

D R A F T
FOR DISCUSSION ONLY

**UNIFORM COMMERCIAL REAL ESTATE
RECEIVERSHIPS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

February 20-21, 2015 Drafting Committee Meeting

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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January 29, 2015

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT

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TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE.....	9
SECTION 2. DEFINITIONS.....	9
SECTION 3. NOTICE AND OPPORTUNITY FOR A HEARING.....	16
SECTION 4. SCOPE; EXCLUSIONS.....	17
SECTION 5. POWER OF COURT.....	20
SECTION 6. APPOINTMENT.....	21
SECTION 7. IDENTITY OF RECEIVER; DISCLOSURE OF INTEREST.....	25
SECTION 8. RECEIVER’S BOND.....	27
SECTION 9. RECEIVER’S STATUS AS LIEN CREDITOR.....	28
SECTION 10. SECURITY AGREEMENT COVERING AFTER-ACQUIRED PROPERTY..	29
SECTION 11. COLLECTION AND TURNOVER OF RECEIVERSHIP PROPERTY.....	30
SECTION 12. POWERS AND DUTIES OF RECEIVER.....	32
SECTION 13. DUTIES OF OWNER.....	35
SECTION 14. STAY.....	36
SECTION 15. ENGAGEMENT AND COMPENSATION OF PROFESSIONAL.....	38
SECTION 16. USE, SALE, LEASE, LICENSE OR OTHER TRANSFER OF RECEIVERSHIP PROPERTY OTHER THAN IN ORDINARY COURSE OF BUSINESS.....	39
SECTION 17. EXECUTORY CONTRACT.....	42
SECTION 18. IMMUNITY OF RECEIVER.....	47
SECTION 19. INTERIM REPORT OF RECEIVER.....	48
SECTION 20. CLAIM AGAINST RECEIVERSHIP; DISTRIBUTION TO CREDITORS.....	49
SECTION 21. FEES AND EXPENSES.....	51
SECTION 22. REMOVAL OF RECEIVER; REPLACEMENT; TERMINATION OF RECEIVERSHIP.....	53
SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.....	54
SECTION 24. ANCILLARY RECEIVERSHIP.....	55
SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE.....	56
SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	58
SECTION 27. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	58
SECTION 28. SAVINGS PROVISION.....	58
SECTION 29. REPEALS.....	58
SECTION 30. EFFECTIVE DATE.....	58

1 **Prefatory Note**

2 **Introduction.** A receiver is a person appointed by a court to take possession of the
3 property of another and to “receive, collect, care for, and dispose of the property or the fruits of
4 the property.” 1 Clark on Receivers § 11(a), at 15 (2d ed. 1929). Courts exercising general
5 equity jurisdiction have traditionally appointed receivers in a variety of different contexts:
6

- 7 • Courts have appointed pendente lite receivers to preserve property that is the subject
8 matter of pending litigation, thereby preventing its waste, deterioration, or removal prior
9 to judgment.
- 10
- 11 • Courts have appointed receivers after entry of a judgment to preserve the property
12 pending appeal, to carry the judgment into effect, or to enforce the judgment.
- 13
- 14 • Courts have appointed receivers to preserve the property of a corporation, partnership, or
15 other legal entity in the context of the dissolution or winding up of the entity.
- 16
- 17 • Courts have appointed receivers, at the behest of one or more creditors, to collect,
18 preserve, administer, liquidate and distribute the property of insolvent debtors.
- 19

20 Where authorized by statute or the usages of equity, receivers may also be appointed for
21 the administration of certain entities affected with the public interest, such as railways, banks, or
22 insurance companies.
23

24 One of the most common situations in which courts appoint receivers is at the request of
25 a mortgage lender which is seeking to enforce a mortgage that is in default. A typical
26 commercial real estate mortgage or deed of trust explicitly provides that upon default, the
27 mortgagee may seek the appointment of a receiver from a court with jurisdiction over the
28 mortgaged premises; frequently, the terms of the mortgage or deed of trust purport to provide
29 mortgagor consent for the appointment of a receiver following default. Traditionally, mortgage
30 lenders have sought the appointment of a receiver pending foreclosure for one or more of several
31 reasons:
32

- 33 • The mortgaged property is located in a state where the foreclosure process takes a
34 substantial period of time (e.g., six months or longer). A receiver can be of fundamental
35 importance in such states because during the pendency of the foreclosure proceeding, the
36 mortgaged premises will typically generate substantial rents from tenants or other
37 occupiers. In most loan transactions, these rents will have been assigned to the
38 mortgagee as security for the loan, and the lender reasonably expects these rents to be
39 applied toward reduction of the mortgage debt. Application of these rents to the debt is
40 of particular importance where the value of the mortgaged premises has declined and the
41 mortgage loan is “nonrecourse” (i.e., where the borrower has no personal liability for the
42 loan’s repayment); in this situation, application of the rents to the mortgage debt could
43 help to reduce or even eliminate the deficiency judgment that might follow a completed
44 foreclosure. Thus, obtaining the appointment of a receiver allows the mortgagee to
45 prevent the mortgagor from diverting rents to other creditors or insiders of the mortgagor

1 pending a foreclosure sale.

