Governmental regulators frequently appoint or move a court to appoint a receiver, conservator, trustee or liquidator as part of the agency’s effort to enforce a statute regulating investment, banking, insurance or other business activities. These “regulatory receivers” occupy a challenging, but potentially satisfying role in these government enforcement proceedings. Such a receiver has an opportunity to deliver compensation to the victims of fraud, embezzlement or other wrongdoing. As there are few reported decisions under most of the applicable regulatory statutes, the receiver and his or her legal counsel are often faced with issues for which there is no obvious precedent. This presents challenges, but also an opportunity to fashion remedies best suited to the circumstances of each particular case.

This article first discusses what regulatory receiverships are and then contrasts them with ordinary receiverships. A discussion of the various parties to such a receivership follows, then concludes with a discussion of how flexibility in claim payment procedures may promote an equitable outcome.

**Contrasting Legal bases of Regulatory and Ordinary Receiverships**

An ordinary receivership is typically based primarily on a plaintiff’s rights under a deed of trust, security agreement or other document, such as a partnership agreement. The law and procedure that govern these proceedings is fairly well developed in California. A regulatory receivership, by contrast, is a highly flexible remedy authorized by statutes that contain limited operating guidelines at best.

In a typical federal regulatory action, the appointment of a receiver is based entirely on the court’s inherent equitable powers, rather than on specific statutory authorization. With only a handful of reported decisions to guide the receiver and the court, these cases are generally governed by principles of equity, with a healthy dose of analogy to the U.S. Bankruptcy Code and practice under it.

There are also receiverships that are a hybrid of regulatory and ordinary receiverships. Unlike purely regulatory receiverships, these may involve governmental policy goals but the appointment of a
The Importance of The Loyola Receivership Program

BY ROBERT P. MOSIER, PUBLISHER

I have opted to devote this page to extolling the virtues and importance of the educational program that will be hosted by the California Receivers Forum at the Loyola Law School on October 8 and 9, 2004. Many of our members attended and participated as presenters in the first Loyola program, held on the Loyola Campus in 2000.

Based on this earlier experience, I am willing to say that this year’s program will be the most important event for receivers in 2004 in terms of providing a comprehensive educational update. Our target attendees (and participants) include receivers, receivers’ counsel, accountants who assist receivers, receivers’ staff members (including bookkeepers and field personnel) and, last but by no means least, members of the judiciary.

The program will draw attendees from throughout California — San Francisco, Sacramento, Fresno, the greater Los Angeles and Orange County areas and San Diego County. Relatively inexpensive airfare and hotel accommodations for a one or two night stay are available to out-of-area attendees.

The faculty will include some of California’s most experienced and respected receivers, receivers’ counsel and accountants. Both judges and commissioners experienced in the appointment and management of receivers will be part of our faculty.

A comment about the Loyola Law School facilities. Loyola Law School is near downtown Los Angeles. We will have full use of one of the school’s state-of-the-art lecture halls, a wonderful learning environment. At the 2000 conference, we found the central location and the self-contained campus unbeatable.

Our designated Dean for the CRF/Loyola Law School Receivership event is Edythe Bronston, a Loyola Law School graduate who now serves as both receiver and receivers’ counsel. Ms. Bronston co-chaired the event with me in 2000 and coordinated the academic content. Ms. Bronston has participated in many educational seminars, and lectures on receiverships and receivership-related issues for the State Bar’s Continuing Education Program. Aside from bringing her hands-on experience to the program, she has a demonstrated flair for coordinating such events to maximize the educational and social opportunities.

The seminar is comprised of a series of three-to-six member panels organized by subject. Areas to be covered include: the legal authority for appointing a receiver; types of receivers; ethics and the receiver; funding the receivership estate; receivers’ rights; claims procedures and distributions; accounting and tax issues; receivers’ liabilities and risk; operational issues; health and safety issues; considerations for special types of receivers (i.e. hotel, family law, regulatory, business, real estate, etc); and, a subject not unimportant to receivers and their counsel/accountants, compensation.

Most panels last 15 to 30 minutes, with some longer for the more complex subjects. The environment fosters class participation with plenty of time for questions and answers. As many of the presenters are lawyers, there will be no shortage of opinions (often contrasting or contradictory) on controversial issues such as receiver liability.

Those who attended the first CRF/Loyola seminar, some of whom have several decades of experience in the area, freely acknowledge Continued on page 15...
Serving as a Receiver...

Continued from page 1..

receiver is obtained under the rents and profits clause of a governmental lender’s deed of trust. The duty of the receiver in these cases is primarily to operate, refinance or recapitalize the receivership estate for a public interest, while the regulatory agency forecloses. Each agency’s requirements and goals are very specific. For example, the California Department of Housing and Community Development may seek a receiver to operate a low-income housing development for a public purpose: to serve low-income or disabled populations. Such a receiver is subject to many restrictions on the operation of such properties, such as rent control and occupancy profiles, but otherwise conducts an ordinary receivership.

In the purely regulatory receivership discussed in this article, the legal proceeding is brought by a government agency to have a licensee or other business entity enjoined from certain conduct the agency views as injuring the public. Often the need is for at least a conservatorship (typically the first step for an insurance company), a full receivership (where current management needs to be removed from control), or a liquidation of the assets of the business.

Where liquidation of the defendant’s assets, rather than rehabilitation or sale of one asset, is a goal of the government’s case, judges do not always adopt the government’s view. Appointment of a receiver is, in the federal courts, often viewed as a “drastic remedy.” A receivership in this circumstance may therefore be (but usually is not) temporary and short term, designed to allow the government access to the business for the purposes of investigation or audit.

