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What the *Liu* Decision Means for Federal Equity Receivers

By David Slovick

In June, the U.S. Supreme Court issued a decision in *Liu v. Securities and Exchange Commission* which limited the government's ability to impose monetary sanctions on defendants in Securities and Exchange Commission ("SEC") enforcement cases.¹

Although the decision may not end up having a big impact on individual fraudsters who find themselves litigating against the SEC, *Liu* will be import-

ant to entities engaged in legitimate securities business activities that are ordered to return ill-gotten gains made as a result of unlawful conduct. Those defendants can now reduce the total amount of money they are required to pay the government if they can demonstrate that some of the money they raised from investors was used to offset "legitimate expenses" incurred in running their businesses.

CONTINUED ON PAGE 3



The NAFER Young Professionals Committee Survey: "How Should Receivers Handle Requests to Share Information with Federal Agencies?"

The Practitioner's Corner is a regular feature where NAFER members can contribute their personal perspective on issues facing receivers.

Receivers are independent fiduciaries. They answer only to the court. But often, governmental agencies ask receivers to share information they obtained, confidential or otherwise. Are receivers obligated to share information with governmental agencies? To answer that question, the NAFER Young Professionals Committee sought guidance through a member wide-NAFER survey.

This article identifies two scenarios and summarizes the responses. The YP Committee received 16 responses from NAFER's general membership.

The first scenario is where a federal agency that recommended the receiver now requests information from the receiver. The second scenario is where a governmental investigative agency, like the FBI, conducts a criminal investigation during the receivership.

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For receivers, however, *Liu* will mean more work. Previously, the task of identifying ill-gotten gains that are subject to disgorgement in SEC cases was straightforward—it required only a showing that money left over in a defendant’s account after his or her fraud was discovered was directly connected to the defendant’s wrongdoing. Now, however, receivers and their counsel will have to perform a detailed analysis to identify which of the money a defendant raised from investors was used for unauthorized purposes and which was used for legitimate business expenses. This, in turn, may mean less money left over for receivers to return to investors at the end of a case.

LEGAL ANALYSIS

The Lower Court Decisions in *Liu*

Liu arose from a fraudulent solicitation scheme related to the federal government’s EB-5 Immigrant Investor Program, which allowed non-U.S. citizens to obtain permanent residency in the United States by investing at least \$500,000 in a “Targeted Employment Area” and creating at least ten full-time jobs for U.S. workers. Defendant Charles Liu raised \$27 million through the program to build and operate a cancer treatment center in California. Instead of building the center, Liu used most of the money to pay himself and his wife millions of dollars in salary, among other unauthorized expenses. In 2016, the SEC sued Liu and his wife for violations of the anti-fraud provisions of the Securities Act of 1933 and Securities Exchange Act of 1934.²

The district court granted summary judgment in favor of the SEC and ordered the Lius to disgorge (give back) the ill-gotten gains they made from their fraud. Although the Lius did not dispute their obligation to pay disgorgement, they did dispute the amount of disgorgement they owed. The correct measure of disgorgement, they argued, was the total amount of money raised from investors less the amount of investor money left at the time the SEC shut down the fraud, and less the amount of the defendants’ “legitimate business expenses.”³ The district court rejected this method of calculation, however, on the grounds that it “would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place.”⁴

On appeal to the Ninth Circuit, the defendants argued that to the extent the district court intended to grant the SEC disgorgement as an equitable remedy, the court erred because in fact it awarded disgorgement also as a penalty.⁵ More specifically, the defendants argued that the district court’s order that they disgorge the total amount they raised from their investors less the amount left over and available to be returned was erroneous.⁶ Relying on the Supreme Court’s 2017 decision in *Kokesh v. Securities and Exchange Commission*, which also dealt with the reach of the SEC’s disgorgement authority, the defendants argued that “the district court lacked the power to order disgorgement in this amount” because the disgorgement award included *all* the funds received by Liu and his wife, not just the amount of their unjust enrichment.⁷ By refusing to exempt their legitimate business expenses from the

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President’s Letter

Hernan Serrano,
NAFER President

Greetings! Having been the NAFER Board Liaison for the Publications Committee, I am especially honored to bring you this President’s Message. My name is Hernan Serrano and I am the new President of NAFER.

I’d like to share two important goals for my term. The first is to encourage communication within our organization. In this unusual time, while we all try to keep ourselves and our families safe, it is even more important that we stay connected.

Use our recently-revamped NAFER website to learn more about current issues, stay in contact with colleagues and friends, and market your own individual talents. Updating your profile will give fellow members and agency representatives an opportunity to learn about you and your firms. Do not miss this invaluable chance to promote yourself in front of a possible new business opportunity.

Look for e-mails and NAFER Community posts for our

upcoming webinars and regional virtual meetings. These programs will give us all an opportunity to learn about some exciting topics from the safety of our homes and offices. These will also be opportunities for you to share with your own office colleagues, business contacts and other professionals that would benefit from membership in NAFER.

My second goal is the strengthening of our NAFER Committee participation. I encourage everyone to get involved. This year all our committees will be setting their own individual goals and will be encouraged to share resources and developments. Our committees offer so much opportunity for our members to express their talents as they help grow NAFER. Go to NAFER.org and click on the Get Involved menu at the top right. Take a minute to browse through the established committees and find one or two that might interest you. There are opportunities for everyone to get involved. Our Chairs and Co-Chairs can provide you highlights of a committee’s focus and ways that you can contribute. These committees allow our members to share in our common pursuit of NAFER’s growth. Do not miss out.

