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The official newsletter written exclusively by and for members of NAFER.

June | 2016

PRESIDENT'S MESSAGE

San Diego, The Plymouth of the West,[1] was the site of NAFER's Fourth Annual Conference this past October 15-17. And what a glorious conference it was. Ensconsed in the iconic U.S. Grant Hotel, which happened to be in the midst of its 10th year anniversary celebration, the conference continued NAFER's tradition of thought provoking educational programs and excellent networking opportunities with the pre-eminent federal equity receivers and their professionals from all across the country.

Under the superb stewardship of Bob Mosier, our conference chair for the 3rd straight year, the conference ran seamlessly. New this year was a greatly increased and active sponsor's area where attendees were able to interact with vendors who provide ancillary services essential to the successful administration of receiverships. Also new this year was the NAFER conference mobile app, where attendees were able to view the conference schedule and materials and participate in instantaneous online polling during the presentations. Highlights included the lunch time presentation by Martin Kenney, a world renowned expert in international asset recovery and the ever popular Judge's Panel, this year featuring District Court Judges Ann D. Montgomery, (Minnesota), David O. Nuffer (Chief Judge,Utah) and Christopher A. Boyko (Northern District of Ohio).

Special thanks to Kevin Duff and Kathy Bazoian Phelps, conference co-chairs who were instrumental in putting together this year's panel presentations and NAFER Executive Director Maureen Whalen, her husband Terry and assistant Deana Linderholm for making sure every detail from check in to the cocktail hour hor dourves was executed with precision and taste.

Did you miss last year's conference? Don't despair, plan to join us this year in Washington, D.C., October 13-15, 2016 at the historic Mayflower Renaissance Hotel for what is sure to be the next great NAFER conference.

Ira Bodenstein, NAFER President

[1] So named because it was the first settlement by European's in what is now the State of California.

EDITOR'S CORNER

On behalf of the Publications Committee, I'm pleased to present the 4th annual installment of The Receiver. As you will see, this edition contains excellent material contributed by our members focusing on hot topics and the constantly evolving case law surrounding federal equity receiverships.

You will also find important information for the 5th Annual NAFER Conference scheduled for October 13-

15, 2016 in Washington, D.C.

The Publications Committee is also pleased to announce plans to increase our member communications as NAFER continues to grow and develop as an organization. Not only will we continue to expand the content and features included in The Receiver, we plan to add a monthly communication entitled "NAFER News and Alerts," a shorter communication with our members announcing new case appointments, significant case rulings or assignments, reports by each of NAFER's hard-working committees, and spotlights on the individual leaders and members, allowing for you to get to know more about your NAFER peers.

Lastly, the Publications Committee is pleased to welcome Dan Seligman to our team. Daniel Seligman is the principal in the Columbia Research Corporation, a consulting company in Seattle, Washington. he brings 35 years of experience as a research analyst, lawyer and journalist. He is also a Certified Fraud Examiner and a Certified Competitive Intelligence Professional ("CIP-1").

We invite you to contribute material for submission for publication in either The Receiver or NAFER News and Alerts to me or any of the members below. If you would like to join the Publications Committee of NAFER, please contact me at **jmaglich@wiandlaw.com**.

We look forward to hearing from you and to seeing everyone in Washington this fall!

***Jordan Maglich**, Chair, Publications Committee*

Jordan D. Maglich is an Associate with Wiand Guerra King and is the author of Ponzitracker, an internet blog that tracks the proliferation of Ponzi schemes across the United States. Ponzitracker was recently included in the ABA Journal's 7th annual Blawg 100 as one of the top 100 blogs for a legal audience. Jordan is also a Forbes contributor, where he writes about white collar crimes. To contact Jordan, e-mail him at jmaglich@wiandlaw.com.