- 2
- 3 • The mortgaged property is subject to waste, deterioration, or some other immediate
- 4 physical harm that threatens to reduce the value of the mortgaged property and thus
- 5 threatens the mortgagee’s security.
- 6
- 7 • The mortgaged property may be subject to a high vacancy rate or underperforming due to
- 8 poor property management. In such a case, the mortgagee might wish to provide better
- 9 and more active property management and to enter into new tenant leases. In this
- 10 situation, the mortgagee may prefer to secure the appointment of a receiver to provide
- 11 this day-to-day management, both because (1) the appointment of a receiver would
- 12 insulate the mortgagee from the liability that the mortgagee would assume if the
- 13 mortgagee provided this property management directly and thereby became a “mortgagee
- 14 in possession,” and (2) the receiver may be a person with specialized expertise in turning
- 15 around a property of that type.
- 16
- 17 • The mortgaged collateral may include not only real estate but substantial personal
- 18 property as well, as would be the case (for example) where the collateral was a hotel or
- 19 resort property. In this situation, the mortgagee may wish to proceed with foreclosure in
- 20 a judicial proceeding so as to minimize or avoid any claim that might arise if it disposed
- 21 of the personal property under Article 9 of the Uniform Commercial Code and the
- 22 disposition was subsequently attacked as being commercially unreasonable.
- 23
- 24 • The property may be subject to environmental contamination, and the mortgagee does not
- 25 want to be in the chain of title or to rely solely on statutory exemptions from federal or
- 26 state environmental laws that may depend upon the mortgagee’s status as a secured
- 27 creditor. See, e.g., 42 U.S.C.A. § 9601(20)(A) (excluding from federal CERCLA “owner
- 28 and operator” liability any person who “without participating in the management of a ...
- 29 facility, holds indicia of ownership primarily to protect his security interest in the ...
- 30 facility”).
- 31

32 ***The Need for a Uniform Act.*** Unfortunately, very few states have comprehensive
33 statutory guidance regarding the appointment and powers of receivers for commercial real estate.
34 In the vast majority of states, receivers are appointed pursuant to a court’s general equitable
35 power to appoint a receiver, with minimal statutory guidance either expressly confirming or
36 limiting the power of a receiver. A small handful of states (including California, Indiana,
37 Nebraska, New Mexico, Oklahoma, and South Dakota) provide a moderate amount of statutory
38 guidance regarding the appointment and powers of receivers. Only two states — Washington
39 and Minnesota — provide a comprehensive statutory codification of the laws governing the
40 appointment and powers of receivers and receivership procedures. Likewise, to date, no uniform
41 law addresses the appointment and powers of real estate receivers in a comprehensive fashion.
42 Although the Uniform Assignment of Rents Act (UARA), promulgated in 2005, does address the
43 evidentiary showing necessary to obtain the appointment of a receiver, UARA’s focus is limited
44 to appointment at the request of an assignee of rents, and nothing in UARA explicitly addresses
45 either receivership procedure or the scope of the powers that a receiver of real estate may
46 exercise prior to foreclosure.

1 As a result, there can be a great deal of variation from state to state with regard to the
2 laws governing appointment and powers of receivers. Furthermore, because most states have
3 such minimal statutory guidance, there is even variation from one county, district, parish, or
4 municipal subdivision to the next within a state, as individual judges may have disparate
5 perspectives on the circumstances in which a receivership constitutes an appropriate remedy.
6 The following provides a non-exhaustive list of some of these inter-state and intra-state
7 variations:
8

- 9 • There is substantial variation as to the circumstances that justify the appointment of a
10 receiver, particularly in the case of mortgaged property. Some courts require that the
11 petitioning party establish the existence of waste; other courts do not require the
12 existence of waste if the property's value is insufficient to satisfy the mortgage debt;
13 others simply permit the petitioning mortgagee to obtain a receiver where the mortgage is
14 in default and the mortgagor consented in the mortgage to the appointment of a receiver
15 after default.
16
- 17 • There is substantial variation as to the circumstances, if any, that justify ex parte
18 appointment of a receiver and the procedures associated with ex parte appointment.
19 Some courts routinely appoint receivers on an ex parte basis with no heightened
20 evidentiary showing required, particularly where the mortgagor consented to ex parte
21 appointment in the mortgage or deed of trust. Other courts refuse ex parte appointment
22 outright, or require the petitioning mortgagee to establish the circumstances justifying
23 appointment without prior notice to the mortgagor.
24
- 25 • There is substantial variation as to the enforceability of provisions in the mortgage or
26 deed of trust by which the mortgagor consents in advance to the appointment of a
27 receiver after default. In some states, such contractual provisions are enforceable as a
28 matter of right. See, e.g., Ind. Code § 32-30-5-1; Minn. Stat. Ann. § 559.17, subd. 2;
29 N.Y. Real Prop. Law § 254(10); N. Mex. Stat. Ann. § 44-8-4(A). By contrast, most
30 existing statutes provide (or have been interpreted to mean) that the decision to appoint a
31 receiver rests in the discretion of the court, without regard to the terms of the mortgage.
32