I hope you enjoy this great new issue of *The Receiver* and I wish everyone a safe and healthy holiday season.

Hernan Serrano
President of NAFER



► **Liu Decision**...continued from page 3

total disgorgement award, defendants believed the court ignored the well-settled definition of disgorgement as “a reasonable approximation of *profits* causally connected to the violation.”⁸

The Ninth Circuit disagreed, holding that “the proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors.”⁹ The court also rejected the defendants’ claim that the district court lacked authority to impose disgorgement at all insofar as disgorgement served as a penalty rather than an equitable remedy. The Supreme Court had raised the same issue in *Kokesh*, but only to clarify that the *Kokesh* decision was not meant to express an opinion about the scope of courts’ authority to order disgorgement in SEC enforcement cases.¹⁰

The Supreme Court’s Decision in Liu

The Supreme Court began its analysis of the disgorgement question in *Liu* with a look back to its earlier decision in *Kokesh*. According to the majority, the Court’s limited task was to answer the “antecedent question” it had “reserved” for itself in *Kokesh*: “whether, and to what extent, the SEC may seek ‘disgorgement’ in the first instance through its power to award ‘equitable relief’

” under Section 21(d)(5) of the Securities Exchange Act.¹¹ The Court’s holding was therefore also limited: a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is permissible under Section 21(d)(5).¹²

To reach this conclusion, the Court first sought to determine whether, as a historical matter, equitable disgorgement was among the forms of relief “that were typically available in equity.”¹³ The court decided that disgorgement was recognized historically by courts sitting in equity, but went on to observe that, while

[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity, * * * they also recognized the countervailing equitable principle that the wrongdoer should not be punished by pay[ing] more than a fair compensation to the person wronged [C]ourts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses. Such remedies, when assessed against only culpable actors and for victims, fall comfortably within those categories of relief that were typically available in equity.¹⁴

Despite this history, the SEC argued that the common law understanding of disgorgement was not relevant to the court’s in-

terpretation of the equitable remedies contemplated by Section 21(d)(5) because it is a statutory provision, not an outgrowth of common law. By codifying its equitable authority in Section 21(d)(5), the SEC said Congress intended the SEC’s disgorgement authority to go beyond the limits imposed by the common law.¹⁵ The Court rejected this view and instead determined that longstanding equitable principles were incorporated into Section 21(d)(5). As a result, Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant’s net profits from wrongdoing when it enacted that provision.¹⁶

But although the Court defined the general contours of the SEC’s disgorgement authority, it declined to rule on how that authority applied to the particular facts *Liu* presented. The Court stopped short of deciding whether the petitioners’ “disgorgement award [was] unlawful because it fail[ed] to return funds to victims” of petitioners’ fraud, or because it did not “deduct business expenses from the award,” explaining that, “[b]ecause the parties focused on the broad question [of] whether any form of disgorgement may

be ordered and did not fully brief these narrower questions, we do not decide them here.”¹⁷ It thus remanded the specific issues surrounding the disgorgement calculation to lower courts.

***Liu*’s Impact in SEC Enforcement Actions**

Because it limited the SEC’s ability to collect disgorgement in its enforcement actions, *Liu* must be considered a victory for the defense bar and a loss for the SEC. Before *Liu*, courts typically refused to allow defendants in SEC cases to reduce the amount they were ordered to pay in disgorgement to account for expenses they incurred in running the businesses that gave rise to the underlying enforcement actions. As a result, the SEC’s enforcement staff did not spend much time worrying about whether the amount of disgorgement they sought excluded the legitimate costs of running the defendant’s business. That is not, however, a criticism of the SEC. The standard for determining the amount of money properly subject to a disgorgement order has always been

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After *Liu*, however, the SEC will have to make a greater effort to determine whether money raised from investors was spent on costs necessary to run a legitimate business rather than misappropriated or otherwise spent in ways that shareholders did not authorize. Receivers will likely bear a lot of this burden: much of the spadework necessary to determine which specific income streams were spent on legitimate business expenses and which were spent on wholly unauthorized expenses will, consistent with their remit, fall to receivers.

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permissive: “courts have held that a party seeking disgorgement need only provide ‘a reasonable approximation of profits causally connected to the violation.’”¹⁸

After *Liu*, however, the SEC will have to make a greater effort to determine whether money raised from investors was spent on costs necessary to run a legitimate business rather than misappropriated or otherwise spent in ways that shareholders did not authorize. Receivers will likely bear a lot of this burden: much of the spadework necessary to determine which specific income streams were spent on legitimate business expenses and which were spent on wholly unauthorized expenses will, consistent with their remit, fall to receivers.

For defendants, the decision in *Liu* is a positive development because legitimate businesses will always spend a portion of investors’ money on completely lawful expenses. According to *Liu*, these expenses must now be excluded from SEC disgorgement awards. And while the Supreme Court did not offer a specific rule to help litigants determine which of the defendants’ expenses are included in the “net profits” that are properly subject to disgorgement, it provided some guidance:

It is true that when the entire profit of a business or undertaking results from the wrongdoing, a defendant may be denied “inequitable deductions” such as for personal services. . . . But that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains under another name. . . . Doing so will ensure that any disgorgement award falls within the limits of equity practice while preventing defendants from profiting from their own wrong.¹⁹

In practical terms, this guidance amounts to an invitation for defendants to scrutinize each element of the SEC’s disgorgement calculation to ensure that it comports with the Court’s “net profits” rule. The majority of entities targeted by the SEC for enforcement action are not wholly fraudulent concerns; they are legitimate businesses that have violated the securities laws in some discrete area of the firm’s operations. After *Liu*, the costs necessary to fund the legal segments of a defendant’s business must be distinguished from money used to fund unlawful conduct, and backed out of the SEC’s disgorgement calculation.

