



AMERICAN
BANKRUPTCY
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Distressed Real Estate Symposium

Fiduciary Panel

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Fiduciary Panel: The Real Estate Fiduciary Lifecycle

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Agenda

The Genesis of a Real Estate Fiduciary

- Why receivers are typically needed in the real estate context
- Who gets appointed and on what basis
- Alternatives to receivership

Concerns and Challenges Unique to Real Estate Fiduciaries

- Powers of the fiduciary
- Asset-based concerns/challenges
- Situational concerns/challenges

Exit Strategies

- Common exit strategies for real estate fiduciaries
- Factors to consider for optimal exit

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I. The Genesis of a Real Estate Fiduciary



Factors that motivate need for real estate fiduciary vary widely

- Loan default
- Litigation
- Fraud
- Bankruptcy

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A. Court-Appointed Fiduciaries: Where to Seek Relief

- Venue: State or Federal
 - Which State or District
- State statutory schemes vary widely
 - Uniform Commercial Real Estate Receiver Act
 - State Statutory Schemes
 - *E.g.*, California Code of Civil Procedure § 564 *et seq.*; Texas Civil Practice & Rem. Code §§ 11.401 *et seq.*; 64.001 *et seq.*
 - Appointment pre- and post-judgment
- Federal receivers
 - FRCP 66 & federal common law
- Bankruptcy Trustees (11 U.S.C. § 1104(a))/Examiners (11 U.S.C. § 1104(c))

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The Uniform Commercial Real Estate Receivership Act (UCRERA)

- Finalized in 2015.
- Goal is greater predictability for litigants, lenders, and other parties doing business with a company subject to receivership
- Fully enacted or enacted “substantially similar” statutes in 14 states, including Arizona, D.C., Florida, Maryland, Nevada, Oregon
 - Source: www.uniformlaws.org (last visited 2025.03.07)
- “The court may not appoint a person as receiver unless the person submits to the court a statement under penalty of perjury that the person is not disqualified.”



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Federal Court Receiverships



Derived from federal common law

Federal Rules of Civil Procedure and potentially other federal statutes apply

- FRCP 66: the Federal Rules “govern an action in which the appointment of a receiver is sought or a receiver sues or is sued.”

Federal court must have jurisdiction to appoint a receiver:

- A federal question or
- Diversity and the minimum amount in controversy (28 U.S.C. § 1332)
 - Citizenship of secured creditor must be different than citizenship of each borrower and guarantor named in action

If jurisdiction established generally in the litigation, federal court has ancillary jurisdiction:

- To appoint a receiver and
- Over every suit receiver brings in court to execute receiver’s duties



B. Qualification Considerations for Appointed Fiduciaries

- Each jurisdiction may have specific/different qualification requirements
 - E.g., Corporate entity vs. an individual?
 - In Texas, receiver must be a Texas citizen and a qualified voter at time of appointment (thus, an individual person)
- Courts may have preferences or guidelines
- U.S. Trustee appointments; SEC considerations
- Auditor/Examiner
 - Consider statutory role
- Generally, cannot be:
 - A party to the action
 - An attorney in the action
 - Or otherwise interested in the outcome of the action



C. Selection of Out-of-Court Fiduciaries

Liquidating Trustees

- Quasi court-appointed

Consultant/Independent Director/CRO

- Following deed in lieu of foreclosure
- During forbearance/out-of-court workout
- Post-foreclosure (judicial and nonjudicial)
- In preparation for and/or in bankruptcy



II. Concerns and Challenges for Real Estate Fiduciaries

Real estate fiduciaries are called upon in various situations that bring unique challenges.