33 Furthermore, in many states, existing receivership statutes simply do not address a
34 number of questions concerning receivership procedure. For example, many state statutes do not
35 address such issues as the necessity or amount of the receiver's bond, the necessity or amount of
36 a bond from the person seeking appointment of a receiver, the eligibility requirements for service
37 as a receiver, or the requirements for notification to creditors. These shortcomings make it more
38 difficult for "best practices" to develop in the receivership context.
39

40 Finally, the existing receivership laws in most states do not adequately set forth the
41 powers that a receiver may (or may not) exercise, either with or without prior approval of the
42 appointing court. This can result in potential uncertainty regarding the ability of a receiver to
43 borrow money, to approve or reject executory contracts entered into by the owner of the property
44 (including unexpired leases), to sell receivership property in the ordinary course of business, or
45 to make improvements to receivership property.
46

1 In particular, there is substantial current uncertainty regarding whether a receiver has the
2 power to sell real estate. Customarily, a receiver’s ability to sell receivership property varied
3 depending upon the circumstances of the receivership. When a court appointed a general
4 receiver for all of the assets of an insolvent debtor, the court would commonly authorize the
5 receiver to gather and sell the assets of the debtor. The court would frequently empower such a
6 receiver, in the receivership order, to sell assets both in the ordinary course of business (such as
7 sales of inventory) and even outside of the ordinary course with court approval.
8

9 By contrast, when a court appointed a limited receiver to take possession of a specific
10 asset — such as a receiver for mortgaged property — the receiver’s role might be more typically
11 viewed as custodial. For this reason, receivers appointed for mortgaged property were often
12 viewed as having the power to operate, maintain, and preserve the property pending a foreclosure
13 sale, but not to sell the property; instead, a sale would occur, if at all, only in the context of the
14 foreclosure proceeding.
15

16 Recently, some commentators have advocated that receivership can be an effective way
17 to dispose of real estate, and mortgaged real property in particular. Indeed, there are at least two
18 specific contexts in which a sale by the receiver may be perceived as advantageous:
19

- 20 • *Sale of property securing commercial mortgaged-backed securities (CMBS) loans.*
21 CMBS loans are held in real estate mortgage investment conduits (“REMICs”), which are
22 special purpose vehicles used for the pooling of mortgage loans and the issuance of
23 mortgage-backed securities. The Internal Revenue Code forbids REMICs from issuing
24 new debt or making new loans, but permits some modifications to an existing defaulted
25 loan. Thus, when a REMIC completes a foreclosure sale, it cannot make a new loan on a
26 seller-financing basis. However, if the property can be sold (through a receiver or by the
27 borrower directly) with the buyer assuming the mortgage, the mortgage loan can be
28 modified and restructured under the REMIC rules. Often, this can produce a sale at a
29 higher value than by comparison to a cash sale, and thus is attractive to lenders who want
30 to avoid foreclosing on a property that is worth less than the outstanding mortgage debt.
31 *See generally* John C. Murray and Kenneth R. Jannen, *Public and Private Sales of Real*
32 *Property by Federal Court Receivers*, ACREL Papers (March 2011).
33
- 34 • *Foreclosure sale at “arms-length” rather than “distress sale.”* Under current
35 foreclosure law in all 50 states, a foreclosure sale is a “distress sale,” i.e., a public auction
36 sale, typically “on the courthouse steps.” Foreclosure by sale has been justified as a
37 means to protect the mortgagor’s equity in the mortgaged property, particularly by
38 comparison to the historical approach under which a defaulting borrower simply forfeited
39 its interest in the mortgaged property (and any equity the borrower may have
40 accumulated either through principal reduction or market appreciation). Nevertheless,
41 there is concern that foreclosure sales may not always bring prices that reflect the value
42 that might be obtained in an arms-length, non-distress sale. By contrast to a traditional
43 foreclosure, a receiver could theoretically market the mortgaged property to potential
44 buyers in the context of its operation of the property. Marketing of the property in an
45 arms-length context could permit potential buyers to perform more meaningful and
46 complete due diligence; further, a sale that is both free and clear of liens and rights of

1 redemption and subject to judicial review and confirmation could produce greater finality
2 regarding the title acquired by the buyer. In theory, providing potential foreclosure
3 buyers with better information regarding the mortgaged property and greater certainty of
4 title might be expected to produce sale prices higher than those that would be produced
5 by distress foreclosure sales.
6