Receiver Training Camp

This exciting new panel will bring together the “Mount Rushmore” of NAFER: Our four highly-esteemed association presidents: Past, Current and Future. Join past presidents Robert Wing and Steve Donell, current President Ira Bodenstein and President-Elect Greg Hays for this power-packed, two-hour session taking place on Thursday afternoon, October 13th from 2:00 – 4:00 PM. Specifically designed for those new to the world of Federal Receiverships, seasoned receivers are welcome and sure to walk away with new insights and ideas. Registration for this session is offered as a stand-alone course for only $200; those attending the entire conference receive a $100 discount. Both registration levels include admission to the conference opening reception.

Sponsored by Dottore Companies

Conference Panels

The End Game: Fairness in Distributing Receivership Funds

This panel will deliver experienced receiver and regulator insights on receivership distribution plans and recurring challenges, including distribution methodology, claims analysis, priority, related claims, multiple funds, complex accounts, offsets, objections, late claims, interest, tax considerations, distribution timing and logistics, unclaimed funds, and other knotty issues. Producer: Kevin Duff, Partner, Rachlis Duff Adler Peel & Kaplan LLC Panelists: Burt Wiand, Shareholder, Wiand, Guerra King, P.A.; Rich Foelber, Division of Enforcement - US Commodity Futures Trading Commission; Marion Hecht, CPA, CFF, CFe, CIRA, MBA - Clifton Larson Allen.

International Panel

As legitimate money flows across borders seeking safety and returns, so does hot money and other ill-gotten gains. This panel, composed of financial and legal experts, will “trace” the steps that federal equity receivers and their professionals follow to identify, find, and recover assets across borders, while seeking to cooperate and collaborate with foreign government agencies, financial institutions, and local professionals. Producer: Alex Moglia, Founder, President and Lead Mergers and Acquisitions and Restructuring Advisor, Moglia Advisors Panelists: Mark McDonald, Director, Grant Thorton, British Virgin Islands; Eric (Rick) Rein, Attorney, Horwood Marcus & Berk Chartered; David Molten, Partner, Litigation & Arbitration, Brown Rudnick LLP; Jack De Kluiver – International Unit, Asset Forfeiture and Money Laundering Section, Criminal Division - US Department of Justice.

Communication is Key: But Receivers Must Stay Within Ethical Boundaries

This panel will discuss ethical and practical issues arising in the various points of communication that a receiver has with the appointing regulatory agency, the court, the victims, counsel, and the press. What notices are required and when must they be given? What should the nature and frequency of communications be with regulators? How is communication impacted by asset recovery strategy, privilege considerations, and other challenges? What is the best way to communicate with victims? How and when to communicate with the press? Producer: Terry Banich, Member, Shaw Fishman Glantz & Towbin Panelists: Henry Sewell, Partner, Dentons; Stephen P. Harbeck, President & CEO, Securities Investors Protection Corporation (SIPC); Kristin W. Murnahan, Senior Trial Counsel, US Securities and Exchange Commission (SEC); John M. Breen – Professor of Law, Loyola University Chicago.

Money, Money, Money: Tax, Insurance, Expenses and Reporting

This panel will discuss the wide variety of financial issues that face receivers, including tax, insurance, interest, investments, subordination of IRS claims, reporting to the court, depreciating assets, and paying professionals, the use of Qualified Settlement Funds, bills, and the costs of litigation. Producer: Andrew W. Caine, Chair, Post Confirmation Practice Group, Pachulski Stang Ziehl & Jones; Panelists: Irving H. Picard, Partner, Baker Hostetler; Mark Dottore, President, Dottore Companies; Byron Z. Moldo, Partner, Ervin Cohen Jessup LLP.

Direct and Cross Examination of Expert Witness in Ponzi Scheme: A Mock Demonstration

Did you ever wonder what the perfect direct and cross-examination of an expert witness looks like? This mock direct and cross-examination of a forensic accountant will demonstrate what to do and not do from the perspective of both the examining lawyers and the expert witness. Determine for yourself whether the receiver established that the use of the Ponzi scheme presumption is appropriate in the fraudulent transfer litigation. Producer: Kathy Bazoian Phelps, Partner, Diamond McCarthy LLP Panelists: Hon. Steve Rhodes (Ret.), retired from service as bankruptcy judge for the US bankruptcy court, Eastern District of Michigan; Gil Miller, CPA, CFE, CIRA, CDBV, Senior Managing Member, Rocky Mountain Advisory LLC; Gary O. Caris, Partner, Dentons.