SELECTING THE REGULATORY RECEIVER: A COMPLEX PROCESS

As in all receivership work, relationships with the parties moving for appointment of a receiver are typically key to obtaining the engagement. The regulatory agency’s procurement guidelines may apply.

A background in the industry in which the business is operating may be essential, depending on the agency petitioning for the appointment of a receiver (or a conservator, liquidator or trustee).

The nominating (or appointing) agency may require the successful candidate to have identified his or her general counsel that would be engaged not only to handle matters in the supervising court, but also to coordinate foreign representation, such as offshore litigation to recover assets. It is commonplace for years of litigation to be required to recover assets, press claims against directors and officers, seek coverage under insurance policies and avoid pre-receivership transfers. Both the receiver and his or her counsel are expected to be cost effective. Creative fee proposals from both the receiver and legal counsel are often useful in obtaining engagements.

In receiverships initiated by California regulatory agencies, the governmental agency often controls who is, in effect, the receiver. See, e.g. Calif. Fin. C. §§ 3100 et seq. The regulator nominally serves as the conservator or liquidator, with his or her powers delegated to “special deputies.” These are sometimes private-practice receivers. In federal cases, the plaintiff agency nominates a candidate or multiple

Continued on page 4...
candidates to the U.S. District Judge, who makes the appointment. Appointment is usually at an unnoticed TRO hearing or shortly after it. Some U.S. District Judges defer to the agency’s wishes on the appointment, while others do not. As regulatory receiverships present challenges that can be unique, judges in these cases are more likely to believe they know who is best-suited to accomplish the tasks at hand than in ordinary receiverships. The regulated person or entity may file a chapter 11 petition under the U.S. Bankruptcy Code to interfere with the process. This tactic can be defeated if it is anticipated. For example, in In re First Independent Trust Company, 101 B.R. 206 (Bankr. E.D.Cal. 1989), the bankruptcy court dismissed a chapter 11 case in its first 24 hours, as it would have interfered with the agency’s enforcement of its regulatory requirements. Receivers should also analyze early on whether the debtor is eligible to file a petition under Bankruptcy Code § 109(b) (governing who may be a debtor).

The Actions of the Defendant/Licensee Vary from Case to Case

An entity that disagrees with its being in receivership may contest many of the receiver’s proposals. It is not uncommon in the early weeks of the case for the defendant and the receiver to battle for the “hearts and minds” of the alleged victims. The defendant often asserts that all would be fine if the government regulatory agency had not moved in precipitously – a pitch that appeals to those who previously fell prey to the defendant. Other times, the defendant’s interest ends when the receiver is appointed. The defendant shifts its concern to minimizing criminal exposure, instead.

The Role of the Court Depends on the Controlling Statute and Inclinations of the Judge

In a typical California case, venue is required to be in the Superior Court for the head office of the defendant. In most federal cases, venue is the choice of the plaintiff governmental agency.

California regulatory receiverships are generally quasi-administrative proceedings. Only some events and activities are subject to court review. Federal courts typically defer to the reasoned recommendations of the plaintiff agency, once the agency has met its high burden for appointment of receiver. Federal courts in California have very broad power to fashion how the receiver will be supervised and what proposals by the receiver will be approved. See SEC v. Hardy, 803 F.2d 1034 (9th Cir. 1986).

The Government Agency Usually is Active in the Case

In federal cases, the government has the burden of persuasion at the appointment hearing. The government agency sometimes must deal with a motion to oust the receiver at an early stage of a California case.
In federal and California cases the agency will generally stay thoroughly involved throughout the term of the receivership. The receiver will need to consult frequently with the agency to assure that the receiver’s proposals are supported. The authorizing statute or appointing court likely also will require or expect the agency to review all professional fees and expenses sought in connection with receivership administration.

**WHAT ROLE THE CLAIMANTS/VICTIMS MAY PLAY DEPENDS ON THE CONTROLLING STATUTE**

In federal cases, intervention is required in order for parties other than the plaintiff/agency, the defendant/licensee or the receiver to be heard. The government generally seeks to limit the number of parties involved in enforcement actions. See SEC v. Qualified Pensions, Inc., 1998 U.S. Dist. Ct. LEXIS 942 (D.D.C. 1998).

In California cases claimants are often active. Creation of committees of the class of claimants being protected in the receivership is commonplace. The committee can become an important ally for the receiver in disputes with the defendant.

**ASSET RECOVERY RULES DIFFER FROM THOSE IN ORDINARY INSOLVENCIES**

A receiver may seek to recover payments made to investors in “Ponzi schemes” as fraudulent transfers (i.e. transfers made for less than full and fair consideration). In response, investors in such schemes often try to trace the payments they received to their particular investments.

Where seeking funds from persons other than the investors, a receiver cannot assert the claims that belong to the investors. A corporation in receivership can, however, be viewed as having been damaged in the amount of the investors’ claims. That enables the receiver to, in effect, assert all investors’ and creditors’ claims against the persons who caused or negligently allowed the fraud or other wrongdoing to occur.

The receiver can assert those claims far more efficiently and as effectively as the individual victims can. Although a receiver stands in the defendant’s shoes for many purposes, the defenses of in pari delicto, unclean hands and inequitable conduct do not apply to a receiver. FDIC v. O’Melveny & Meyers, 61 F.3d 17 (9th Cir. 1995). It is sometimes necessary, however, to include the victims themselves in a settlement, to obtain a “global” resolution.

The receiver may seek and receive assistance from a defendant in locating records and locating and valuing assets, cooperation perhaps inspired by the defendant’s desire for leniency in a criminal prosecution. The receiver must be wary, and assure there is a third-person witness at all meetings with the defendant and keep the regulatory agency and prosecutors fully informed of such relationships.