7 In this respect, federal law has evolved further than state statutory law, as federal law
8 authorizes receivers appointed by a federal court to sell mortgaged property free and clear of
9 liens. 28 U.S.C.A. §§ 2001 to 2004. The federal statutes are vague with respect to the procedures
10 for marketing and selling the property, “thereby allowing for flexibility and creativity.” Kay
11 Kress, *Federal Receiverships* (2005 ABA Business Law Section Meeting). Furthermore, federal
12 courts have concluded that “the power of sale is within the scope of a receiver’s ‘complete
13 control’ over receivership assets . . . , a conclusion firmly rooted in the common law of equity
14 receiverships.” Securities Exch. Comm’n v. American Capital Investments, Inc., 98 F.3d 1133,
15 1144 (9th Cir. 1996). The federal statute specifically authorizes receivers appointed by a federal
16 court to conduct a private sale after notice to all interested parties and a hearing. 28 U.S.C. §
17 2001(b). Further, federal courts have concluded that there is no right of post-sale redemption
18 from judicial sales conducted under 28 U.S.C.A. § 2001(b), notwithstanding any state statutory
19 redemption rights the mortgagor might otherwise claim. See, e.g., *United States v. Heasley*, 283
20 F.2d 422 (8th Cir. 1960).
21

22 For the reasons described above, substantial benefits could flow to the resolution of
23 distressed commercial mortgage loans if state law explicitly granted a receiver the power of sale
24 as recognized under federal law. Unfortunately, most existing state statutes do not specifically
25 authorize a receiver to conduct a sale of real property, and some courts have held that in the
26 absence of express statutory authority, receivers lack the authority to conduct such sales. See,
27 e.g., *Kirven v. Lawrence*, 137 S.E.2d 764 (S.C. 1964) (receiver does not have inherent power of
28 sale, as receivership is “custodial” in nature and designed to preserve the status quo); *Andrick*
29 *Dev. Corp. v. Maccaro*, 311 S.E.2d 95 (S.C. Ct. App. 1984) (same); *Eppes v. Dade Developers,*
30 *Inc.*, 170 So. 875 (Fla. 1936); *Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. Dist. Ct.
31 App. 2010) (receiver lacked power to sell hotel even though appointing court had authorized the
32 sale; no Florida statute authorizes a court-appointed receiver in a foreclosure case to sell the
33 mortgaged property in contravention of mortgagor’s right of redemption). To provide the needed
34 clarity, the Act seeks to provide more explicit rules addressing the extent to which a receiver can
35 sell receivership property, either subject to or free and clear of existing liens and rights of
36 redemption.
37

38 ***Summary of the Act.*** The following paragraphs provide a brief summary of the
39 provisions of the Act.
40

- 41 • ***After Notice and Opportunity for a Hearing.*** Under the Act, the court may enter
42 orders only after such notice and such opportunity for a hearing as is appropriate
43 under the particular circumstances. § 3(a), (b). The court may issue an order without
44 an actual hearing if no interested party timely requests a hearing or the particular
45 circumstances require the issuance of an order before a hearing can be held.
46

- 1 • **Scope.** The Act applies to receiverships for real property as well as personal property
2 that is related to the real property or used in its operation. § 4(a). It does not govern a
3 receivership for property improved by one to four dwelling units, unless (1) the property
4 is configured for nonresidential use, (2) the owner planned to develop the property with
5 one or more dwelling units to be sold or leased in the ordinary course of the owner’s
6 business, or (3) the owner collects rents or other income from an unrelated tenant or other
7 occupier. § 4(b). The Act does not provide the exclusive method for the appointment of
8 a receiver. § 4(d).
9
- 10 • **Court.** The state’s court of general equity jurisdiction has exclusive jurisdiction of the
11 receivership proceeding. § 5.
12
- 13 • **Appointment.** The Act establishes standards under which a court may appoint a receiver
14 in the exercise of its equitable discretion. § 6(a). The Act also establishes standards under
15 which a petitioning mortgage lienholder is entitled to appointment of a receiver, either as
16 a matter of right or as a matter of the court’s discretion. § 6(b). The Act also addresses the
17 *ex parte* appointment of a receiver, § 6(c).
18
- 19 • **Identity and Independence of Receiver.** Because a receiver holds receivership property
20 for the benefit of all interested parties, the Act requires that the receiver provide sworn
21 evidence of the receiver’s independence, § 7(a), (b), subject to an exception to prevent
22 disqualification based upon certain pre-existing relationships that are de minimis in
23 nature. § 7(c). While a party seeking the appointment of a receiver may nominate a
24 person to serve as a receiver, the nomination is not binding on the court. § 7(d).
25
- 26 • **Effect of Appointment.** Upon appointment, a receiver has the status and priority of a lien
27 creditor with respect to receivership property. § 9. Appointment of a receiver does not
28 affect the validity of a pre-receivership security interest in receivership property, and
29 property acquired after appointment is subject to any pre-receivership security agreement
30 to the same extent as if no receiver had been appointed. § 10. Upon appointment,
31 persons having possession, custody or control of receivership property must turn the
32 property over to the receiver, and persons owing debts that constitute receivership
33 property must pay those debts to the receiver. § 11. Entry of the order of appointment
34 effects a stay, applicable to all persons, of an act to obtain possession of, exercise control
35 over, or enforce a judgment against receivership property, as well as an act to enforce a
36 lien against receivership property. § 14(a). In appropriate situations, the court can expand
37 the scope of the stay, § 14(b), and grant relief from the stay, § 14(c). However, for policy
38 reasons, certain actions are outside the scope of the stay. § 14(d). The Act also addresses
39 the consequences of a violation of the stay. §§ 14(e) and 14(f).
40
- 41 • **Powers and Duties of Receiver; Duties of Owner.** The Act sets forth the receiver’s
42 presumptive powers, § 12(a), as well as those that the receiver may exercise only with
43 court approval. § 12(b). The Act also sets forth the duties of the owner of receivership
44 property. § 13.
45
- 46 • **Engagement and Compensation of Professionals.** The Act authorizes the receiver to