Judges Panel

Back by popular demand, district court judges from across the country will share their views on a wide variety of issues of interest to receivers and the professionals who support them. This panel promises to be both lively and informative. Producer: Robert P. Mosier, President and CEO, Mosier & Company Judges: Hon. Ursula Ungarro (S.D. Fla); Hon. Robert Shelby (D. Utah); Hon. David O. Carter (C.D. CA).

I'm in! Take me to Conference Registration!

NAFER Website Upgrades -
Make the most of your Membership!

You may have noticed that NAFER is making continual upgrades to our website. We just finished "Phase II," and there are a couple of features that you may find of interest!

1) Member Directory / Your Profile: You will now find the opportunity to add additional information about yourself and your experience. While logged in, simply click on your name on the top right of the NAFER Banner over the menu bar. You will find a number of new fields, including "Professional Designations," Education," and "Specialties." As we continue to build this resource for those in need of a receiver and / or looking for your particular expertise, this will prove extremely valuable. Be sure to upload a photo while you are there!

2) Member Needs and Wants: On the Members Only drop down menu, you will find a tab entitled "Members Needs and Wants." This is your chance to reach out to your fellow members when you are looking for additional resources or expertise. **However, you must opt-in to this feature in order to post your "ads" and to automatically receive updates from others.** Simply click on "Subscribe to this Forum" and you are all set!

3) **Link your Member Profile to your LinkedIn Membership!** Simple add the hyperlink for your LinkedIn profile to your NAFER profile...instantly double your impact!

These are just the first in a long line of exciting improvements we have planned. Stay tuned for more announcements. If you'd like to join the Website Committee, please e-mail **Maureen.Whalen@NAFER.org**. We'd love to have your input and expertise on our team.

Golf Channel Update

Joseph J. Wielebinski and Kenneth W. Bullock II of Munsch Hardt Kopf & Harr PC.

On April 1, 2016, the Texas Supreme Court handed down a decision that will likely mark the end of the Stanford receiver's efforts to claw back payments from Stanford pre-receivership vendors. In doing so, the Court clarified what is needed to show "reasonably equivalent value" under the Texas Uniform Fraudulent Transfer Act ("TUFTA"). Moreover, the Court clarified that the so called "Ponzi presumption" will not override the legitimate defenses of vendor's who provide actual and objective equal value.

The underlying lawsuit involved the Golf Channel, which provided advertising time on its network to Stanford. The parties stipulated that Stanford paid a market rate. Even so, the receiver asserted that, under TUFTA, the Golf Channel should be required to return the payments.

The critical issue in the case was whether the Golf Channel could show that it provided "reasonably equivalent value" in exchange for the payments that were, admittedly, received from a company involved in a Ponzi scheme. The receiver argued that the central question should be whether the creditors ultimately received a benefit from the advertising, citing a note in the Uniform Fraudulent Transfer Act that consideration of no value to creditors, such as love and affection, should not qualify as value. The Golf Channel argued that the proper question was whether there was an objective exchange of equal value at the time of the transaction. In support, the Golf Channel pointed to the market sale example that TUFTA gives as representative of a scenario within which a party gives reasonably equivalent value.

The federal district court where the Stanford receivership is pending ruled in favor of the Golf Channel. Notwithstanding the fact that a receiver is an extension of the equitable power of the appointing court, the receiver appealed the ruling to the Fifth Circuit. The receiver initially obtained some traction with the reviewing panel, which issued an opinion in favor of the receiver. The Fifth Circuit went so far as to suggest that even an electric company would have return payments for electricity unless there was evidence that the electricity preserved an asset of the estate. This opinion caused a flurry of motions for rehearing, including the Golf Channel and several amicus parties. In response, the panel withdrew its opinion and certified a question to the Texas Supreme Court which sought guidance on what constitutes "value" under TUFTA.