**A CUSTOM-TAILORED CLAIMS SUBMISSION AND REVIEW PROCESS CAN BE APPROPRIATE**

Classes of claims other than general creditors are the primary ones to be resolved and paid in regulatory cases. Therefore, although the one-size-fits-all model of the U.S. Bankruptcy Code is readily applicable, it is not always appropriate. As noted above, a U.S. District Court has “broad powers and wide discretion to determine the appropriate remedy in an equity receivership.” SEC v. Lincoln Thrift Assoc, 577 F.2d 600, 606 (9th Cir. 1978); SEC v. Hardy, supra.

The receiver’s first concern is to determine the class of claimants to be benefited by the receivership. A regulatory receiver should analyze early in the case whether, on a fair-value balance sheet, there is any hope for general creditors. General creditors are not the real victims in most of these cases (it is not uncommon for the largest creditor claims to be held by insiders and by the defendants’ lawyers). Therefore even though the bankruptcy courts disfavor application of trust principles to defeat a pro rata distribution of assets, in cases involving investment frauds trust law is very important. Tracing principles are often appropriately used to place investors (those who entrusted funds to the defendant, not shareholders in the defendant) ahead of ordinary creditors for purposes of distribution and to provide useful guides. See FTC v. Crittenden, 823 F.Supp. 699, 703 (C.D. Cal. 1993), aff’d 19 F.3d 26 (9th Cir. 1994), cert. denied 115 S.Ct. 645 (1994).

Therefore it is sometimes appropriate to recognize multiple trusts. Where defrauded investors constitute the class of claimants to be protected by the receivership, claims may then be separated into separate groups with claims against certain pools of recovered assets. Appropriate claim amounts may be limited to out-of-pocket losses, excluding promised profits, where the recovery is limited. In re Tedlock Cattle Co., Inc., 552 F.2d 1351 (9th Cir. 1977).

Even such normally venerable principles as prorating of distributions within a trust class may be markedly unfair in a regulatory receivership. For example, estimating and paying claims according to the length of time the invested funds were subject to embezzlement may be necessary in order to avoid a late-in-time investor’s losses exceeding all the embezzlement that occurred after his or her investment was made. See SEC v. Qualified Pensions, Inc., supra.

Early partial payments can be critically important to the victims who are not typically commercial creditors. The subject fund may be some victims’ primary source for meeting every day living expenses. For that reason, even when a general partial distribution cannot be made, hardship exceptions may be important to consider. Full payment of small claims will reduce administrative expenses and may also lessen victims’ hardship.

Claimants sometimes are not considered parties to regulatory enforcement actions and, in some courts, must first intervene if they want to be heard. In the U.S. District Court for the Central District of California, Local Civil Rules 25.7 and 7 anticipate notice to creditors.

In conclusion, regulatory receiverships are replete with profoundly personal concerns that, fortunately, benefit from the flexibility afforded by their not being strictly subject to the rigid and necessarily lengthy liquidation process under the Bankruptcy Code.

Fred Holden is a partner in the San Francisco office of Orrick, Herrington & Sutcliffe LLP. He has represented California government regulators, in their capacity as liquidators, and receivers and trustees appointed by U.S. District Courts in many of the largest receiverships in which financial or pension frauds were resolved. Fred served on the faculty of CRF’s training program in 2000.
Because “Ask the Receiver” has not been deluged with questions, I have been asked to comment on a new receivership case from the California Court of Appeal, Gold v. Gold Realty Company, 114 Cal. App. 4th 791, 8 Cal. Rptr. 3d 118 (2003). As most of you know, receivership issues are rarely appealed. When they are, they often do not result in published opinions. It is always of interest, therefore, when a published opinion dealing with receivership issues comes along. While the Gold case is not ground breaking, it does highlight some basic receivership concepts.

The litigation which spawned the Gold case is reminiscent of Dicken’s Bleak House; a family battle which, by the time the Court of Appeal ruled, had been going on for ten years. After the death of the family patriarch, one faction of the Gold family sued the other over the management of three of the family’s wholly owned corporations, seeking an involuntary dissolution of the corporations and damages. After trial, the court denied the damage claims but ordered the three corporations to be dissolved and wound up. Because the parties couldn’t agree on how to manage the corporations during the wind up period, as part of the judgment the court ordered that a three-person board would run the corporations and oversee the dissolution and wind up. One board member was to be selected by each family group and a third, an independent director, was to be jointly chosen, or if that was not possible, appointed by the court.

Initially, both sides agreed on a third director to serve for two years. After two years he resigned because of the acrimony between the two warring family factions.

The plaintiffs then filed a motion for the appointment of one of five retired jurists as the third director. Retired Associate Justice John Zebrowski was appointed. However, he would only agree to the appointment if the parties stipulated that the appointment was a reference pursuant to C.C.P. §638, clothing him with judicial immunity and the parties agreed not to sue him. He served for over a year until one of the factions objected to his re-election to the board and threatened to sue him if he continued. Because of the election deadlock, the court re-appointed Zebrowski as the third director, but he declined to serve when the defendants would not agree to a stipulation again giving him judicial immunity. The court then appointed another retired justice, Richard Neal, as the director and ordered the parties to obtain director’s liability insurance, but none could be found. At this point the court appointed Justice Neal as receiver to wind up the corporations; thereby giving him quasi-judicial immunity. In doing so, the court held that it had inherent equitable power to appoint a receiver on its own motion where essential to accomplish a judicial objective, citing C.C.P. §564(b)(3) and (4). The court felt it was necessary to have a receiver appointed because this was the only method the court could devise to protect whomever was appointed from personal liability.