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A. Powers of the Fiduciary

- **Statute or Code-Based Powers**
 - E.g., Federal court receivers
“A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.” 28 USC § 754
 - E.g., Bankruptcy trustees
“A trustee shall...” investigate the acts and financial condition of the debtor, file tax returns, etc. 11 U.S.C. § 1106(a)
 - E.g., Auditor
“When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible.” Texas Rule of Civil Procedure 172
- **Receivership Order**
 - **Receiver is an arm of the court:**
“Courts have ... inherent power to provide themselves with appropriate instruments required for the performance of their duties.... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.” *In re Peterson (State Rep. Title: Ex Parte Peterson)*, 253 U.S. 300, 312 (1920) (internal citations omitted).
 - Orders given wide deference:
“[Reviewing courts] would be remiss ... to interfere with a district court’s supervision of an equity receivership absent a clear abuse of discretion.” *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)
- Certain actions require subsequent court orders (e.g., sale of property), depending on purpose of receivership
- Counsel to the fiduciary critical to help guide

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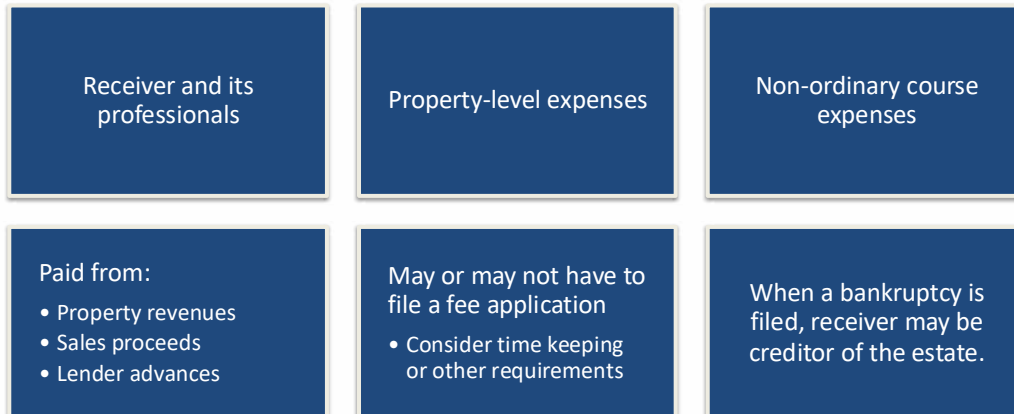
Barton Doctrine Meets Bankruptcy Stay

- *Barton* doctrine generally requires party seeking to sue receiver obtain leave from the court that appointed the receiver. *Barton v. Barbour*, 104 U.S. 126, 127 (1881).
- *Berleth v. Preferred Ready-Mix, L.L.C. (In re Preferred Ready-Mix, L.L.C.)*, No. 24-20158, 2024 WL 5252498, at *1 (5th Cir. Dec. 31, 2024)
 - Holding: *Ultra vires* exception excused need for first seek relief from appointing court.
- Preferred Ready-Mix filed Chapter 11; demanded receiver (Berleth) release its property
 - Receiver conditioned release of property on payment of an administrative fee
 - Preferred Ready-Mix sued receiver for (1) turnover; (2) stay violation; (3) conversion; and (4) disallowance of claim. Bankruptcy Court found in debtor's favor (except as to conversion). Required Berleth to pay \$45,000 (and denied fee claim).
- Fifth Circuit found: "Berleth only had appointing court authority to seize and maintain Preferred Ready-Mix's property, not property of the bankruptcy estate."
 - Because bankruptcy filing immediately and automatically forms a bankruptcy estate, and Berleth did not have authority with respect to property of the bankruptcy estate, Berleth acted outside his power (committed an *ultra vires* act) in withholding Preferred Ready-Mix assets.

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B. Receivership Expenses



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C. Asset-based Challenges/Concerns

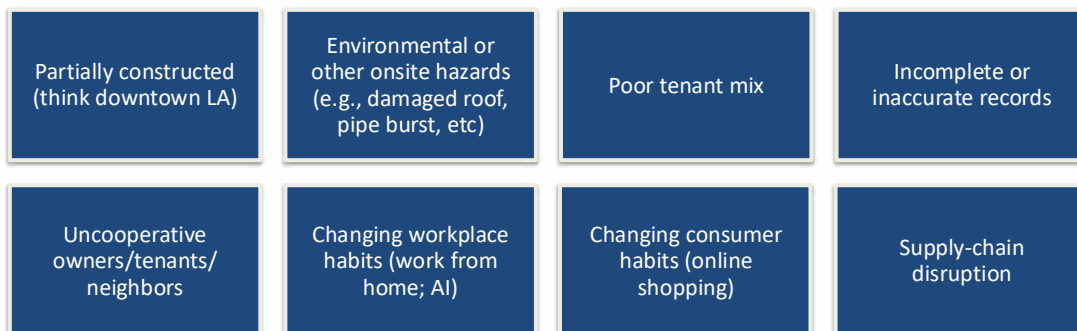
- Office
- Multi-family
- Hotel
- Raw land/agricultural
- Mixed portfolios