Finally, the Court’s guidance in *Liu* provides another way for defendants to push back on SEC disgorgement demands. The Court in *Liu* suggested that disgorgement collected by the SEC but not returned to investors (because they cannot be found, or because there are no identifiable victims of the defendant’s fraud) may not qualify as legitimate equitable disgorgement at all. This is because Section 21(d)(5), which authorizes the SEC to seek equitable remedies in district court cases, also requires that such remedies be “appropriate or necessary for the benefit of investors.” This wrinkle, too, will likely add to receivers’ responsibilities because they will be called upon to help identify specific investors who were harmed by the defendant’s conduct, and to assist the SEC in tracking down investors to whom disgorgement will be paid. Alternatively, if there are no discernable investors to whom money can be returned, the SEC may well be foreclosed by the language of Section 21(d)(5) from seeking disgorgement in any

amount—thus eliminating one of a receiver’s primary tasks of returning ill-gotten money to its rightful owners. 🏠

About The Author

David Slovick



David Slovick is a partner in the New York and Washington, D.C. offices of Barnes & Thornburg LLP. Prior to joining the firm, Mr. Slovick served as a Senior Attorney in the Enforcement Divisions of the U.S. Commodity Futures Trading Commission and U.S. Securities and Exchange Commission. dslovick@btlaw.com.

ENDNOTES

- ¹ No. 18-1501, 2020 WL 3405845 (June 22, 2020).
- ² *Sec. and Exch. Comm’n v. Liu*, 262 F. Supp.3d 957, 960-63, 970 (C.D. Cal. 2017).
- ³ *Id.* at 975 (internal quotation marks omitted).
- ⁴ *Id.* (quoting *Sec. and Exch. Comm’n v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006) (internal quotation marks omitted)).
- ⁵ Brief for Defendants-Appellants, *Sec. and Exch. Comm’n v. Liu*, No. 17-55849, 2017 WL 6611910, at *49 (9th Cir. Dec. 21, 2017).
- ⁶ *Sec. and Exch. Comm’n v. Liu*, 754 F. App’x. 505, 509 (9th Cir. 2018).
- ⁷ *Id.*; see also Brief for Defendants-Appellants, 2017 WL 6611910, at *50.
- ⁸ Brief for Defendants-Appellants, 2017 WL 6611910, at *51 (quoting *JT Wallenbrock & Assocs.*, 440 F.3d at 1113-14 (internal quotation marks omitted, emphasis added)).
- ⁹ *Liu*, 754 F. App’x. at 509.
- ¹⁰ *Kokesh v. Sec. and Exch. Comm’n*, 137 S. Ct. 1635, 1642 n.3 (2017).
- ¹¹ *Liu*, 2020 WL 3405845, at *2.
- ¹² *Id.*
- ¹³ *Id.* at *5 (internal citations, quotation marks, and emphasis omitted).
- ¹⁴ *Id.* at *5, *8.
- ¹⁵ *Id.* at *8.
- ¹⁶ *Id.* The lone dissenter in *Liu*, Justice Thomas, disagreed with both the premise and the substance of the majority’s decision. In his view, disgorgement awards are never appropriate under Section 21(d)(5) because that provision authorizes the SEC to seek only “equitable relief that may be appropriate or necessary for the benefit of investors,” and disgorgement is not a traditional equitable remedy.
- ¹⁷ *Id.* at *9.
- ¹⁸ *Sec. and Exch. Comm’n v. Lek Sec. Corp.*, No. 17cv1789 (DLC), 2020 WL 1316911, at *3 (S.D.N.Y. Mar. 20, 2020) (internal citations omitted).
- ¹⁹ *Liu*, 2020 WL 3405845, at *11-12 (internal citations and quotation marks omitted).

MEMBER SPOTLIGHT

Kenneth Dante Murena, Attorney-at-Law, Damian & Valori LLP, Miami, Florida



How did you get started in your line of work?

In 2002, as a young associate at Tew Cardenas LLP, a litigation, bankruptcy and receivership boutique law firm in Miami, I was asked by a partner to assist him in an SEC enforcement action in which he was appointed receiver. I had a bankruptcy and litigation background, having clerked for a bankruptcy judge after law school (1998-1999) and worked in the firm's litigation and bankruptcy departments for 2+ years. But bankruptcy was slow at the time, so I started working on the partner's receivership matter, became his go-to associate on all of his receiverships, and it soon became my primary area of practice.

How long have you been a NAFER member?

I have been a member of NAFER for more than eight years and have attended every annual conference except the first one.

How has NAFER helped you as a professional?

NAFER has provided and continues to foster a network of receivers, attorneys, accountants, and support professionals with whom I routinely collaborate and work on receivership and other fiduciary matters. And NAFER offers unmatched educational opportunities, including national and regional conferences produced by and featuring some of the nation's preeminent receivers, receiver's counsel and forensic accountants, federal judges and federal agencies.

What's the most interesting project on which you've worked?

I served as lead counsel to the court-appointed receiver in an SEC enforcement action brought against a pastor in Southern Georgia who had lured 150 of his parishioners to invest their life savings with him. The pastor had promised significant returns from investments in a real estate hedge fund he created and the purchase of a failing bank being investigated by the FDIC.