The Court of Appeal affirmed the appointment of the receiver. As indicated, its decision is not ground breaking but reconfirms a number of receivership concepts, including the following: (1) a receiver can be appointed to carry a judgment into effect or to dispose of property according to a previously entered judgment; (2) Corporations Code §1800 gives the superior court jurisdiction over an action for the involuntary dissolution of a corporation and grants the superior court the power to appoint a receiver to wind up the corporation; (3) a court of equity can change the manner of sale of property in its custody by a receiver appointed by it from that previously prescribed; (4) a receiver is an agent of the court and the property in his or her hands remains under the custody and continuous supervision of the court; (5) the fact that another potential remedy was available, (i.e., the appointment of a third director) did not prevent the court from appointing a receiver. The Court notes “the availability of other remedies does not, in and of itself, preclude the use of a receivership.” The Court notes that while various cases state that a receivership is a drastic remedy that does not mean, in appropriate cases, receivers cannot be appointed even though other remedies exist. The trial court must merely “consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership”; (6) finally, an order appointing a receiver will be reversed on appeal only there if there is a clear showing of an abuse of discretion. Here, the court noted, given the case’s long history, the aborted attempts to find a provisional director, and the need to provide whomever was appointed with some protection of his or her personal assets, the remedy of receivership was clearly appropriate.

The case is also an example of what you should consider, by way of protection, should you be approached to act as a provisional director rather than as a receiver. You should insist that the parties provide you with officer’s and director’s insurance and other protections, such as a stipulation that they will not sue you. If that cannot be obtained, you should seriously consider whether it is beneficial to take the appointment as a provisional director rather than as a receiver.

PETER A. DAVIDSON, an attorney with Rein Evans & Sestanovich LLP located in Los Angeles, is a receiver and an attorney who specializes in representing receivers in state and federal court.
The complex operations of hotels and restaurants — often referred to as the “hospitality industry” — makes even the shortest term receivership daunting for a receiver with little or no experience in the industry. Few other types of businesses “book it, cook it, service it and account for it” under one roof. Add to this recipe for trouble a shortage of qualified employees and seasoned managers, low profit margins and unceasing demands of a round-the-clock operation, and the receiver's job of maintaining cash flow, generating income and preserving value becomes quite a challenge. It is important for courts and opposing parties to understand what confronts a receiver during a hospitality industry business dispute and what steps are needed to achieve a positive outcome.

**Beware - Kids Supervising Playgrounds**

A typical manager in the hospitality industry is younger and less experienced than his or her counterpart in other businesses, yet is often responsible for directing a multi-faceted operation generating millions of dollars in annual revenue. A typical hospitality industry manager has multiple duties, such as marketing, purchasing, labor planning, maintenance, accounting and supervising day-to-day operations. Staffing the business is a real challenge. More than 80% of the staff in lodging, resort and food-service businesses are non-management, are minimum wage or low wage workers, and have limited education. Many are recent immigrants. These factors, along with employee turnover averaging 200%-400% annually, make the need for seasoned management readily apparent.

It is critical for a receiver to assess the capability of the current manager during takeover. Retaining a professional management firm to deal with these complex operating issues may be necessary. This is especially true if the receivership entity is a sizeable business operation, the receiver lacks hospitality industry expertise, and retaining a management firm is not cost-prohibitive. An experienced management company's fee...
Edythe L. Bronston
Law Office of Edythe L. Bronston
Tel: 818-528-2893
ebronston@bronstonlaw.com

is pleased to announce her appointment

as a Receiver for
Los Angeles Homeowners Aid, Inc.,
an operating company

Superior Court
County of Los Angeles

Robb Evans
Robb Evans & Associates LLC
Tel: 818-768-8100
rea@robbevans.com

is pleased to announce his appointment

as Equity Receiver for
James P. Lewis Jr. dba Financial Advisory Consultants

U.S. District Court for the Central District of California
Los Angeles Division

Robert P. Mosier
Mosier & Company, Inc.
Tel: 714-432-0800 x 222
rmosier@mosierco.com

is pleased to announce the completion of his duties

as Receiver for
LB Guam Opportunities vs. LLC Partnership,
a fire reconstruction and mold abatement project

Superior Court
County of Los Angeles

Douglas Morehead
Optima Asset Management Services
Tel: 949-852-0900
doug@optimaasset.com

has opened an office in
Palm Desert
and is purchasing
commercial real estate
in the area

Superior Court
County of San Bernardino

Robert C. Warren III
Investors’ Property Services
Tel: 714-708-0180
rob@investorshq.com

is pleased to announce his appointment

as a Receiver for
Cavic, a rents and profits receivership

Superior Court
County of Orange

Robert P. Mosier
Mosier & Company, Inc.
Tel: 714-432-0800 x 222
rmosier@mosierco.com

is pleased to announce the completion of his duties

as Special Master for the Superior Court in Barratt American vs. Orange County Building Planning Department Reconciling an $18 million surplus vs. regulatory guidelines

Superior Court
County of Orange
Douglas P. Wilson
Douglas Wilson Companies

is pleased to announce the completion of his duties

as a Receiver for
The Auld Golf Course
An operating company

Superior Court
San Diego County

Douglas P. Wilson
Douglas Wilson Companies

is pleased to announce his appointment

as a Receiver for
Shoreline Development Company
an operating company

U.S. District Court
California Central District

Douglas P. Wilson
Douglas Wilson Companies

is pleased to announce the completion of his duties

as a Receiver for
Vallco Fashion Park
a rents and profits receivership

Superior Court
Santa Clara County

IT IS COMING OCTOBER 8 & 9, 2004

LOYOLA II

A comprehensive, two-day instructional seminar on all aspects of Receivership

Where: On the Campus of Loyola Law School, near downtown Los Angeles.

