

MEMORANDUM

TO: Uniform Commercial Real Estate Receiverships Act (“UCRERA”) Drafting Committee, Advisors and Observers

CC: Harriett Lansing, Richard Cassidy, Anita Ramasastry, Lane Shetterly, John Sebert, Liza Karsai, and Ben Orzeske

FROM: Thomas S. Hemmendinger and R. Wilson Freyermuth

DATE: February 28, 2015

RE: Summary of February 20 and 21, 2015 Meeting of the UCRERA Drafting Committee

The Drafting Committee on a Uniform Commercial Real Estate Receiverships Act met on February 20 and 21, 2015 in Washington, DC. Those attending were Commissioners Thomas Hemmendinger (Chairperson), Thomas Edmonds, Patricia Fry, Donald Mielke, Rosemary Sackett, Mark Sandlin, and Mary Gay Taylor-Jones; Reporter R. Wilson Freyermuth; ULC President Harriett Lansing; ULC Executive Committee Chairperson Richard Cassidy; ABA Advisor John Trott and ABA Section Advisors Jeffrey Allen, Kay Kress, and Justin Williams; and Observers William Hoffman, Kenneth Jannen (ALTA), Cheryl Kelly, Steve Sepinuck (American College of Commercial Finance Lawyers), Jeffrey Smith, and Richard Weissman (California Receivers Forum); Division Chair Lane Shetterly; retiring ULC Executive Director John Sebert; incoming ULC Executive Director Liza Karsai; and Staff Liaison Ben Orzeske. Commissioners John Burton, Steve Cawood, Ellen Dyke, and Fred Miller could not attend.

We considered the Reporter’s January 29, 2015 draft of the Uniform Act and the Style Committee’s comments and proposed changes. As in our previous meetings, the discussion was extremely productive. Everyone contributed helpful and practical comments and suggestions to improve the text of the Act.

We met our objectives of finalizing the substance and text of the Act in preparation for reading the Act at the ULC’s 2015 annual meeting.

The following is a summary of the decisions made at the meeting, organized by section number:

1) Short Title (Section 1).

- a) The Committee expressed its thanks for the Executive Committee re-designation of this Act as a Uniform Act. The Committee also agreed with the Style Committee’s suggestion that

the Act be retitled with the singular “Receivership”. The Chair will ask the Executive Committee to make the change.

2) Definitions (Section 2).

- a) The definition of “affiliate” will include bracketed language to accommodate both domestic partnerships, registered domestic partnerships, and civil unions, depending on the particular state’s laws. The section will also include a Legislative Note on this point. The definition of “affiliate” will also include adoptees.
- b) The definition of “mortgage” will ensure that it is limited to consensual grants of a lien, such as what is traditionally considered a mortgage, deed of trust, or assignment of rents, and does not include a judgment. This may require changes to the definitions of “security agreement” and “secured obligation”. Further, the Official Comments will explain that “mortgage” is a subset of “security agreement”.
- c) The Committee thought that the definition of “mortgagee” should be changed to read “the person entitled to enforce a mortgage”. The Reporter will consider whether this raises unintended consequences. If it does, the Chair will report back to the group.
- d) The definition of “property” will expressly include both intangible and tangible property.
- e) The Reporter will consider whether it makes sense to add a definition of proceeds. The goal would be to ensure that terms such as “receivership property” include collections, insurance proceeds, and claims arising from damage to or loss of property.

3) Notice and Opportunity for a Hearing (Section 3).

- a) The Committee thought that both the January 29 meeting draft and February 9 Style Committee suggestions had merit, but that neither on its own was sufficient. Therefore, after discussion the Committee adopted the following version:

SECTION 3. NOTICE AND OPPORTUNITY FOR A HEARING.

(a) Except as otherwise provided in subsection (b), the court may issue an order under this [act] only after such notice and opportunity for a hearing as are appropriate in the particular circumstances.

(b) The court may issue an order:

(1) without prior notice if the particular circumstances require issuance of an order before notice is given;

(2) after notice and without a prior hearing if the particular circumstances require issuance of an order before a hearing is held; or

(3) after notice and without a hearing if no interested party timely requests a hearing.