The hedge fund's real estate investments included two farms in a Chávez-controlled Venezuela and houses, condos and an

old bank building scattered along Florida's west coast. Upon purchasing the bank and realizing it was doomed, the defendant transferred tens of millions of dollars of the bank's reserve funds to his day-trading account. Over the course of eighteen months, in a desperate attempt to recover the investment, he lost every penny through \$8 billion dollars' worth of highly-leveraged, ultra-risky options trading.

Shortly before the SEC commenced the enforcement action in 2012, the defendant sent a 22-page letter to regulators and his family confessing to his crimes and explaining that he would commit suicide by jumping off the ferry from Key West to Fort Meyers.

Video captured him getting on the ferry but not getting off. Extensive investigations by the Coast Guard, FBI and local law enforcement did not locate a body so he was added to the FBI's Most Wanted list. A few months after the receiver's appointment, we had him declared deceased and were able to recover nearly \$2 million in life insurance proceeds for the benefit of the Estate. The case was featured on the "Fugitives" episode of American Greed.

Eighteen months later, a police officer in rural South Georgia pulled over an old pick-up truck because its window tinting was too dark. When asked for his ID, the driver informed the patrolman that he had just found one of America's Most Wanted. The defendant confessed, was arrested and prosecuted for securities and bank fraud, was sentenced to 30 years in federal prison, and is still serving that sentence.

After seven years of litigation against insurance companies, certain affiliates of the defendants and third parties who facilitated the fraud, and liquidating all of the real properties, we recovered and distributed to the defrauded investors several million dollars. And the second half of this saga was featured on an American Greed update to the "Fugitives" episode.

How do you keep up-to-date in your field?

At least twice a year, I attend receivership-related CLEs and conferences, including those produced by NAFER. Also, I routinely consult with other NAFER members regarding novel issues that arise in our receivership matters, recent developments in the law, and the best practices for overcoming the challenges regularly faced by receivers and receiver's counsel.

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Because each federal equity receivership presents a unique set of facts and circumstances and raises new legal issues, we are continually conducting research and monitoring other receivership and bankruptcy matters throughout the country and the resulting decisions that may be binding or instructive in our cases.

In addition, I write and edit articles and summaries posted on **TheReceiversReport.com**, a blog that I created to compile our research findings on issues that we, as receivers and receiver's counsel, are frequently confronted with and to serve as a resource for our receivership team and other receivers and receiver's counsel who may face similar issues.

Finally, I volunteer to work on Florida Bar Business Law Section committees and task forces that address issues and study, draft and propose laws relevant to receivers, trustees and other fiduciaries. For instance, I chaired the Florida Bar Business Law Section's Task Force on the Uniform Commercial Real Estate Receivership Act (UCRERA) and spearheaded the four-year effort to have it enacted in Florida. On July 1, 2020, UCRERA became law in Florida.

How do you see the organization growing in the next few years?

As existing members of NAFER bring their younger associates to events and encourage them to apply to become associate members, NAFER will organically grow, adding new members with a fresh perspective, energy and enthusiasm based on their unique experiences working with and learning from existing members on federal equity receiverships.

If you could take a year off work - what would you do, or where would you go?

In 2006-2007, my wife (then girlfriend) and I, after practicing law for 8 and 4 years, respectively, took a year off to travel through Italy, moving to a new region each month and learning to speak Italian. Having developed a deep connection with and affinity for the country, its people and their way of life, if given the opportunity, we would return to Italy but this time, with our 7 year-old son and 9 year-old daughter. Rather than moving from region to region, we would probably settle in small hill town in central Italy, immerse ourselves in the community, get to know its residents and hopefully make life-long friends, teach our children to speak Italian, and create a second home that we would return year after year. 🏠



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From the onset of MaryAnn McIntyre's banking career, she has focused on partnering with professional fiduciaries toward adhering to their ultimate, mutual objective: honoring fiduciary responsibility. She champions the Axos Global Fiduciary Banking commitment to proactively provide a superior Receivership banking experience by facilitating the mobilization of industry expertise and tech-forward resources that maximize estate values for the fiduciary clients she serves. MaryAnn demonstrates dedication to her clients' success by maintaining an active role throughout the lifecycle of each appointment, ensuring Receivers can fully depend on their strategic banking partner from Day-One through case conclusion.

MaryAnn has served on several planning committees responsible for educating fiduciaries in highly regulated industries. Additionally, she puts her degrees in Communication and Political Science from University of California, San Diego to good use in her advocacy for initiatives at the municipal and state-level that directly benefit her clients and community.



Leslie Perez **Axos Bank, Global Fiduciary Banking**

Leslie Perez is an accomplished Business Development Manager at Axos Bank with 20 years of experience in the legal and banking industries. Leslie has a proven ability to foster relationships and assist fiduciaries engaged in complex matters, both in-court and out-of-court. Leslie has proven herself to be an invaluable resource to her fiduciary clients by providing innovative banking products and case management solutions. Leslie has over 7 years of experience working intimately with receivers, trustees and other fiduciary clients. Leslie's understanding of her client's fiduciary banking needs has helped positioned Axos Bank as a trusted client partner, not just another vendor. Leslie will now concentrate her business development efforts as part of the Global Fiduciary Banking team for Axos Bank, primarily focused on the Eastern U.S.

Leslie has an M.A. in Law Firm Management from George Washington University and an M.A. in Project Management from Georgetown. In the early years, Leslie worked for Shapiro, Fishman & Gache as a litigation manager. During her time there, she effectively built a trial system to prepare and close a record amount of cases for their bank partners.