When: October 8 & 9, 2004. It is a two-day event starting on Friday morning and ending Saturday afternoon, followed by a reception with the faculty.

Who Should Attend: Every receiver, receivers’ counsel, receivers’ accountant, receivers’ administrative aid, agents of receivers — in short, anyone involved in the receivership process. Judges, Commissioners and courtroom staff are also invited to attend.

Who Will Teach the Course: Panels of experienced and highly qualified receivers as well as Judges and Commissioners with experience in Receivership law.

What is the Benefit: Each attendee will dramatically increase his/her knowledge of the law and procedures involved in acting as a receiver, as a receiver’s agent, or in representing a receiver. Attendees will earn the California Receivership Forum’s Certificate of Completion of this comprehensive program, a qualification of increasing importance to those who nominate and select receivers. An important part of the program is the personal exchange of information and ideas that takes place between the panelists and the class.

Will the Materials be Made Available?: Extensive written materials will be prepared and provided, but only to seminar attendees. The materials are alone worth the price of admission.

Details: price of the seminar, local lodging and other program details will be mailed in the second quarter, 2004 and announced in the June 30, 2004 issue of the Receivership News.

The Organizing Committee: Edythe Bronston, Esq., Chair, Robert P. Mosier, David Ray, Esq., Beverly McFarland, James Lowe, Martin Goldberg, Marilyn Bessey, and Shawn Christianson, Esq., and Dominic LoBuglio.

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

• Robert Jameson, the well-respected former Presiding Judge of the Superior Court in Orange County has announced his retirement effective at the end of this year. He shared the following thoughts:
  ➔ The most important attributes of a receiver are impartiality and openness with all concerned;
  ➔ He will miss court colleagues and staff, but will not miss unprepared attorneys;
  ➔ Standout moment in a receivership: When a receiver (identified as Bob Mosier) waived his fees at the Final Accounting to enable the employees of the company in receivership to receive more funds…

• The Forum will be presenting a two-day educational seminar, with a “stellar” array of presenters on a Friday and Saturday in October 2004, at Loyola Law School in Los Angeles. Many of you will remember the program at Loyola several years ago, which heightened both the educational levels and awareness of receivership issues in Southern California. This is a statewide effort, with Edythe Bronston serving as the Education Chair. This is the “certification” opportunity you were waiting for…

• Beverly McFarland, Chapter 11 Trustee, Sacramento Valley Chapter, is coming off a high energy wave right now as she just closed the sale of 14 Taco Bell stores this month, from Willits to the East Bay Area. A very complex, lengthy closing process involved Taco Bell stores owned by various entities, some in bankruptcy, some not. The sale got off to a fine start in December 2003 with a very successful auction performed by National Franchise Sales, Santa Ana…

• More announcements, movin’ and shakin’:
  David Ray, a past-president of the LA/Orange County Chapter, has moved on to a new presidency — that of 2000-member National Association of Bankruptcy Trustees. More than 1000 of the nation’s 1200 bankruptcy trustees are members of this prestigious organization, and David has been a member for some 20 years. Congratulations…
  Edythe Bronston of the LA/Orange County Chapter has formed an of-counsel relationship with Kirk Rense, the Editor of this fine Newsletter. He works out of Orange County, she out of LA. Another great business opportunity arising from affiliation and active participation in the Receiver’s Forum…
  Rebecca Callahan, a well-known litigator and insolvency practitioner in Orange County has moved her offices to new digs in Irvine. Reach her at rcallahan@callahanlaw.biz …

• Judicial assignments: Judges David Yaffe and Dzintra Janavs will remain in the Writs and Receivers departments in Los Angeles Superior Court, Central District, handling the equity receiverships, while Commissioners Bruce Mitchell and Victor Greenberg handle the rents and profits cases…

*Alan M. Mirman is a partner in the Calabasas law firm of Horgan, Rosen, Beckham & Coren, LLP, and specializes, not surprisingly, in Creditor’s Rights. His practice includes various aspects of provisional remedies, representation of receivers, litigation, loan and lease documentation, etc.

Heard in the Halls and the Publisher of the California Receivership News thought we would share this early-morning photo taken at the March LA/Orange County Chapter board meeting. This Board regularly meets (yawn!) at 7a.m. at David Ray’s office in West LA, a long commute for Orange County members who must leave well before 6a.m. to beat the traffic.

Many of these folks are founding board members (FBM’s). They are, L-R: Dominic LuBuglio (FBM), Doug Morehead (FBM), Gary Plotkin (FBM), Kenton Johnson (seated, currently co-chair), Gary Holme, Edy Bronston, Bob Mosier (FBM), Howard Grobstein, Alan Mirman (seated, currently co-chair), Rob Warren III, Peter Davidson (FBM), Michael Wachtell, David Pasternak (FBM), Steve Linkon, David Ray (FBM), and Kirk Rense.

Chapter boards are the backbone of our organization. I encourage other boards of the California Receivers Forum to send in their meeting pictures for future issues. We encourage all receivers, receiver’s counsel and all other receivership professionals to join the CRF and get involved!
arrangement is generally 3% to 6% of revenues, plus expenses. An “incentive” or “disposition” fee may also be appropriate if the management firm’s retention contract includes assisting in a sale or transfer.

Hiring a qualified on-site interim manager rather than a management firm may be more appropriate where the entity in receivership is a small, single-asset hotel or restaurant. Such experienced short-term managers are normally paid a salary 25% to 35% higher than is customary for permanent managers, because of their limited availability and the short-term nature of the work.