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D. Situational Challenges/Concerns



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III. Considerations at Exit

- Court may discharge a fiduciary at any stage.
 - *E.g.*, 11 U.S.C. § 1105
- When the reason for the appointment of the fiduciary has ceased to exist
 - Real estate sale(s)
 - 28 U.S.C. § 2001 ("Sale of realty generally")
 - 11 U.S.C. § 363
 - Bankruptcy plan
 - Investigation and report completed
 - Estate distributions finalized
 - Trust sunsets
- Application for discharge

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QUESTIONS

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Faculty

Katharine B. Clark is a partner with Thompson Coburn LLP in Dallas and represents clients before bankruptcy courts, federal and state trial courts, arbitration panels and appellate courts nationwide. She routinely handles bankruptcy and insolvency litigation, including the representation of debtors, banks, court-appointed fiduciaries and creditors in chapter 11, 7, 15 and 13 bankruptcies. Ms. Clark has broad commercial litigation experience related to troubled and insolvent businesses. Her experience includes representing companies, fiduciaries, lenders, secured and unsecured creditors, and constituencies from every segment of the capital structure in federal and state court reorganization, liquidation and litigation proceedings. She has helped clients navigate insolvency matters involving billions of dollars in liabilities. In 2017, Ms. Clark was part of a team that received the Turnaround of the Year Award (Large Company) from the Turnaround Management Association for her work on the first successful bankruptcy reorganization of a life-settlement company. She also has experience in bankruptcy and litigation matters involving the real estate and energy industries, and she has litigated actions related to fraud that leads to bankruptcy or other displacement of management or control, including fraudulent-transfer litigation and state and federal court receivers. Ms. Clark received her B.A. *magna cum laude* in 2001 from Austin College and her J.D. *cum laude* from SMU Dedman School of Law in 2004, where she was a member of the Order of the Coif and associate managing editor of the *SMU Law Review*.

Robbin L. Itkin is the founder of Robbin Itkin Corporate Governance Solutions in Los Angeles and serves as an independent director on several company boards. She is a chamber-ranked seasoned attorney and certified mediator who has spent her legal career addressing and resolving business issues facing public and private companies and high-profile individuals. Ms. Itkin advises on sophisticated and complex issues for boards, executives and portfolio companies on core matters ranging from fiduciary duties to management and employment matters, acquisitions, dispositions, litigation and financial restructure, and during all stages of business growth, whether healthy or distressed. She has been appointed by the U.S. Trustee to serve in a fiduciary role as independent trustee in complex matters involving extensive litigation among multiple parties where an efficient resolution is required. Ms. Itkin received the 2022 Turnaround Managers' Association Transaction of the Year Award (Large Company) for her role in representing a large group of victims in the Professional Financial Investors, Inc. Ponzi scheme case, where she worked with competing interests to co-formulate a fair plan for distribution to all victims, notwithstanding their investment vehicle. As counsel to the Ad Hoc Committee of Season Ticket Holders in the Los Angeles Dodgers bankruptcy case, she formulated a resolution with the Office of the U.S. Trustee to allow for season ticket-holders to serve as members of the official creditors' committee. Ms. Itkin's experience spans all industries, including sports and entertainment, retail, manufacturing, real estate, health care, pharma, tech, transportation, commercial lending, food, lifestyle and hospitality. She is experienced in serving on nonprofit boards, including the City of Hope National Medical Center parent board and its Risk, Audit & Compliance Committee, among other committees, as well as on private company boards. Ms. Itkin received the Leading Lawyers in America 2024 Award and is listed in *Chambers USA* and *Lawdragon*, among others. She received her B.A. in 1981 from the University of California, Los Angeles and her J.D. in 1984 from the University of Southern California.