The Texas Supreme Court held that TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business.

"In this case, Golf Channel's media-advertising services had objective value and utility from a reasonable creditor's perspective at the time of the transaction, regardless of Stanford's financial solvency at the time," the court said. "In exchange for its payments, Stanford received not merely speculative, emotional consideration, but accepted full performance of services with objective, economic value that were provided in the ordinary course of Golf Channel's business."

This is a clear victory for the Golf Channel, and for innocent vendors and service providers who are involved in a Ponzi scheme. The result is not, however, particularly surprising. The Texas Supreme Court followed the plain language of the statute, and there are almost no other examples of trustees or receivers having gone so far as to attempt to claw back payments to vendors who were compensated at market rates for providing goods or services. Under TUFTA when consideration for a purchase had objective value at the time of the transfer, even if the consideration neither preserved the debtor's estate nor generated an asset or other benefits that could be used to satisfy unsecured creditors like the Stanford fraud's victims, then value exists, the court said.

Some have suggested that the ruling also evidences growing dissatisfaction with the so-called "Ponzi presumption," which is an evidentiary presumption that courts have applied to the question of whether a

transfer is motivated by actual fraud, or whether the transfer occurred while the debtor was insolvent. In fact, in this case, the parties stipulated that the Ponzi presumption applied and that accordingly there was actual fraud. What the receiver was attempting to do was to carry the Ponzi presumption a step further and use it to negate the existence of reasonably equivalent value. The Supreme Court characterized the receiver as seeking a result in Ponzi scheme cases that was tantamount to eliminating the affirmative defense that otherwise exists for parties who provide reasonably equivalent or objective value at the time of the transaction.

The case is noteworthy for the fact that the receiver brought the case at all, and then went on to appeal an adverse decision of his appointing court since a receiver ordinarily looks for direction from the appointing judge. In addition, the case is representative of a recently expanded scope of targets for what have become known as clawback suits, which have increasingly been pursued in large fraud schemes. It seems likely that this case will stand as a guidepost for how far fiduciaries should go in seeking to claw back fraudulently obtained investor funds in the wake of Ponzi schemes or other large frauds.

Joseph J. Wielebinski (left) and Kenneth W. Bullock II (right) are co-authors of this article. Both are Shareholders with Munsch Hardt Kopf & Harr PC. To read more about the authors,visit ***www.munsch.com/biography***.

DECISIONS, DECISIONS, DECISIONS...

SEC v. A. Nadel et al., 8:09-cv-00087 (Feb. 2, 2016). Wells Fargo Bank holds several promissory notes purportedly secured by real properties that are within the receivership estate based on loans made to Ponzi-perpetrator Arthur. The court established a claims bar date for all receivership creditors, but Wells Fargo failed to file claims for several of those loans by that date. Relying on bankruptcy law, Wells Fargo argued secured creditors are not required to file claims to protect their interests in receivership property, but the Receiver argued Wells Fargo lost its right to enforce its liens against that property by failing to file claim forms. The court held that the orders governing the claims process and the claims bar date applied to all creditors – not just unsecured creditors – and as such, Wells Fargo was required to file proof of claim forms to preserve its interests in receivership real property. The Court granted the Receiver's motion to extinguish Wells Fargo's claims regardless of its status as a secured creditor.

Klein v. Roberto Penedo, Case No. 14-4077 (Oct. 26, 2015). Clayton Ballard claimed he planned to build a refinery in Guatemala. Ballard hired Penedo to help Ballard obtain political and regulatory approvals in Guatemala. However, Ballard, did not have the money to pay Penedo. Ballard turned to his friend, Robert Andres, to supply the funds. Andres had funds because he was running an $80 million Ponzi scheme. Andres paid $197,000 of investor money to Penedo. After a receiver was appointed, Penedo filed a claim for $4 million, asserting that the receivership estate should pay him the balance of consulting fees he was owed by Ballard. The Tenth Circuit affirmed that Andres' payment of investor funds to Penedo did not entitle Penedo to assert a claim on funds in the receivership estate.