**Minding Money AND Mayonnaise**

Hotels and restaurants generate hundreds or thousands of customer transactions daily. Most are paid with credit cards or cash. Watching money and material is critical and “daily” reporting by management must be timely and have sufficient built-in controls and cross checks. The Receiver’s accountant must also understand how cash, sales receipts and product costs flow through this type of business to enable him or her to spot peculiar activity not being properly accounted for. For example, in one recent partnership dispute involving a nightclub, the on-site managers set up separate credit card machines that directed the monies into the managers’ bank accounts—not the account of the owners. It was determined where the missing money was going when spotters were sent in and daily receipts audited. Unfortunately, this was 6 months and $100,000 too late. In another hotel receivership, it was discovered soon after regular inventories were instituted and cost samplings undertaken, that certain food items paid for were nowhere to be found. Later it was discovered that the purchases were transported from the delivery dock to a nearby warehouse instead of the receivership business.

Labor – rather than product costs or operating costs, as is the case in many other businesses – is the single biggest expense in operating a hotel or restaurant. This is a service-driven industry. There is a minimum number of employees required just to open doors, make beds, prepare meals, register and serve customers and account for the day’s income. This employee cost can be as much as 30% to 50% of gross revenues. Higher labor costs also increase related expenses, such as employer taxes, workmen’s compensation insurance premiums, employee meals and uniforms. Payroll must be monitored daily in order to avoid excess spending and must be watched as closely as the cash register!

Many hotels and some restaurants customarily bill large clients on a monthly basis for rooms, meals and miscellaneous charges, creating accounts receivable worth many thousands of dollars. Sales personnel trying to bring in large clients tend to focus on volume and price, paying less attention to good credit management when trying to improve business. A cash shortage problem may be the result of too many ongoing company contracts with airlines, nearby corporations and tour wholesalers. Aggressive collection action on late payers without alienating regular clients will yield more cash to fund operations.

**Continued from page 7.**

**Continued on page 14....**
y father Rubin Pasternak was a Polish Holocaust survivor who moved to New York City after the war, where he met my mother, Esther, who was a native New Yorker who never lost her New York accent. Though born in New York, I have lived in Los Angeles continuously since 1953.

When I was six, my parents moved to Sherman Oaks, where they lived for the remainder of their lives and I lived until I moved to the other side of the Santa Monica Mountains as a UCLA undergraduate in 1971. One of my UCLA friends (and fellow political science major) was Alan Mirman (how is that for a Heard In The Halls tidbit?). So my friendship with Alan goes back to the days when we both had considerably more, and longer, hair.

After college, I attended Loyola Law School in Los Angeles, future site of the comprehensive Receivers Forum educational programs. I remember my first days there, and being surprised to learn that many of my classmates went to law school after deciding to do so around the time that they graduated from college. I had decided that I wanted to be a lawyer when I was about 12 years old, although I don’t recall ever meeting a lawyer for any meaningful conversation until I was in law school (and not all of the conversations were meaningful then).

It was at Loyola that I met my wife and law partner Cindy, who was then Cynthia Rosen. We were seated alphabetically by our Sales Professor, and Pasternak wound up next to Rosen. I was married and Cindy was engaged, so it took about 14 years for the romance to blossom. Cindy always accuses me of being slow.

I went to law school wanting to become a corporate securities lawyer. When I graduated, I tried to get a job with the S.E.C., but they had a hiring freeze at the time. Instead, I was hired by the Department of Corporations, and found myself in their enforcement division. At that time, the Department of Corporations Enforcement Division prepared civil cases for the Attorney General to litigate and criminal cases for District Attorneys. Department of Corporations enforcement attorneys handled only administrative hearings. That changed during my three-and-one-half years there: we got the authority to co-counsel criminal cases with District Attorneys. It was a great time to work there, with Willie Barnes as Commissioner of Corporations, energetic Ron Fein as Chief Deputy, and Jerry Baker in charge of the Enforcement Division. It wasn’t long before I realized that I wanted to be a litigator, and not a corporate attorney.

It also was at the Department of Corporations that I first worked with receivers. I was fascinated by the concept of appointed individuals running businesses and investigating fraud and the like. While it seemed like great work, I never envisioned myself as a receiver, but thought that it would be interesting to work for a firm that represented receivers.

In 1980 I became the first Department of Corporations attorney in (my) recent memory to become a Deputy Attorney General in the Business Section in Los Angeles. We had five clients at the time: the departments of Corporations, Banking, Savings and Loan, Real Estate, and Insurance. While I was there the Business Section merged with the Tax Section, and we also represented the Franchise Tax Board and the Board of Equalization.

I have always thought that my brief career at the Attorney General’s Office was a highlight of my legal career, and still regret leaving after less than a year to take what appeared to be a great opportunity with a small Century City law firm. As a lawyer with only a few years experience, I was given tremendous responsibility as a Deputy AG. In one memorable securities fraud case, I obtained a contempt judgment from Judge Robert Weil in the Writs and Receivers Department. However, my most memorable case was a corporate takeover battle in Orange County. The lead attorney for one of the two other parties was Evelle Younger, who had left his position as the former California AG less than a year before (to join the Buchalter firm as a new name partner). I remember a phone call from Younger one day telling me that he had spoken to the judge in Orange County about the difficulty of Los Angeles lawyers appearing there for a 9:30 motion hearing, and she had agreed to schedule it at 11 a.m. to accommodate us. While it was intimidating to a young lawyer such as me, only a government office such as the AG’s office would give a young lawyer the responsibility to handle a case of that magnitude against experienced lawyers — such as the former Attorney General. Needless to say, the judge ruled in favor of Younger’s client at the hearing. But, a few weeks later I obtained a writ of supersedeas from the Court of Appeal overturning her ruling, and the case settled a short time later.