1 engage and pay professionals to assist in the administration of the receivership following
2 court approval after notice and a hearing. § 15.
3

- 4 • ***Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in***
5 ***Ordinary Course.*** With court approval after notice and a hearing, the Act permits the
6 receiver to use, sell, lease, license, or otherwise transfer receivership property other than
7 in the ordinary course of business. § 16. Unless the agreement of transfer provides
8 otherwise, the transfer would be free and clear of rights of redemption and liens other
9 than liens that are senior to the lien of the person who obtained the receiver’s
10 appointment. § 16(b). Liens extinguished by the receiver’s sale attach to proceeds with
11 the same validity, perfection, and priority as they had with respect to the property sold. §
12 16(c). The sale may occur in a private sale. § 16(d). Creditors with valid secured claims
13 may credit bid. § 16(d). The Act also provides a safe harbor for purchasers, in case a
14 party objects to the sale but fails to get a stay of the order approving the sale. § 16(e).
15 Secured creditors are entitled to the proceeds of their collateral according to the priority
16 rules established by law other than this Act, § 20(f), although the court may award the
17 receiver the reasonable and necessary fees and expenses for preserving and transferring
18 receivership property. § 21.
19
- 20 • ***Executory Contracts and Unexpired Leases.*** With court approval, a receiver may adopt
21 or reject an executory contract of the owner relating to receivership property. § 17(b).
22 The Act covers the mechanics for adoption or rejection of executory contracts. § 17(c).
23 The receiver may also assign an adopted executory contract to the extent permitted by the
24 contract and applicable law other than this Act, but free of so-called “ipso facto” clauses.
25 §§ 17(d) and 17(f). The Act specifies the consequences of a receiver’s rejection of an
26 executory contract. § 17(e). The Act contains protections for purchasers in possession of
27 real property or real property time share interests that are analogous to those contained in
28 the Bankruptcy Code. § 17(g). The Act also limits the receiver’s ability to reject the
29 unexpired lease of a tenant. § 17(h).
30
- 31 • ***Immunity of Receiver.*** Consistent with the receiver’s status as an officer of the court, the
32 Act provides the receiver with immunity for acts or omissions within the scope of the
33 receiver’s appointment. § 18(a). Further, the Act incorporates the *Barton* doctrine and
34 provides that a receiver cannot be sued for an act, omission or transaction in
35 administering receivership property except with the approval of the appointing court. §
36 18(b).
37
- 38 • ***Claims.*** The Act requires the receiver to notify creditors of the appointment of the
39 receiver if ordered to do so by the court, § 20(a), and requires creditors to file claims with
40 the receiver as a precondition to obtaining any distribution from receivership property or
41 the proceeds of such property. § 20(b). The Act permits the receiver to recommend
42 disallowance of claims. § 20(d). The Act also authorizes the court to forgo the filing of
43 unsecured claims where the receivership property is likely to be insufficient to satisfy
44 secured claims against the property. § 20(e).
45
- 46 • ***Receiver’s Reports.*** The receiver must file interim and final reports. §§ 19 and 23.

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- ***Ancillary Receivership.*** Where a receiver has been appointed by another state, the Act authorizes the court to appoint that person or its designee as an ancillary receiver for the purpose of obtaining possession, custody and control of receivership property located within this state. § 24(a). The Act also permits the court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. § 24(b).
- ***Receivership in Context of Mortgage Enforcement.*** The Act makes clear that the appointment of a receiver upon request by a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee of rents a “mortgagee in possession,” do not constitute an election of remedies or make the secured obligation unenforceable, and do not constitute an “action” within the meaning of a state’s “one-action” rule. § 25(a). In a state with anti-deficiency rules, where a receiver conducts a sale of receivership property free and clear of a lien, the state’s anti-deficiency rules will apply to any person that held a lien extinguished by the sale. § 25(b).

