 2023 after the Securities and Exchange Commission obtained an emergency order to halt the alleged ongoing offering fraud and Ponzi-like scheme. More than \$60 million is alleged to have been raised to invest in cannabis operations—promising returns up to 36%! What could possibly go wrong? They must not have been passing the dutchie on the left hand side. Moving on!
- **Success in the Desert** – The California Receiver's Forum (CRF) bet big and won at the California Bankruptcy Forum's (CBF) thirty-fifth annual insolvency conference! By all accounts the CBF's conference at the La Quinta Resort and Club was a resounding success. CRF, for its part, hosted a set of three panels within the conference: 1) Ante Up: The Rise of Receiverships in 2023, 2) Roll the Dice: Cannabis Restructuring and Receivership, and 3) Bankruptcy Card Counting: When to Stay and File vs When to Split and Double Down on the Alternatives. It was a wonderful partnership and many thanks to our CBF friends!
- **Spread the Word:** Know someone thinking about getting started in the receivership industry? Steer them to [www.receivers.org](http://www.receivers.org) to order a past Loyola program 4-disc DVD set for \$75 teaching receivership Basics and including sample pleadings.



Curtis A. Kin in future receivership matters. Blake Alsbrook, of Ervin Cohen and Jessup LLP, was on the inside track and the first to report this scoop—many thanks to Mr. Alsbrook!



*\*Ryan Baker has been a Receiver for nearly 15-years and is with Douglas Wilson Companies. Mr. Baker has overseen receiverships of nearly every flavor including operating companies, rents and profits, construction, environmental contamination, regulatory, post judgment, and many, many others.*

Ryan Baker



## Appointment Orders

BY CHAD C. COOMBS\*

An order appointing a receiver should authorize the receiver to meet tax reporting and payment obligations that could potentially occur in the receivership. Broad authority is typically necessary since the receiver's specific tax duties and obligations may not be known or even fully knowable until the receiver can determine the full nature and extent of the receivership. In some cases, especially those involving fraud, this may require extensive investigation of the entity, person or property in receivership and the review and even reconstruction of the pertinent books and records.

For example, it might appear at the outset that the receiver will not have any income tax return filing requirements or payment obligations, yet facts may come to light upon the receiver's investigation that change the dynamic of the receivership. The receiver may discover and take possession of assets that become part of the receivership estate that give rise to income tax filing requirements on behalf of the owner of such assets, such as when the receiver takes possession of all or substantially all of the assets or business of an entity.<sup>1</sup> Or the receiver may find that even a single property in receivership constitutes all or substantially all of the assets or business of its owner, triggering income tax obligations.

The goal in drafting the appointment order is to authorize the receiver to take actions necessary to comply with applicable tax laws to the extent possible without having to seek further orders from the appointing court. The drafter of the appointment order should, at a minimum, consider granting the receiver the authority and complete discretion and the power to:

1) file all federal, state and local tax returns that the receiver is required to file (including any delinquent and amended returns) and satisfy any other tax reporting requirements,<sup>2</sup>

2) pay all federal taxes and claims which the receiver is required to pay,<sup>3</sup>

3) pay any other taxes that have priority or for which the receiver could be held personally liable for failing to pay,<sup>4</sup>

4) obtain, review, investigate, and verify all tax, accounting and other records and information, including forensic accounting and reconstruction of books and records, that the receiver believes are necessary to prepare meaningful returns and otherwise satisfy the receiver's filing, reporting and tax payment obligations and any other obligations the receiver may have with respect to providing accurate tax information to any party,

5) delay distributions until all the receiver's tax obligations are satisfied, or alternatively, allow the receiver to establish adequate reserves for federal tax liabilities (and other federal claims) and any other priority taxes, including potential interest, penalties and fees owed, and

6) enter into a closing or other agreement that establishes the IRS and other federal agency claims and relieves the receiver of any federal personal liability for receivership federal taxes and claims.<sup>5</sup>

While appointment orders often authorize the receiver to investigate assets and prepare an accounting of assets for the court, the duties of a receiver for tax purposes may extend well beyond these actions. A receiver may be held personally liable for failing to pay federal taxes and claims about which the receiver knew or should have known.<sup>6</sup> As such, a receiver may need to investigate activities and actions taken prior to the receivership, as well as review prior year tax returns and transcripts, to determine the proper tax treatment and attributes of various assets and transactions and potential tax claims against the receivership. Failure to conduct proper tax diligence might not spare the receiver

*Continued on page 27....*

from personal liability for unpaid federal tax claims if the receiver had sufficient funds to pay such claims.

Even with broad authority granted to the receiver in the appointment order to meet tax obligations, the receiver may want to seek further orders of the court related to tax issues. For example, a receiver may wish to obtain a court order approving an agreement with a taxing authority to give any parties in interest the opportunity to object, thereby protecting the receiver from later accusations that the agreement was not in the best interests of the receivership estate or certain parties in interest. A receiver may also wish to seek an order subordinating tax claims pursuant to a constructive trust or as otherwise may be appropriate.<sup>7</sup> In some cases, a receiver may desire to eliminate certain entities from the receivership estate that were initially included if the receiver was unable to locate or recover from such entities sufficient assets of value to possess and administer. This should help establish that the receiver does not have any tax obligations for those entities.<sup>8</sup>

The importance of a well-drafted appointment order highlights that a receiver's duties and obligations with respect to federal, state and local income taxes, while perhaps appearing simple on the surface, can in fact be quite complex, especially given the different circumstances in

which a receivership may arise. If possible, the parties seeking appointment of the receiver may wish to have a tax advisor review the background of the proposed receivership and a draft of the appointment order before the appointment order is finalized and filed with the court.

<sup>1</sup> See Coombs, Filing Tax Returns, *Receivership News*, Issue 77, p.26 (Spring 2023).

<sup>2</sup> Id.

<sup>3</sup> See Coombs, Tax Closure, *Receivership News*, Issue 76, p.22 (Winter 2022).

<sup>4</sup> For example, California Rev. & Tax Code Section 6829 provides for personal liability for failure to pay sales tax, and California Rev. & Tax Code Section 19253 provides for priority payment of California franchise and income taxes but does not specifically provide personal liability. In addition, a receiver who fails to pay state taxes may be found to breach his duty as receiver and have his bond surcharged. See *Stewart v. California*, 272 Cal. App. 2d 345 (Ct. App. 4th Dist. 1969) (California sales tax and a state disability liability insurance claim). See also California Unemp. Ins. Code Section 1736.

<sup>5</sup> See Coombs, Tax Closure, *Receivership News*, Issue 76, p.22 (Winter 2022).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> See Coombs, Filing Tax Returns, *Receivership News*, Issue 77, p.26 (Spring 2023).



*\*Chad Coombs is chief tax counsel at Thomas Seaman Company in Irvine, CA and an expert in insolvency tax law.*

Chad Coombs

## Mark Your Calendar for these upcoming educational events

**ALL TAKE PLACE FROM NOON TO 1:00 PM UNLESS OTHERWISE INDICATED.**



### Complex Equity Receiverships

Sullivan Hill  
600 B St.  
San Diego CA

Speakers include: **Ted Fates**, Allen Matkins LLP; **Mike Bergthold**, The Stapleton Group and **Douglas Wilson**, The Wilson Companies



### Topic TBD

Loeb & Loeb LLP  
10100 Santa Monica Blvd.  
Suite 2200  
Los Angeles, CA

A meeting of CRF's Board of Directors will immediately precede this meeting from 11:00am to Noon



Topic and Location TBD



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