Klein v. Cornelius et al., Case No. 14-4024 (May 27, 2015). In the same receivership matter, Andres paid Cornelius (a Texas attorney) $90,000 to defend Andres' friend on criminal charges unrelated to the Ponzi scheme. The receiver brought a UFTA claim. Most UFTA litigation is against overpaid investors, so most of the case law relates to defenses an investor can assert in an UFTA action. In this case, Cornelius was not an investor, but a third party. The Tenth Circuit clarified that a defendant seeking to show that a benefit was provided must prove that the benefit went to the Ponzi scheme, not some third party. Here, the benefit was to the criminal defendant, not to the Ponzi scheme. Cornelius was ordered to return those funds to the receiver.

Jurisdictional Land Mines Facing Receivers in Pursuing Claims in Foreign Jurisdictions

Eric (Rick) S. Rein, Esq. and Paul Richard Brown, Esq.

The first and essential question to be answered is: does the US appointed receiver have standing in the particular foreign jurisdiction where assets are located? Indeed, it is an obvious and seemingly simple inquiry. However, the correct answer can be extremely complex--fraught with potentially paradoxical and unintended results, especially since it is coupled with the reality that the receiver is not the victim. Frankly, many "experts" fail to address this fundamental and case altering query. This article summarily reviews some of the considerations to evaluate standing issues facing US appointed receivers.

The offshore world has seen an increase in cross-border liquidations. Often times, the tax havens in the Caribbean Islands are fertile ground for those who move assets to financial institutions there due to strict confidentiality laws and tax incentives. English law has significant influence in the various islands located in the Caribbean, and Europe and Asia in countries where the British Commonwealth was at one time in control, which have enacted laws which allow these jurisdictions to recognize receivers appointed by a foreign court and to enforce the orders of the foreign court. Addressing in part, the legal "standing" issue for US appointed receivers. However, these laws have very strict limitations.

These limitations include the following tests: (1) has defendant subjected him/itself to the foreign courts' jurisdiction; (2) was defendant entity formed in foreign jurisdiction; (3) did defendant entity engage in business activities in foreign jurisdiction; and (4) will the court where defendant entity is formed recognize a receiver appointed by a foreign jurisdiction. Applying the above limitations, the defendant involved in the action must have sufficient connections with the jurisdiction in which the receiver was appointed.

Schemmer v. Property Resources Ltd., which involved the Bahama Islands, is instructive. There, an SEC

receiver sought to be recognized in order to take possession of the shares and assets of a Bahamian company and its subsidiaries. The court defined the above four tests to determine whether there are sufficient connections between the defendant and the jurisdiction appointing the receiver. The court determined the defendant did not submit to the federal jurisdiction where the SEC receiver was appointed, the foreign company involved was not incorporated in the United States, the company did not carry on business in the United States, and there was no evidence that the Bahamian Islands would recognize the United States order as affecting the assets located in the Bahama Islands. Therefore, the court decided that there were not sufficient connections to recognize the SEC receiver, meaning the SEC receiver did not have standing to pursue those claims in the Bahamas.

Certainly, each matter and the particular appointment are unique. Once offshore assets have been identified, early evaluation of the receiver's standing and potential alternatives will place the receiver in an advantageous position for ultimate success.

Hence, as outlined above, the recognition and assistance in the offshore country must be preeminent in deciding how to pursue offshore claims and assets by a federal equity receiver. If there is a possibility of the lack of recognition, the receiver could consider having a liquidator appointed in the foreign country where the claims and distributions could be handled in a coordinated fashion. The offshore appointed liquidator would be recognized by the foreign jurisdiction and in some instances may be the same party as the US based receiver. This potential "problem-solving" alternative has been recognized in various foreign jurisdictions.