1 **UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Commercial
3 Real Estate Receiverships Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Affiliate” means:

6 (A) with respect to an individual:

7 (i) the spouse [or domestic partner] of the individual;

8 (ii) a sibling of the individual or the spouse [or domestic partner] of a
9 sibling;

10 (iii) a person or the spouse [or domestic partner] of a person who is a
11 lineal ancestor or lineal descendant of the individual or the individual’s spouse [or domestic
12 partner];

13 (iv) an aunt, uncle, great aunt, great uncle, first cousin, niece, nephew,
14 grandniece, or grandnephew of the individual, whether related by the whole or the half blood or
15 adoption, or the spouse [or domestic partner] of any of them; or

16 (v) any other person occupying the residence of the individual; and

17 (B) with respect to a person other than an individual:

18 (i) another person that directly or indirectly controls, is controlled by, or is
19 under common control with the person;

20 (ii) an officer, director, manager, member, partner, employee, or trustee or
21 other fiduciary of the person; or

22 (iii) the spouse [or domestic partner] of, or a person occupying the
23 residence of, an individual described in subparagraphs (i) and (ii).

- 1 (2) “Court” means [identify court of general equity jurisdiction in this state].
- 2 (3) “Executory contract” means a contract, including a lease, under which the obligations
3 of all parties are not fully performed and the failure of a party to complete performance of its
4 obligations would constitute a material breach.
- 5 (4) “Good faith” means honesty in fact and the observance of reasonable commercial
6 standards of fair dealing.
- 7 (5) “Governmental unit” means an office, department, division, bureau, board,
8 commission, or other agency of this state or a subdivision of this state.
- 9 (6) “Lien” means an interest in property that secures payment or performance of an
10 obligation.
- 11 (7) “Mortgage” means a record, however denominated, that creates or provides for a lien
12 in real property or rents, whether or not it also creates or provides for a lien in personal property.
- 13 (8) “Mortgagee” means a person that holds a mortgage.
- 14 (9) “Mortgagor” means a person that grants a mortgage or a successor in ownership of
15 the real property described in the mortgage.
- 16 (10) “Owner” means the person for whose property a receiver is appointed.
- 17 (11) “Person” means an individual, estate, business or nonprofit entity, public
18 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
19 entity.
- 20 (12) “Property” means all of a person’s right, title, and interest, both legal and equitable,
21 in real and personal property, wherever located and however acquired. The term includes
22 proceeds, products, offspring, rents, or profits of or from the original property.
- 23 (13) “Receiver” means a person appointed by the court as the court’s agent, and subject

1 to the court's direction, to take possession of, manage, and, if authorized by this [act] or order of
2 the court, dispose of receivership property.

3 (14) "Receivership" means a proceeding in which a receiver is appointed.

4 (15) "Receivership property" means the property of an owner which is described in the
5 order appointing a receiver or a subsequent order, and includes any proceeds from the sale, lease,
6 license, exchange, or other disposition of the property.

7 (16) "Record," when used as a noun, means information that is inscribed on a tangible
8 medium or that is stored on an electronic or other medium and is retrievable in perceivable form.

9 (17) "Rents" means:

10 (A) sums payable for the right to possess or occupy, or for the actual possession
11 or occupation of, real property of another person;

12 (B) sums payable to an assignor under a policy of rental interruption insurance
13 covering real property;

14 (C) claims arising out of a default in the payment of sums payable for the right to
15 possess or occupy real property of another person;

16 (D) sums payable to terminate an agreement to possess or occupy real property of
17 another person;

18 (E) sums payable to an assignor for payment or reimbursement of expenses
19 incurred in owning, operating and maintaining, or constructing or installing improvements on,
20 real property; or

21 (F) any other sums payable under an agreement relating to the real property of
22 another person that constitute rents under law of this state other than this [act].

23 (18) "Secured obligation" means an obligation the payment or performance of which is

1 secured by a mortgage, a security agreement, or both.

2 (19) “Security agreement” means an agreement that creates or provides for a lien.

3 (20) “Sign” means, with present intent to authenticate or adopt a record:

4 (A) to execute or adopt a tangible symbol; or

5 (B) to attach to or logically associate with the record an electronic sound, symbol,
6 or process.

7 (21) “State” means a state of the United States, the District of Columbia, Puerto Rico,
8 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction
9 of the United States.