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► The Practitioner's Corner...continued from page 1

Scenario 1 – The Federal Agency Requests Information from the Receiver It Recommended

Question 1: *Have you encountered specific issues or problems when sharing information with the federal entity?*

Answer 1: Seventy-five percent of the respondents said “no,” they did not encounter specific issues or problems while sharing information with the federal entity. Twenty-five percent, however, said “yes,” they did encounter problems. One respondent reminded practitioners that confidentiality must remain paramount because receivers report only to the court, not to the federal agency that recommended their appointment. Another response recognized that communications with the regulatory agency may not be privileged. Any information shared may become public, or discoverable. In those situations, receivers should consider whether a joint defense or other similar agreement can protect privilege. In such a situation, a receiver should above all remain cognizant that their communications might one day be scrutinized by others.

Question 2: *Do you believe the receiver has an obligation to provide internal investigatory materials to federal entities?*

Answer 2: Here, the responses were split 50/50 between “yes” and “no.” A former regulator responded that the receiver should first determine what is in the best interest of the beneficiaries of the receivership estate. That individual generally supports assisting regulators and criminal authorities, and believes there is a deterrent effect if receivers help regulators be more effective and efficient. Also, victims generally feel better about their losses if they know the fraudster has gone to jail.

Another response emphasized that the receiver is an independent fiduciary appointed by the court and that the receiver has an overarching obligation to be independent and, as such, need not answer to anyone but the court. Nevertheless, that response remains mindful of working in tandem with the federal agencies towards common goals and suggests that the receiver may still want to provide materials to the federal entity.

Still others responded that they would only share the information and documents with federal agencies under court order or pursuant to a subpoena. Those concerns can often be addressed by asking the federal agency to provide a subpoena or written request for documents.

Question 3: *If you have shared information with federal entities, what are some best practices/tips in doing so?*

Answer 3: Many responded that it is best to discuss and share information via telephone. One respondent stated that telephone conversations are best because, unless the line is being recorded, defendants can subpoena written communications with governmental agencies. Another responded that obtaining a subpoena/demand first makes sharing documents and information easier and, further, the documents should be tracked/date stamped if possible and logged.

A few responded that a receiver should consider whether having a common interest agreement is necessary or appropriate. Even if a formal agreement is not put in place, the receiver should consider whether to expressly state limitations or expectations with respect to the use of shared materials before sharing them with the federal entities that requested said information.

Question 4: *Is there certain information a receiver is required to share with federal entities? Is there information the receiver is not required to share?*

Answer 4: Slightly more than half of respondents answered “yes” to both questions, while roughly twenty-seven percent of respondents answered “no” to the first question and “yes” to the second question. Only thirteen percent answered “no” to both questions and about seven percent answered “yes” to the first question and “no” to the second question.

One respondent stated that the receiver is required to share evidence of criminal conduct with federal authorities but they are not required to share much else. Another responded that although the receiver may be required to share forensic accounting information with federal entities, they are not required to share work product, attorney-client materials, documents protected by HIPAA regulations, and other documents protected under “seal” orders or confidentiality agreements without further order of the court.

Another responded that as custodian of records, the receiver is required to produce company records because the receiver is the only one in possession of and who can authenticate the records. However, the receiver is not obligated to share privileged information with governmental entities.

Scenario 2 – A Governmental Investigative Agency is Conducting a Criminal Investigation

Question 5: *How do you view your role and relationship with state or federal criminal authority/agencies?*

Answer 5: Generally, respondents answered that they try to assist and be as cooperative as possible with state or federal criminal authorities/agencies and provide them with information to which they are entitled, being mindful of the receiver’s role to maximize recovery for the receivership estate beneficiaries. Often the goals of the receiver and the authorities are aligned, and in such cases, it is important to keep an open line of communication with the criminal investigators to make sure that everyone can accomplish their goals.

One response, however, cautions that criminal agencies may attempt to take away some of the receivership assets.

Question 6: *If you are aware the FBI is involved with or investigating your case, are there any formal or informal methods you have employed to obtain facts or information from them?*

Answer 6: Although many respondents answered that communication is key, most responded that generally criminal agencies such as the FBI are less willing to share information with receivers and that information generally goes one way, with the

receivers providing information to the investigating governmental agencies. One respondent stated that it is very difficult to get information from the investigating governmental agency for a variety of legal and practical reasons. Therefore, building a relationship of trust with the investigating agents is key.

Question 7: *Have you ever had to seek court approval or guidance regarding whether you are or are not required to share information with a state or federal criminal authority/agency?*

Answer 7: Overwhelmingly, at approximately ninety-four percent, respondents answered “no” to this question. One respondent who answered “yes” to the question indicated that they sought court approval just to ensure that the judge in the matter is always informed about what was going on.

Question 8: *In your experience, do appointment orders typically include guidelines regarding to which federal agencies the receiver may or shall provide information?*

Answer 8: Most of the respondents, at seventy-five percent, answered “no” to this question. Many answered that the appointment orders generally direct or encourage the receiver to cooperate with the recommending agency. For example, one response stated that language in receiver orders typically either explicitly or implicitly allow the receiver to provide information: (i) to communicate with law enforcement and governmental regulatory authorities, as appropriate, including to assist the receiver in carrying out his or her duties; and (ii) to communicate with authorities that the receiver deems appropriate to inform them of the status of the receivership or the financial condition of the receivership estate.

Question 9: *Have you ever had to provide privileged information to a state or federal criminal authority/agency and stipulate to keep that information sealed?*

Answer 9: Most of the respondents, at about eighty-two percent, responded “no” to the question of whether they ever had to provide privileged information. One respondent answered that sometimes it is appropriate to share limited privileged information, with the caveat that it may only be used for informational or background purposes while stipulating that a privilege is not being waived. That respondent pointed out that it is essential to get such an agreement with the criminal authority/agency established upfront. Similarly, another respondent stated that they generally ask the federal agencies to sign agreements to keep certain types of information confidential.