Another limitation is that the English courts will not recognize a foreign-appointed receiver if recognition of the receiver would result in the enforcement of foreign penal laws. Foreign courts have opined that this limitation arises where the laws of the United States are invoked. In other words, for federal equity receivers, it occurs when the receiver is appointed by a governmental agency, not by common law or under the bankruptcy code. For instance, in Stutts v. Premier Benefit Capital Trust, the Grand Court of the Cayman Islands considered whether the recognition of the SEC receiver would be enforcement of a foreign penal law. The Grand Court examined the SEC Act of 1933 and 1934 and decided that the discouragement proceedings pursuant to the provisions of those Acts were penal in nature and, therefore, the receiver cannot be recognized by the Cayman Islands.

On the other hand, the Grand Court of the Cayman Islands in Canadian Arab Fincorp and Kilderkin Inv. Ltd. v. Player, considered the four tests in Schemmer and determined the defendant in the Canadian proceedings in Ontario, where the receiver had been appointed, had submitted to the jurisdiction of the Supreme Court of Ontario, the defendant was incorporated in Canada, the defendant carried on business in Canada, and the Ontario courts could recognize the appointment of a foreign receiver. The Cayman court decided it could recognize a foreign receiver.

Rick Rein (left) and Paul Brown (right) are members of NAFER's International Committee. Our International Committee is working on lessons to be drawn from the release of the Panama Papers

and recovery of illicit offshore assets, establishing an international network of legal and financial professionals available to help NAFER members seeking to recover offshore assets, collaborating and working with INSOL, C5-sponsored fraud recovery seminars, FraudNet, and other international groups, as well as other initiatives. Our members will participate in an offshore asset recovery panel in NAFER's annual conference in DC in 2016, and Alex Moglia, our Committee Chair, will be part of a panel on offshore asset tracing and recovery at INSOL's Congress in March 2017 in Sydney, Australia. For more information, or to join NAFER's International Committee, contact Alex Moglia at amoglia@mogliaadvisors.com.

Brown Bag Lunch with District Court Judges, SEC and NAFER in Dallas

Representatives of the Dallas-Fort Worth office of the SEC were invited, along with NAFER representatives, to attend the monthly brown bag lunch held by the district court judges for the Northern District of Texas. David Peavler, Shamoil Shipchandler, and David Reece of the SEC were in attendance, as were Kathy Bazoian Phelps and Dennis Roosien representing NAFER. Four of the district court judges and their clerks actively participating in the 90 minute discussion about receiverships. The judges were particularly interested in the process employed by the SEC in appointing receivers and how to ensure that not all of the available funds in the case are used solely to pay the receiver and professionals.

The informal meeting with the judges was win-win-win for the judges, the SEC and receivers. The meeting went a long way to demystifying the receivership process for the district court judges. In addition to the outreach to the judges, the coordinated effort between the SEC and NAFER was a wonderful opportunity to work side by side with the SEC in advancing discussions about receivership administration.

This was hopefully the first of what will be many other regional programs with regulatory agencies and district court judges in NAFER’s educational outreach efforts.

Ensure that Your Data is Protected Year-Round

Doug Bradley, BMS Regional Account Executive

As a Federal Equity Receiver, any breach of security – especially to your computer files and data – is a serious issue. However, now it is more important than ever to ensure that your data is protected, especially from malware and other computer viruses, to reduce your liability.

By now, you've probably heard of the CryptoWall "ransomware" malware that encrypts all files on an infected computer and holds them hostage in exchange for a ransom which must be paid within a specific amount of time.

Recently, a new version of the ransomware was released (CryptoWall 4.0) which now also scrambles the names of your files, making it impossible to recognize individual files. The CryptoWall Trojan horse arrives on affected computers through zipped files in email, or when a user visits a compromised website or clicks on malicious Internet ads. Once the ransomware infects a computer, not only are the files on the local hard drive encrypted, but so are the files on any connected external drives (portable hard drives, flash drives, USB thumb drives) as well as files on connected network drives and servers.