10 **Reporter’s Notes**

11 1. “Affiliate.” This draft adds the defined term “affiliate.” The Act uses the term to
12 describe persons presumptively disqualified from serving as a receiver under Section 7’s
13 “independence” standard based on their relationship with a party to the proceeding. The
14 definition is adapted from the one used in the Uniform Debt-Management Services Act (2011).
15 The term is also used in conjunction with the Act’s scope exclusion for residential real property
16 in Section 4(b).

17
18 At present, the draft uses the bracketed term “domestic partner,” which was not used in
19 the UDMSA. Committee members may wish to consider whether the term requires further
20 definition.

21
22 References: § 4(b) (scope exclusion for residential real property; § 7(b) (independence
23 of receiver).

24
25 2. “Court.” The Act defines the term to refer to the court of general equity jurisdiction
26 within the state. The term is used with sufficient frequency in the Act that the notes do not set
27 out each distinct use of the term.

28
29 3. “Executory contract.” The Act defines the term to include an unexpired lease. The
30 definition is similar to the one contained in the Minnesota receivership statute, Minn. Stat. Ann.
31 § 576.21(d), but with a slight modification to track the traditional “Countryman” formulation of
32 the term more precisely. See, e.g., Countryman, Executory Contracts in Bankruptcy: Part I, 57
33 Minn. L. Rev. 439, 460 (1973) (executory contract is one under which the obligation of both
34 parties “are so far unperformed that the failure of either to complete performance would
35 constitute a material breach excusing the performance of the other”).
36

1 References: § 12(b) (power of receiver includes right to adopt/reject executory contract);
2 § 17(b) through (g) (adoption/rejection/assignment of executory contract/unexpired lease).

3
4 4. “Good faith.” The Act uses the Uniform Commercial Code definition of good faith,
5 including both subjective and objective elements.

6
7 Reference: § 16(e) (sale by receiver other than in ordinary course); § 17(i) (rejection of
8 unexpired lease).

9
10 5. “Governmental unit.” In this Act, the term “governmental unit” is used to describe state
11 or municipal entities capable of exercising regulatory and police powers. See Minn. Stat. Ann. §
12 576.21(t).

13
14 References: § 4(c) (scope of Act); § 14(d) (exceptions to automatic stay).

15
16 6. “Lien.” The Act defines “lien” to include any voluntary and involuntary interest in
17 property securing an obligation, and includes a security interest.

18
19 References: § 9 (receiver’s status as lien creditor); § 11(b) (adequate protection as
20 precondition to turnover of receivership property subject to lien); § 14(a) (enforcement of lien
21 stayed by appointment); § 16(b) (sale, lease, license, or other transfer by receiver other than in
22 ordinary course); § 16(c) (transfer of lien to proceeds); § 16(d) (right of lienholder to credit bid);
23 § 17(g) (receiver’s rejection of executory contract for purchase of real property or real estate
24 timeshare interest); § 20(f) (distribution on claim of lienholder); § 25(a), (b) (effects of
25 receivership/one-action and anti-deficiency rules).

26
27 7. “Mortgage.” The Act defines “mortgage” to mean any document, however denominated,
28 that creates a security interest in real property. The term would include a deed of trust or deed to
29 secure debt, and would include an installment land contract in states that treat installment land
30 contracts as creating a security interest. The term also includes an assignment of rents and
31 leases.

32
33 References: § 5(§ 5(b) (appointment of receiver at request of mortgagee; effect of
34 consent expressed in mortgage); § 14(d) (stay does not prevent foreclosure by creditor who
35 obtained appointment of receiver); § 17(h) (receiver’s power to reject unexpired lease).

36
37 8. “Mortgagee.” The Act defines the term to include any person holding a mortgage. The
38 term includes an assignee of rents.

39
40 References: § 6(b) (appointment where consent expressed in mortgage); § 17(i)
41 (receiver’s power to reject unexpired lease); § 25(a) (effects of receivership/one-action and anti-
42 deficiency rules).

43
44 9. “Mortgagor.” The Act defines “mortgagor” to mean the person granting a mortgage and
45 any successor owner of the mortgaged real property. The term includes an assignor of rents.

46

1 References: § 6(b) (appointment where consent expressed in mortgage); § 25(a) (effects
2 of receivership/one-action and anti-deficiency rules).

3
4 10. “Owner.” The initial draft of the Act used the term “respondent” to identify the person
5 over whose property the receiver is appointed, in part because the term is commonly used in
6 receivership practice. Consistent with the Conference’s drafting rules, the term has been
7 changed from the “procedural” term and replaced with “owner.”

8
9 References: § 4(b) (scope exclusion for owner-occupied residential property); § 6(a)
10 (grounds for appointment); § 6(b) (appointment where consent expressed in mortgage); § 10
11 (receivership property subject to pre-petition security agreement); § 12(a), (b) (power of receiver
12 to assert rights of owner and adopt/reject executory contract of owner); § 13(a), (b) (duties of
13 owner); § 14(a), (d) (effect and scope of stay); § 17(b) (adoption/rejection of executory contract
14 of owner); § 17(d) (assignment of executory contract); § 17(f) (enforceability of contractual limit
15 on assignment of executory contract); § 17(g) (rejection of executory contract to purchase real
16 estate); § 17(h) (rejection of unexpired lease).