Question 10: *Have you ever had to deal with a criminal forfeiture that potentially involved receivership assets?*

Answer 10: Slightly more than half of the respondents, about

fifty-three percent, responded “yes” to the question. Overall, responses indicated that a best practice with dealing with potential or current forfeiture proceedings is to work with the agencies and establish clear communication with respect to the assets. One response answered that they have always been able to work out a resolution with the governmental agency and that they have never had an agency insist on getting priority over the victims. Again, proactive communication seems to be key in this instance.

However, another respondent stated that they had the unfortunate experience of criminal authorities taking assets that were originally in possession of the receivership estate, which resulted in a reduction in recovery to the defrauded investors all while the receivership estate incurred the expenses to recover the assets. Further, a different respondent answered that if the receiver is tasked with paying the allowed claims of the victims, then the receiver may have no choice but to legally fight a forfeiture proceeding that seeks to use the proceeds to pay the government instead of the victims.

Conclusion

There are a few key takeaways from the survey. First, open communication between the receiver and the governmental agencies is important and makes everything go over more smoothly. Second, receivers should always remember that they are an independent fiduciary appointed by the court and not by the governmental agency that may have recommended their appointment. Lastly, when the interests of the receiver and the governmental agencies are aligned, sharing information as appropriate may be the best way towards achieving those common goals. 🏠

About The Author

Qiva Dinuri



Qiva Dinuri is a senior manager and tax attorney with Miller Kaplan in San Francisco, California and a member of the NAFER Young Professionals Committee. Qiva’s tax advice work includes an emphasis on issues related to the administration of funds of money established to resolve claims, informational tax return reporting, employment taxation, Qualified Settlement Funds, receiverships and bankruptcy estates. The questions that were asked in this article were developed by the members of the Young Professionals Committee.

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From Handshakes to Headsets: A Recap of NAFER's 2020 Virtual Annual Conference

By Jonathan Friedland and Hajar Jouglaf

The Show Must Go On (Online, That Is)

After months of anticipation, NAFER's first-ever virtual annual conference has come and gone. Although COVID-19 paused most large-scale live events, NAFER soldiered on with a conference experience that left us wanting more. The Conference, which was open to all NAFER members at no cost, consisted of four educational sessions spread out over two days, a hands-on cocktail-making event, and plenty of light-hearted humor.

If you were not among the approximately 163 people representing 27 states and Canada who attended, we hope this will give you a flavor of what you missed. And even if you did attend but missed a session or two, this should serve as a handy guide as you decide which sessions to review on-demand.¹

Conversations Not Presentations

Those are the words that come to mind as we reminisce on NAFER's annual Conference this year. It kicked off Thursday, October 8, when NAFER **Immediate Past President Kevin Duff** took the virtual stage to warmly welcome all attendees.

Kevin recognized Conference co-chairs, **Director-at-Large Kenton Johnson**, **Director-at-Large Geoff Winkler**, and **Bob Mosier**, and the conference committee, **Kyra Andrassy**, **Ira Bodenstein**, **Jeffrey Brandlin**, **Peter Davis**, **Joshua del Castillo**, **Chantal Eikey**, **Chip Hoebeke**, **Jordan Maglich**, **Jonathan Perlman**, **Secretary Kathy Bazoian Phelps**, and **Frank Simon**, for their hard work in curating a virtual event that provided attendees with lasting education and networking value beyond the Conference itself.

DAY 1

Receiver Training Camp: The First Days

Geoff Winkler and Chantal Eikey kicked off the educational segment of NAFER's 9th annual Conference with the **Receiver Training Camp: First Days**.

Geoff and Chantal, joined by **Stephen Donell**, **Kenton Johnson**, **Molly White** and **Maria Yip**, provided invaluable insight on the first days of a federal equity receivership. First, Kent and Molly offered planning tips for pre-appointment – from how to prepare to act as a receiver (e.g., review NAFER's "Best Practices Receiver Order") – to considerations for recruiting the receiver's "dream team" of consultants and professionals to assist the receiver.

Kent and Molly were followed by Maria and Chantal, who examined issues receivers may encounter in the first days of a receivership. Steve and Molly wrapped up the panel with their discussion on the importance of identifying and utilizing communication tools during the initial stages of a new receivership



case. This includes the importance of keeping investors, consumers, creditors, regulators and the court informed regarding the actions taken by the receiver and her team.

Virtual Happy Hour

The **Receiver Trainer Camp** on Thursday was immediately followed by a **Virtual Happy Hour**. Hosted by long-time NAFER-partner **Stretto**, the Virtual Happy Hour was a blast. Conference attendees, led by mixologist Jon Mullen of the "Cocktail Academy," learned how to master the art of cocktail-making by making their very own "Orange Mule." Participants then broke out into small Zoom breakout rooms to enjoy their drinks with friends and colleagues.

DAY 2

The second day of the Conference began on a crisp fall morning (at least where the authors of this article were) with Kevin Duff and Kent Johnson warmly thanking Conference sponsors, including long-time NAFER sponsor, **East West Bank**, for their unwavering support of the NAFER community.

Panel #1 – "The Bankruptcy Code and Receiverships – Cracking the Code"

"The Bankruptcy Code allows for the sale of property free and clear of liens, can you do that in a receivership case?"