During a brief sojourn at a Century City law firm that included receivers, I discovered that the firm’s major practice area was bankruptcy, and I moved on to Tyre & Kamins (which later became Tyre Kamins Katz & Granof). After about a year there as a business litigator, I was asked by the Department of Corporations to become a conservator of an escrow company that they were shutting down. I was not enthusiastic, but took the assignment after one of the partners at the firm encouraged me to do so. After a short time as the conservator, the Department of Corporations filed a lawsuit and had me appointed as the receiver of the escrow company, my first receivership.

For the next ten years or so I dabbled in receiverships, generally getting appointed a few times a year, but concentrated on litigation. By the early 90’s I decided that I preferred my receivership practice and concentrated on that instead. I found that I enjoy the responsibility and challenges of receivership practice, and especially enjoy the many court hearings while generally avoiding the bane of litigation — discovery.

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In 1993 Cindy and I formed our own Century City law firm with two other partners. Though Cindy is now a full-time mediator, she is still a member of Pasternak, Pasternak & Patton.

I have handled some large receiverships (as well as many small ones) during recent years, while regularly representing and advising many other receivers. In 2000, San Bernardino Superior Court Judge Peter Norell (who is now the Supervising Judge in San Bernardino) appointed me as the Receiver of the parent company of Wickes Furniture Company and its sister company, which was a furniture distribution company headquartered in Ontario and with a large facility in Mississippi. That receivership has posed many special challenges, including complex tax and business issues. I sold the assets of the sister company in 2002, and sold Wickes (which was a profitable operating business) shortly thereafter. Since then I have had over $45 million in the bank pending our attempts to resolve tax and other issues. The banks that had me appointed as receiver are undoubtedly not pleased that they have yet to receive any of these funds.

In April, 2003, United States District Judge Dean Pregerson appointed me as receiver in a large mortgage fraud case that has kept me busy ever since (as well as fellow Receivers Forum Board members Michael Wachtel, who is my principal attorney in that case, and Howard Grobstein, who is my principal forensic accountant in that case). We have entered homes and businesses with U.S. Marshalls without notice in California and Utah and seized documents and assets after demonstrating that the principal defendants destroyed computer and documentary records following my appointment. I have administered some 85 expensive homes in the most exclusive California communities (La Jolla, Malibu, Beverly Hills, Bel-Air, Carmel, etc.), and sold about 25 of them. I also have located and sold a variety of other assets, including wine, jewelry, and extensive home furnishings.

At my request both of the primary individual defendants in this case have been held in contempt of court for failing to comply and cooperate with our efforts. One has disappeared (with five of his six children and one of his two wives), and the second spent thirty days in federal detention as a result of the contempt conviction.

I have always believed that attorneys have an obligation to give something back to the community, due, at least in part, to growing up during the ‘60s. Consequently, I have been involved in bar and related activities since I began practicing law. A highlight of this involvement was serving as president of the Los Angeles County Bar Association about five years ago. Another highlight is my current 3-year term on the California Judicial Council, which is responsible for the operation of all of the California courts. Four attorneys appointed by the State Bar Board of Governors, 14 judges, one member each from the State Senate and Assembly and six advisory members make up the Council. California Chief Justice Ron George presides over the meetings.

I have three sons and sports are a large part of my free time. We are all enthusiastic UCLA supporters (and still admit it), attending as many basketball and football games as possible. There are also Dodgers games, and some visits to Staples to see the Lakers and Kings. I enjoy hiking, and recently purchased a new bicycle, hoping to find the time to bicycle with my middle son, Kevin. Our oldest son, Greg, graduated from Bard College in the Hudson Valley last year, and is living in New York trying to find acting jobs for this year. Fourteen-year-old Kevin is an eighth grader at Buckley, and Matthew is a 10-year old fifth grader at Curtis.

Somehow, a future corporate securities lawyer never handled a corporate securities matter, and instead wound up as a receiver. Funny how that happens.
Beds Go Bump at Night - Income v. Value

Hospitality businesses are priced, bought, financed and sold according to income produced, rather than to value of the land, bricks and mortar or fixtures, furnishings and equipment. Industry values are normally determined by applying an income capitalization rate for hotels, or a multiple of the cash flow for restaurants. In a stable year, the industry average capitalization rate for hotels is 11% to 12% and the average restaurant multiple is 2x to 3x.

Since value is directly related to income, how the Receiver operates the business will impact the receivership property’s value. Ideally, maintaining (or improving) profitability will help all concerned where there is to be a disposition or refinancing. If the receivership business is failing but is perceived to be capable of generating a profit with a new operator or brand name, it may be appropriate for a receiver to seek to fund short term losses, rather than close the doors. In one case involving a 110-seat nightclub without debt (or assets worth anything), the fair market value of the lease was $5,000 monthly, with net cash flow in prior years of $100,000. By negotiating an agreement with the building owner to cover losses and eventually sell it at $200,000 market value, this covers the outlay and secures a tenant.

In another case involving a mid-market, soon-to-be-branded 197-room hotel, income was increased short term by entering into 6-month housing contracts for construction workers. This gave the receiver time and income to demonstrate future viability. This resulted in a $1,300,000 sale, $400,000 more than the $900,000 distressed appraisal value of the business.

In short, the unique issues implicating management, manpower and money in hotel and restaurant businesses have the greatest impact on production of income and business value. If operated correctly, a hospitality industry receivership can accomplish its purpose, give everyone a good night’s rest and still generate plenty of dough.