In just the past month, an even more virulent ransomware known as Locky has been making the rounds. It is currently being distributed via email in attachments with malicious macros. The attachments have seemingly benign names such as “Invoice J-98223146.doc”; however, when that attachment is opened and the macros are run, Locky similarly encrypts all files on your hard drive but targets a larger amount of file extensions as well as data on both mapped and unmapped network drives. In addition, the Locky malware will also delete any Shadow Volume copies, rendering any backups unusable.

With constant variants of dangerous malware making its rounds, the only viable solution is to have a cloud-based backup routine (such as Carbonite) in place for your computer files. Backups must be performed on a regular basis in order to ensure that you have a series of snapshots available. Regular nightly backups are recommended so that, should you need to restore your files from a backup, only a minimal amount of data will be lost.

Doug Bradley | Regional Account Executive
BMS
Corporate Restructuring Solutions
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Troice v. Proskauer Rose, LLP: The Fifth Circuit Strengthens Immunity Defenses

Michael Napoli, Member, Dykema Cox Smith

The long-running attempt by the Stanford investors to hold Stanford’s lawyers responsible for his Ponzi scheme appears to have come to an end. The Fifth Circuit recently rendered judgment in favor of the attorneys dismissing the plaintiffs’ claims with prejudice. Troice v. Proskauer Rose, LLP, 2016 U.S. App. LEXIS 4480 (5th Cir. March 10, 2016). Troice confirms that it is difficult to hold lawyers and other professionals liable for participating in their clients’ fraudulent schemes in the context of federal equity receiverships. This alone would be enough to commend this case to the receivership community. But, in fact, Troice bolsters the derived judicial immunity that protects receivers and their counsel from suit by

disgruntled parties.

The attorneys in Troice represented Allen Stanford and his entities in connection with the SEC's investigation of Stanford International Bank. The plaintiffs alleged that the attorneys aided and abetted Stanford's common law and securities fraud[i] and conspired with Stanford to defraud them. Specifically, they alleged that, in representing Stanford in the SEC's investigation, the attorneys: sent a letter arguing, using legal authorities, that the SEC did not have jurisdiction; communicated with the SEC about its document requests and about Stanford credibility and legitimacy; stated that certain Stanford executives would be more informative deponents than others; and represented a Stanford executive during a deposition during which the executive allegedly lied. Troice, supra, at *4.

The lawyers moved to dismiss the claims arguing that they were entitled to attorney immunity under Texas law.[ii] Texas law provides that attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation.[iii] Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015). Whether an attorney's conduct is immune turns not on the alleged impropriety of the attorney's acts but how the those acts relate to the discharge of the attorney's duties to the client. Id. So, suborning perjury while presenting a witness in a deposition is entitled to immunity because presenting witnesses is a normal part of an attorney's duties. But, assaulting opposing counsel is not entitled to immunity because fisticuffs among counsel have nothing to do with an attorney's duties to the client. Id.

The district court denied the motion to dismiss and the attorneys appealed. On appeal, the Troice court held that the plaintiffs' claims were barred by attorney immunity. The court reasoned that the conduct the attorneys were accused of – arguing that the investment at issue was not a security, presenting witnesses in deposition and responding to subpoenas – was the sort of thing that attorneys representing parties in governmental investigations typically do. Troice, supra, at *15. Thus, regardless of whether the attorneys lied to the SEC in the course of these activities, the attorneys' actions were protected by immunity from the plaintiffs' claims. Id.

Troice illustrates the difficulty in pursuing claims against attorneys who allegedly conspire with their clients to commit fraud in a receivership context. When the receiver sues, the attorneys argue that their former clients, the parties in receivership, suffered no damages (i.e., the fraud was on behalf of the client), that any actual damage claims belong to the investors and that the attorneys' conduct did not cause any damage. They also argue that the receiver's claims are barred by in pari delicto. These arguments have met with various degrees of success. When the victims sue, the attorneys argue that the victims' claims are barred by privity and attorney immunity. To this extent, Troice and Cantey Hanger are unhelpful to the receiver's task of recovering money for the benefit of the victims of fraud.