Jeff Jacobs, CPA is CEO of LOGIC Commercial Real Estate in Las Vegas and oversees the company's operations, support services and client interactions across all divisions. He plays a pivotal role in supporting the company's Brokerage division, fostering collaboration between brokers and clients to ensure optimal outcomes in commercial real estate transactions. Mr. Jacobs provides strategic guidance to the Brokerage teams, helping them navigate market dynamics, client needs and operational challenges. In addition to his work with Brokerage, he leads LOGIC's Receivership Services division, where he has successfully managed nearly approximately commercial real estate receiverships in Southern Nevada. He handles asset transition and recovery, implements and executes business plans, and ensures rigorous court reporting. Mr. Jacobs works closely with financial institutions, legal teams and all stakeholders to stabilize distressed assets, maximize value and facilitate smooth resolution processes. He has more than 13 years of corporate accounting and finance experience, starting his career at Arthur Andersen, where he audited financial statements for Fortune 500 companies. He also handled Securities and Exchange Commission (SEC) filings for Starbucks Coffee Co. Mr. Jacobs currently serves on the LIED Real Estate School Council of Advisors. He also is a board member for the Realty Resources Network. Mr. Jacobs received his B.S. in business administration with a specialization in accounting from the University of Nevada, Las Vegas (UNLV) and has since served on the boards of the UNLV Alumni Association and the UNLV Lee Business School Alumni.

David Kieffer is a senior managing director with the Stapleton Group, Inc., a part of J.S. Held, in Los Angeles. A court-appointed receiver and restructuring consultant, he provides solutions for complex situations caused by illiquidity, fraud and shareholder disputes. Mr. Kieffer manages the stabilization, repositioning, completion of construction, leasing and disposition of real estate assets for wide-ranging engagements. His experience spans all asset classes, including commercial and industrial buildings, multifamily housing, retail, mixed-use projects, senior housing, raw land, agricultural properties, hotels and motels, gas stations, golf courses, food and beverage operations, dairy farms and residential property portfolios. Mr. Kieffer serves as a fiduciary and advises creditors, shareholders and other stakeholders. His skills include case management, property management, development and construction, dispute-resolution, asset-disposition, brokerage, and environmental and regulatory issues. Since joining Stapleton Group upon its formation in 2008, Mr. Kieffer has managed hundreds of engagements encompassing billions of dollars of real estate and agribusiness assets. He currently is receiver for the \$300 million *SEC v. SiliconSage Builders*, trustee of a \$200 million portfolio of 40 income-producing properties in Southern California, and receiver of large dairies, nut farms and other agribusiness entities throughout the Western U.S. Mr. Kieffer received his B.S. from Michigan State University and his M.B.A. from the University of Denver.

Mike F. Zandpour is a senior vice president, deputy general counsel and head of Litigation at City National Bank in Los Angeles. He supports a variety of business areas within the bank, including commercial, corporate, entertainment, technology, SBA, private banking and special assets, having served as the lead attorney in the resolution of four whole-bank acquisitions through FDIC loss share. Mr. Zandpour received the 2024 Almon McCallum Award from the California Bankers Association (CBA) at CBA's Bank Counsel Seminar in recognition of his contributions to the California banking industry. He serves on the CBA's Legal Affairs Committee and previously chaired the State Bar's Financial Institutions Committee. Prior to joining City National Bank, Mr. Zandpour served as assistant general counsel at Far East National Bank, where he managed litigation and advised on lending, regulatory and bank operational matters. He also led efforts to resolve the bank's portfolio of problem corporate and real estate assets during the great recession, during which time he served in a dual role

as manager of the Special Assets Department. Mr. Zandpour previously externed for Hon. Robert W. Alberts in the U.S. Bankruptcy Court for the Central District of California. He received his J.D. from The Ohio State University (Moritz) College of Law, where he served on the *Ohio State Journal on Dispute Resolution*.