*Dennis P. Gemberling is president of Perry Group International, based in San Francisco with a satellite office in Los Angeles. Perry Group has managed, operated and consulted on numerous lodging, foodservice, resort, gaming and club businesses across North America since 1985. Mr. Gemberling has more than 30 years of hospitality industry experience.
THE LIST

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

AREA

**BAY AREA**
- Dennis P. Gemberling 415-431-0135
dpg@perrygroup.com
- David A. Summers 925-933-2875
  davidsummers@aol.com
- Robert M. Rose 650-802-1629
  brouse@wres.com
- Donald G. Savage 510-547-2247
donald.savage@worldnet.att.net
- Douglas P. Wilson 415-439-5202
dwilson@douglaswilson.com

**SACRAMENTO VALLEY**
- Beverly N. McFarland 916-408-3755
  beverlygroup@att.net
- Kevin J. Whelan 916-408-3755
  beverlygroup@att.net

**FRESNO AREA**
- Clifford E. Bressler 559-298-1089
  cliffordbressler@earthlink.net
- Steve Franson 559-930-8119
  steve@stevefranson.com
- James S. Lowe III 559-924-4214
  jslowe@lemooreret.net
- Hal Kijster 559-435-1756
  hkijsler@mancoalbott.com

**LOS ANGELES/ORANGE COUNTY/INLAND EMPIRE**
- Edythe L. Bronston 818-528-2893
  erbronston@bronsontlaw.com
- Weldon L. Brown 909-682-5454
  weldon@weldonbrown.com
- Weldon “Bud” Brown 909-682-5454
  bud@weldonbrown.com
- Douglas B. Davidson 949-725-8305
  dbdmotel@aol.com
- Richard Dennis 818-990-7733
  rick@carerrick.com
- James H. Donell 310-207-8481
  james.donell@jlagmar.com
- Steven Donell 310-207-8481
  steven.donell@jlagmar.com
- Robb Evans & Associates 818-768-8100
  robb.evans@robbevans.com
- Burdette “Bud” Garvin 909-387-0901
  awl@burdettegarvin@aol.com
- David A. Gill 310-277-0077
- Gary Haddock 310-306-6789
- Nigel W. Hamer 818-382-7500
- Gary R. Holme 323-466-9761
- Mary Keshishian 818-990-7733
- Timothy Kuhn 818-990-3700
- Everett Miller 818-979-0010
  everettmiller_inkenn@hotmail.com

**LOS ANGELES/ORANGE COUNTY**
- George R. Monte 626-930-0283
  monteg@aoa.com
- Douglas C. Morehead 949-852-0900
  dougg@douglasmotorset.com
- Robert P. Mosier 714-432-0800
  mosier@mosierco.com
- Leon J. Owens 310-826-9838
  leonjowens@aol.com
- David J. Pasternak 310-553-1500
  djdp@pdaslaw.com
- James L. Peerson 323-954-7575
  jim@peergrdproup.com
- Theodore G. Phelps 714-734-0479
  tphelps@dusdators.com
- Gary A. Plotkin 818-906-1600
  gplotkin@pmlaw.com
- David L. Ray 310-481-6700
  drl@srblaw.com
- William E. Turner 714-228-9153
  dwall@waldeytrealadvisors.com
- David D. Wald 310-979-3850
- Robert C. Warren III 949-226-5434
  rweissman@rweiss.com
- Richard Weissman 949-263-2690
  jswilliams@bbklaw.com
- J. Scott Williams 949-476-2696
- John M. “Jack” Wolfe 714-751-7588
  azimball@allenmanagement.com

**SAN DIEGO AREA**
- M. Daniel Close 858-792-6800
  dcloes@cts.com
- Mike Essary 858-560-1178
  mcsary@cni4you.com
- Martin Goldberg 858-560-7515
  mgoldberg@bgsdsusi.com
- William J. Hoffman 858-720-6700
  bill.hoffman@trigld1.com
- Richard M. Kipperman 619-668-4500
  mk@cmorpgt.com
- Thad L. Meyer 858-713-9345
  tmeyer@allianceturnaround.com
- Douglas P. Wilson 415-439-5202
  dwilson@douglaswilson.com

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

Loyola II...

Continued from page 2.

having learned a great deal. You cannot bring this much talent and experience together in one setting without producing new insights, knowledge and experience for program attendees. The two-day conference qualifies for both MCLE and CPE credits.

The written materials are an important part of the conference, and are alone worth the price of admission. They will update your existing resource files as well as assist in the development of a comprehensive set of forms for both receivers and their counsel.

A significant goal in 2004 is to increase the number of participating judges and commissioners. Invitations are just now going out, and members of the judiciary interested in participating should contact me at the Receivership News (714) 432-0800 x222 or Ms. Bronston at (818) 528-2893 and let us know of your interest. We also hope to enlist the participation of some of Loyola Law School’s finest faculty to make presentations in selected subjects, such as ethics.

In addition to a comprehensive educational program, there will be plenty of time for socializing. There will be structured coffee breaks, and two luncheons (with special speaker) on Friday and Saturday. Friday evening will also feature a no-host cocktail hour and, for those interested, an informally organized dinner(s).

The benefits of attending are obvious. The program will be a strong refresher course for those who practice in the area, will provide a great overview and introduction and “how to,” for those who would like to expand their practice into the area, and a unique opportunity to get to know receivers, counsel, attorneys and judges from around the State, all of whom have involvement in the receivership practice area.

Watch for your formal CRF/Loyola attendance packet. If you practice in the area of receiverships or if you wish to, attending the Loyola Seminar may be your two best-spent days in 2004. We look forward to seeing you there. RPM
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