- b) Subsection (a) states the general rule that the court may tailor notice and hearing procedures to the particular situation before the court. Subsection (b) specifically addresses where the court may act without prior notice (paragraph 1) or with notice but without a prior hearing or any hearing (paragraphs 2 and 3). The phrase “if the particular circumstances require” in paragraphs 1 and 2 directs the court to focus on the specific circumstances that would justify issuing an order without the usual notice and opportunity for a hearing.
- 4) Scope (Section 4).
- a) The Committee instructed the Reporter to consider modifying subsection (a) to avoid the implication that the Act excludes real property that does not have related personal property.
- b) The Committee expanded paragraph (b)(3) to include situations where the owner is presently planning to develop the property.
- 5) Power of Court (Section 5).
- a) The Committee considered the Style Committee’s suggestion that the Act present two Alternatives to deal with those states where judges in one county, circuit or district may not have the power to act on property located in another county, circuit or district of the same state. However, the Committee prefers to present only one version of this section and to retain the Legislative Note on this issue.
- 6) Grounds for Appointment (Section 6).
- a) The Reporter will clarify the clause authorizing appointment of a receiver if the property is or might be subject to a voidable transaction by replacing “may” with “might” or “could”.
- b) Paragraphs (a)(2)(B), (b)(1), and (b)(5) should also cover rents and insurance proceeds. This may be done here or in the definitions.
- c) Paragraph (b)(3) will be limited to post-default agreements to appointment of a receiver.
- d) The Official Comments should explain how a mortgagee could ask for a receiver under either subsection (a) or subsection (b) if supported by the facts.
- 7) Identity of Receiver (Section 7).

- a) The Committee decided that to change this section from rules on what makes a potential receiver “independent” or “not independent” into rules on what does or does not disqualify a potential receiver. The purpose of the change is for clarity, not a change in substance.
 - b) The Act will also require the receiver to update his or her disclosures. See Section 12 below.
- 8) Receiver’s Bond (Section 8).
- a) The Committee thought that Style’s Committee’s suggestion to add “other than this [act} to the end of subsection (a) is substantive. The Reporter will address this with our Style liaison.
- 9) Receiver as Lien Creditor (Section 9).
- a) The Committee directed the Reporter to make change the beginning of this section from “At the time a receiver is appointed” to “As of the time a receiver is appointed” to make clear that the receiver gains the status as a lien creditor as of the time of appointment.
- 10) Security Interests in After-Acquired Property (Section 10).
- a) The Committee was satisfied with this section as drafted and requested no further changes.
- 11) Turnover (Section 11).
- a) The Committee expanded the operation of this section to address liens where “validity, priority, or perfection” depend on the creditor’s possession, custody, or control of collateral.
 - b) The Official Comments should explain how this section and Section 14 address the situation where a secured party collects collateral after the receiver is appointed.
- 12) Receiver’s Powers (Section 12).
- a) The Committee simplified the language in the chapeau of subsection (a) and in paragraph (a)(9), and directed the Reporter to put the receiver’s additional powers in subsection (b) to a more logical order.
 - b) The Official Comments should elaborate on the power to make improvements to receivership property in paragraph (b)(9) and generally on the receiver’s duties as a fiduciary.
 - c) The duties in subsection (c) will include the duty to update the disclosures required in Section 7.
 - d) The Style Committee had suggested a change to the chapeau of subsection (a), but the Drafting Committee believes could change the substance of the Act. The Reporter will

confer with our Style liaison on this point and on a Style question about the use of “collection” in (c)(2).

13) Owner’s Duties (Section 13).

- a) The owner should have the duty in paragraph (a)(3) not only to make records and other information available to the receiver, but to identify the records and other information. Further, the duty to make identify and available will cover authorizations in addition to passwords and other information about receivership property.

14) Stay (Section 14).

- a) The Committee noted that the Style Committee suggested deleting “for cause” from subsection (c) on the court’s power to grant relief from the stay. The Committee believes that the deletion is substantive, and the Chair and the Reporter will address this question with the Style Committee.
- b) In subsection (e), the Committee deleted “On motion of a party, ” so that anyone with standing would have the right to ask the court to void an act that violates the stay, and to make clear that the court may do so on its own motion.
- c) The Official Comments should address how the Act deals with a secured party’s collection of accounts or other intangible collateral (see above under Section 11).
- d) Section 6(b)(6) allows a senior mortgagee to seek appointment of a receiver if a junior lienholder has already obtained appointment of a receiver. This section would require the senior mortgagee to obtain court approval before asking for its own receiver. The Official Comments will elaborate on this.

15) Engagement of Professionals (Section 15).

- a) The Committee decided that the provisions on qualification or disqualification of a professional or of the receiver serving as a professional in the third and fourth sentences of subsection (a) should both include the requirement that the court find that the engagement is appropriate.
- b) The Committee changed the last sentence of subsection (b) to make it clear that the amount of a professional’s fees are subject to court approval.

16) Use or Transfer Not in the Ordinary Course of Business (Section 16).

- a) In response to a question from Style, the Committee decided to retain “free and clear” rather than shorten it to “free”. The Committee feels that the term “free and clear” is a term of art.