Panel producer and moderator, **Ira Bodenstein**, began this panel by asking that question. Then, joined by panelists **Kathy**

Bazoian Phelps, Kyra Andrassy, Hon. Steven Rhodes, and Jason Weiner, this panel explored circumstances where the Bankruptcy Code can be useful in receiverships and some instances where it is not.

First, Kathy offered attendees practical tips on the circumstances where the Bankruptcy Code, particularly §363, is helpful to receivers and circumstances where it is not. Then, Jason examined stays and third-party releases, contrasting how they are handled in bankruptcy versus receiverships. Finally, Kyra and Judge Rhodes concluded the panel by discussing several legal issues, including the use of funds subject to security interests, surcharge of collateral, and assumption and rejection of executory contracts.

Panel #2 – “Enhancing Receivership Recovery”

Following Panel #1, Kathy Bazoian Phelps took the stage to thank Conference sponsor, **Axos Bank**, for its continued support in NAFER. **Mary Ann McIntyre** of Axos Bank offered a few remarks before turning it over to the second panel of the day, produced and moderated by **Jordan Maglich**.

Jordan, joined by **JonMarc Buffa, Mark Dottore, Amy Longo, and Mark Rasmussen**, shared their points of view on the core goal of a federal equity receivership – to identify, locate, and collect as many assets as possible, to liquidate them to cash, and then to distribute that cash to creditors of the receivership estate.

The panel explored potential avenues that receivers and their professionals can pursue to enhance their recovery of assets. This seasoned panel of experts outlined ways a receiver can coordinate with the appointing agency to minimize costs and maximize efficiency in pursuing common goals.

The panel was well-received by Jordan, who said, “[i]t was very insightful getting perspective from both seasoned receivers and representatives from the SEC and CFTC into various methods and avenues to potentially increase receivership recovery, and I’m hopeful that the audience took away some helpful information from the presentation and some of the highlighted recent cases and case studies.”

Annual Members’ Meeting

This year’s NAFER members meeting included a well-deserved President’s Award, an Apple watch and an iconic bobblehead.

Kevin Duff launched the NAFER annual members’ meeting early Friday afternoon on October 9. Kevin reported on NAFER’s growing membership (a total of 257 members, including 13 new members within the last 30 days alone) and recognized NAFER members, **Kelly Crawford, Wayne Klein, Dennis Roossien, and Robert Wing**, for committing 10 years of service to the NAFER community.

Kevin awarded Kathy Bazoian Phelps with the first-ever “President’s Award” -- presented to a NAFER member who has provided dedicated and distinguished service and made significant contributions to the NAFER community.

2019-2020 Board Nominating Committee Co-Chair Greg Hays took the stage to announce NAFER’s 2020-2021 board of directors – **Hernan Serrano, Kevin Duff, Kathy Bazoian Phelps, Jeffrey Brandlin, Julia Damasco, Peter Davis, Mark Dottore, Chip Hoebeke, Kenton Johnson, Jonathan Perlman,**

Melanie Vartabedian, Geoff Winkler and Maria Yip. Following Greg was **President-Elect Hernan Serrano** who thanked Kevin Duff for his service and unwavering commitment to the NAFER community in such an unprecedented year. Hernan presented Kevin with a “one-of-a-kind” receiver bobblehead for his service.

One lucky NAFER member also won a free Apple watch.

Panel #3 – “Working Together with Federal and State Agencies”

Kathy Bazoian Phelps welcomed all Conference attendees back after annual member meeting, congratulated the newly-elected board of directors for next year, and then handed the virtual podium over to the co-moderators of the final panel, **Joshua del Castillo and Kevin Duff**.

Josh and Kevin were joined by panelists **Carly Diroll-Black (DOJ), Richard Foelber (CFTC), Marsha Massey (SEC), and Doug Wolfe (FTC)** for this panel.

The panelists tackled areas that included the selection of receivers, parallel civil and criminal actions, receiver neutrality, communication and information management, scrutiny of the relationship between receivers and regulators, privileges and immunities, securing or providing access to records and information, and evidence of unlawful activity uncovered during the receiver’s appointment.

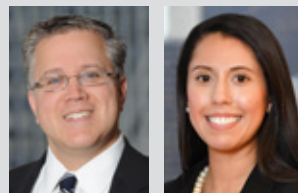
That’s All Folks, See You Next Year

It takes creativity, flexibility, positivity and persistence to put together a virtual conference that has features that are usually only available through in-person events. Hats off to the Conference committee, **Executive Director Jennifer Brinkley** and her team, **Amanda Davis and Hannah Martin**, for planning a groundbreaking virtual Conference.

We can’t wait to see what’s in store for next year for the 2021 conference in Los Angeles. Hopefully, we’ll meet in person! 🏠

About The Authors

Jonathan Friedland and Hajar Jouglaf



Jonathan Friedland is a corporate restructuring and insolvency attorney at Sugar Felsenthal Grais & Helsing LLP in Chicago and New York, where he sits on the executive committee. Jonathan is also the founder of NAFER-partner organization, Daily Dac, the industry leader in helping receivers, trustees, assignees and other fiduciaries provide commercially reasonable notice of assets sales. www.dailydac.com Hajar Jouglaf is an associate at SFGH. The authors thank Jordan Maglich, Ira Bodenstein, Steve Donell, Molly White, Kyra Andrassy and Kathy Bazoian Phelps for their invaluable input with this article.

ENDNOTES

¹ The virtual Conference retained NAFER’s core focus on excellent receivership education. NAFER members can access hours of on-demand Conference programming and detailed written materials (prepared by the fleet of expert moderators and panelists from the Conference) on NAFER’s website.