But, Troice does provide some help for receivers as well. More interesting than the court's decision on the merits is the court's decision to allow the appeal. Normally, the denial of a motion to dismiss is not appealable because it is not a final order. Except for certain narrowly defined interlocutory (non-final) orders, courts of appeals have jurisdiction only to hear appeals from final orders.

Nevertheless, the Troice court held that the it had jurisdiction under the collateral order doctrine. The doctrine deems final (and, thus, allows appeals of) otherwise interlocutory orders that "(1) conclusively determine the disputed question; (2) resolve an issue that is completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment." Walker v. U.S. Dep't of Housing & Urban Dev., 99 F.3d 761, 766 (5th Cir. 1996). The Troice court found that the first two elements were easily established because the order conclusively determined the question of immunity and was separate from the merits of the plaintiffs' claim. Troice, supra, at *6. The court, thus, concentrated on the third element: was the order effectively unreviewable after final judgment.

Whether the order denying the motion to dismiss was effectively unreviewable turned on whether attorney immunity is a defense to liability or a bar to suit. Id. at *7. The court found that attorney immunity was a bar to suit, that is, a true immunity. The court reasoned that the purpose of the doctrine is to ensure loyal,

faithful, and aggressive representation by attorneys employed as advocates. In this respect, attorney immunity is like other true immunities. In the words of the Troice court:
All share an objective of safeguarding the unfettered exercise of judgment in the judicial system by protecting the person exercising it not only against liability but also against incurring the costs of defending a lawsuit. All therefore protect against imperiling a substantial public interest: the effective functioning of our adversary system.

Troice, supra, at *9. Thus, attorney immunity is a true immunity and a bar to suit. An order denying a motion to dismiss on this ground is, therefore, immediately appealable.

A receiver's derived judicial immunity shares these objectives as well. A receiver functions as an arm of the court by making decisions about the operation of a business that the judge would otherwise have to make. New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1303 n.6 (9th Cir. 1989). A receiver is required to exercise judgment to fulfill the duties delegated by the court. Notably, receivers share the judge's judicial immunity, which is generally held to be a true immunity. Id. at 1303. Under Troice, then, an order denying a motion to dismiss a claim against a receiver on immunity ground should be immediately appealable.

A receiver's immunity is an important part of the protections provided by the court. Without immunity a receiver would become "a lightning rod for harassing litigation aimed at judicial orders." Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976). By holding that orders denying motions to dismiss on immunity grounds are immediately appealable, Troice has strengthened the immunity protecting receivers.

[i] Plaintiffs' securities laws claims were based on the Texas Securities Act rather than federal law.

[ii] They also moved to dismiss on the ground that SLUSA precluded the claims against them. The district court granted this motion. The Fifth Circuit reversed. The Supreme Court affirmed the Fifth Circuit. On remand, the district court considered the attorney immunity defense.

*[iii] Texas courts have not fully resolved whether attorney immunity applies to conduct that is unconnected to litigation. Cantey Hanger, 467 S.W.3d at 482 n.6. They have, however, held that attorney immunity applies to adversarial proceedings that occur outside of court such as non-judicial foreclosures. Id,; also id. at 489 n.3 (Green, J. dissenting). An SEC investigation, which is adversarial in nature and utilizes procedures similar to litigation, should fall within the class of non-judicial proceedings to which immunity applies. The plaintiffs in Troice waived the argument that the attorneys' conduct was unrelated to litigation and the court did not consider it. Troice, supra, at *16-*17.*

Michael Napoli protects individuals and companies facing lawsuits. He works closely with his clients to create practical, business solutions to litigation problems. Representing both plaintiffs and defendants, Michael works on a wide variety of cases including securities, commercial and products liability matters.

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