- b) The Committee made several grammatical changes to subsections (c), (d), and (e) for greater clarity. Most important, subsection (c) should articulate the receiver's power to transfer not as "sell, lease, license or otherwise transfer", but as "transfer by sale, lease, license, exchange, or other disposition".
- c) The Committee stood by its prior decision that in general a receiver's sale should be free and clear of the plaintiff's lien and junior liens, but subject to senior liens.
- d) The Committee also stood by its prior decision not to set standards for a receiver's marketing efforts or sale terms. However, the Official Comments should discourage the court from issuing blanket authority to sell without knowing the receiver's marketing efforts or sale terms.
- e) The Reporter will consider changing the reference to "valid senior lien" in subsection (c) for clarity.
- f) The Official Comments should also elaborate on the meaning of "perfection" in subsection (d) in the context of UCC Article 9 and the state's real estate laws.

17) Executory Contracts (Section 17).

- a) The definition of "timeshare interest" should refer to the state's existing definition of the term and provide bracketed language and a Legislative Note for those states that do not already have a definition.
- b) Subsection (f) will be simplified by deleting "contract and" as unnecessary.
- c) The Chair and the Reporter will confer with the Style Committee about the latter's suggestions in subsection (g).

18) Receiver's Immunity (Section 18).

- a) The Committee was satisfied with the substance of this section and requested no changes.

19) Interim Report of Receiver (Section 19).

- a) The Committee was satisfied with the substance of this section and requested no changes.

20) Claims (Section 20).

- a) This section will include a Legislative Note to alert the states to consider how best to describe the type of newspaper where notice may be published.
- b) The Official Comments will explain that references to "the law of this state other than this

[act]” as the law governing allowance and disallowance of claims and governing priority includes the forum state’s choice-of-law and conflicts of laws rules.

- c) The Committee also directed the Reporter to make some stylistic changes to simplify subsection (f).

21) Fees and Expenses (Section 21).

- a) The Committee considered and approved, with certain changes, a revised draft from the Chair and the Reporter dated February 21, 2015:

SECTION 21. FEES AND EXPENSES.

(a) The court may award a receiver from receivership property the reasonable and necessary fees and expenses of preserving, protecting, or transferring the property.

(b) The court may order one or more of the following persons to pay the reasonable and necessary fees and expenses of the receivership, including reasonable attorney’s fees:

(1) a person who requested the appointment of the receiver, if the receivership does not produce sufficient funds to pay the fees and expenses; or

(2) a person whose conduct would have justified the appointment of a receiver under section 6(a)(1).

- b) The new version allows the court to assess the fees and expenses of the receivership against any person whose conduct would have justified the appointment of a receiver under Section 6(a)(1)—waste, loss, dissipation, impairment, or voidable transaction.

22) Replacement of Receiver; Termination of Receivership (Section 22).

- a) Where the appointment of a receiver was procured wrongfully or in bad faith, the court should have the power to assess both the fees and expenses of the receivership and also actual damages, in each case including attorney’s fees. The Committee also decided that the cause of action under this section should not be limited to the owner.

23) Final Report of Receiver; Discharge (Section 23).

- a) The Committee dropped “for all matters in the report” from subsection (b), based on the view that discharge of a receiver does not absolve the receiver from liability, but merely

terminates the receiver's duty to perform further services.

24) Ancillary Receiverships (Section 24).

- a) Subsection (b) authorizes the court to issue an order to effectuate an order in another state. The Style Committee suggested introducing the provision with “when the court appoints an ancillary receiver under subsection (a)”. The Drafting Committee sees this as a substantive change and prefers to have this subsection apply whether or not there is an ancillary receivership proceeding.

25) One-Action and Anti-Deficiency Laws (Section 25).

- a) The Committee decided that subsection (b) should contain a bracketed reference to the state's anti-deficiency statute, if it has one, and that the section should include a Legislative Note on that point.

26) Final Sections (Sections 26 – 30).

- a) These are ULC standard language on the topic and require no change.

27) Enactability; Additional Observers.

- a) Ben Orzeske and Rich Cassidy briefed the group on how the enactment effort might proceed.
- b) Our ABA Advisors and our Observers pointed out that this Act would benefit a substantial number of states and made helpful suggestions on how to advance the enactment effort.

28) Wrap-up and Next Steps.

- a) The deadline to ask the Executive Committee for action on any points within the Executive Committee's purview is April 17, 2015.
- b) The deadline to submit an updated draft of the Act to the Style Committee is April 17, 2015.
- c) The annual meeting draft is due May 26, 2015.
- d) The annual meeting is July 10 – 16, 2015 in Williamsburg, Virginia. We encourage ABA Advisors and Observers to attend, as we anticipate this will be the Act's final reading.