FEDERAL EQUITY RECEIVERSHIPS IN THE NEWS

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Committee Chair: Alysson Mills | Mills & Amond LLP | New Orleans, LA

BEST PRACTICES COMMITTEE NAFER's Best Practices Committee determines the code to which the organization must adhere and advises on modifications and additions. The Committee also publishes articles on Best Practices topics.

Committee Co-Chair: Jonathan Perlman | Genovese Joblove & Battista, P.A. Miami, FL

Committee Co-Chair: Kyle Everett | Development Specialists, Inc. San Francisco, CA

BUDGET AND FINANCE COMMITTEE NAFER's Budget and Finance Committee acts as the fiduciary arm of the organization and, together with the Board Treasurer, insures prudent use of Association funds. The Budget and Finance Committee also ensures all government requirements for the running of our Association, a 501c6, are adhered to and necessary filings are done accurately.

Committee Chair: Jeff Brandlin | Brandlin & Associates | Los Angeles, CA

CONFERENCE COMMITTEE NAFER's Conference Committee is responsible for planning the Annual Conference including program content and format, sponsorships and other logistics. The committee begins its work in January of each year.

Committee Co-Chair: Geoff Winkler | American Fiduciary Services | Portland, OR

Committee Co-Chair: Kyra Andrassy | Smiley Wang-Ekval, LLP | Costa Mesa, CA

INTERNATIONAL COMMITTEE The International Committee monitors international developments in insolvency, oversees research into the international presence of NAFER and determines requirements of establishing professional resources in each country. The International Committee includes experts in cross-border transactions, and one of its primary goals is the identification of ways to reach out to the international receiver community in order to establish collaborative relationships and new referral resources.

Committee Co-Chair: Chip Hoebeke | Rehmann Consulting | Grand Rapids, MI

Committee Co-Chair: Irina Sadovnic | Genovese Joblove & Battista, P.A. Miami, FL

IRS COMMITTEE NAFER's IRS Committee will focus on issues facing receivers, including tax issues related to individuals; personal and real property; cash and other assets; ongoing businesses; defunct companies; illegal income; and payments to vendors and victims.

Committee Co-Chair: Julia Damasco | Miller Kaplan Arase LLP | San Francisco, CA

Committee Co-Chair: Eileen Castle | Squar Milner | San Diego, CA

JUDICIAL OUTREACH COMMITTEE This committee will engage with the federal judiciary for education and promote federal equity receivers who are NAFER members.

Committee Chair: Open

MEMBERSHIP COMMITTEE NAFER's Membership Committee helps to screen applicants for qualifications and levels of membership.

Committee Chair: Gil Miller | Rocky Mountain Advisory, LLC | Salt Lake City, UT

MEMBERSHIP RECRUITMENT COMMITTEE The Membership Recruitment committee's purpose is to identify and recruit new members for NAFER who fit the membership criteria established by the Board. The idea behind the Committee is to engage in targeted marketing to identify potential members who would be interested in NAFER.

Committee Co-Chair: Todd Ranta | PricewaterhouseCoopers | Dallas, TX

Committee Co-Chair: Melanie Vartabedian | Ballard Spahr | Salt Lake City, UT

NOMINATING COMMITTEE The Nominating Committee determines the nominations for candidates eligible to serve on the board. The Nominating Committee reports to the Board and is subject to oversight by the Board.

Committee Chair: Kevin Duff | Rachlis Duff & Peel, LLC | Chicago, IL

Committee Co-Chair: Hernan Serrano | S&P Forensics, LLC | New York, NY

PUBLICATIONS COMMITTEE The Publications Committee produces NAFER's twice-a-year printed newsletter, *The Receiver*, and an occasional e-bulletin, NAFER NEWS, for distribution to members. The Publications Committee solicits Board and member input on the issues and problems facing receivers. Members of the Committee contribute articles (or find contributors to submit items) on legal, financial and management issues, tips for practitioners, member accomplishments, etc., and they provide peer review of proposed articles.

Committee Chair: Dan Seligman | Columbia Research Corp. | Seattle, WA

REGIONAL PROGRAM COMMITTEE The Regional Program Committee coordinates with NAFER's sponsors to select dates and cities for NAFER's regional programs. The committee also coordinates with NAFER members in the selected locations to choose the topic for discussion at each event, the program moderator and panel members, and to promote the event to potential attendees. These programs are intended to provide education and networking opportunities for NAFER members, raise NAFER visibility and attract new NAFER members.

Committee Co-Chair: Kenton Johnson | Robb Evans & Associates | Sun Valley, CA

Committee Co-Chair: Eduardo Espinosa | Akerman LLP | Dallas, TX

REGULATORY OUTREACH COMMITTEE NAFER's Regulatory Outreach Committee forms relationships with SEC and other Government Agencies through written correspondence and / or personal outreach in order to educate them about the work of the receiver as well as the ethical standards set by NAFER for its members.

Committee Chair: Melanie Damian | Damian & Valori LLP | Miami, FL

WEBSITE / COMMUNICATIONS COMMITTEE NAFER's Website Committee helps to provide technical expertise and guidance on website changes, upgrades, and content to ensure a positive member and visitor experience.

Committee Chair: Jordan Maglich | Quarles & Brady | Tampa, FL

YOUNG PROFESSIONALS COMMITTEE The Young Professionals Committee is responsible for recruiting young professionals in the receiver community to become members and recommending engagement opportunities through conference participation and educational and networking resources for young professionals.

Committee Chair: Chantal Eikey | Rehmann Consulting | Grand Rapids, MI



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