17
18 11. “Person.” The Act uses the ULC-required definition for the term.

19
20 References: § 6(a) (grounds for appointment of receiver); § 6(c) (ex parte appointment of
21 receiver); § 7(a) through (d) (identity/eligibility of receiver); § 8(a) (receiver’s bond); § 11(a), (c)
22 (turnover requirement); § 12(a) (powers of receiver); § 13(b) (duties of owner); § 14(a)
23 (automatic stay); § 14(c) (relief from stay); § 14(d) (exceptions to automatic stay); § 14(f)
24 (sanctions for stay violation); § 15(a), (b) (appointment of professionals); § 16(b) (sale, lease,
25 license or other transfer other than in ordinary course); § 16(e) (finality of sale, lease, license or
26 other transfer other than in ordinary course); § 22(d) (sanctions for improvident appointment of
27 receiver); § 24(a) (appointment of ancillary receiver).

28
29 12. “Property.” The Act defines the term broadly to include all legally-recognized interests.
30 “Personal property” includes both tangible and intangible property. The term is used with
31 sufficient frequency in the Act that the notes do not set out each distinct use of the term.

32
33 13. “Receiver.” The definition derives from the one contained in Minn. Stat. Ann. §
34 576.21(p). The term is used with sufficient frequency in the Act that the notes do not set out
35 each distinct use of the term.

36
37 14. “Receivership.” The definition derives from the one contained in Minn. Stat. Ann. §
38 576.21(q). The term is used with sufficient frequency in the Act that the notes do not set out
39 each distinct use of the term.

40
41 15. “Receivership property.” The definition is adapted from Minn. Stat. Ann. § 576.21(r).

42
43 References: § 5 (power of court); § 8(a), 8(b) (receiver’s bond); § 9 (receiver’s status as
44 lien creditor); § 11(a), (b), (c) (turnover of receivership property); § 12(a), (b) (powers of
45 receiver); § 12(c) (duties of receiver); § 13(a) (duties of owner); § 14(a), (b) (nature and scope of
46 automatic stay); § 14(d) (exceptions to automatic stay); § 16(a) (use of receivership property)

1 other than in ordinary course); § 16(b) (sale, lease, license, or other transfer by receiver other
2 than in ordinary course); § 17(b) (receiver’s power to adopt/reject executory contract relating to
3 receivership property); § 17(e) (effect of rejection of executory contract); § 17(f) (enforceability
4 of contractual limit on assignment of executory contract); § 17(g) (receiver’s power to reject
5 executory contract for sale of land or timeshare interest); § 18(b) (suit against receiver); § 19
6 (interim report of receiver); § 20(d) (distribution of receivership property); § 20(f) (distribution
7 of receivership property to secured creditor); § 21 (fees and expenses of receivership); § 22(c),
8 (d) (removal/termination of receiver); § 23(a) (final report of receiver); § 25(a), (b) (effects of
9 receivership/one-action and anti-deficiency rules).

10
11 16. “Record.” A prior draft used the media-neutral term “document,” to avoid potential
12 confusion due to the customary use of the term “record” in real estate practice. The Style
13 Committee suggested that the Act was using the term “document” to describe what the UCC
14 would describe as a “record,” and documents in a somewhat broader sense (such as in provisions
15 requiring the owner to turn over documents). At the request of the Style Committee, this draft
16 uses the term “record” (making it explicit that the definition is limited to instances where the
17 term is used as a noun, although the act does not use “record” as a verb anywhere).

18
19 References: § 6(b) (appointment where mortgagor consent expressed in a record); § 7(a)
20 (eligibility to serve as receiver); § 12(c) (duties of receiver); § 16(b) (sale, lease, license, or other
21 transfer other than in ordinary course); § 20(b) (filing of claims).

22
23 17. “Rents.” This definition is substantially identical to the definition used in the Uniform
24 Assignment of Rents Act. The draft adds the definition in response to concerns that because the
25 Act’s scope exclusion for residential property depends upon whether the resident is collecting
26 rents from a non-affiliate, a definition of “rents” is needed to delineate the Act’s scope with
27 sufficient clarity.

28
29 References: § 4(b) (scope exclusion for residential real property); § 6(a), 6(b) (standards
30 for appointment of receiver).

31
32 18. “Secured obligation.” The Act uses this term (commonly used in other real estate-related
33 acts, see, e.g., Uniform Assignment of Rents Act § 2(13); Uniform Residential Mortgage
34 Satisfaction Act § 102(15)) rather than “mortgage debt.” The current draft of the proposed
35 Home Foreclosure Procedures Act instead merely uses the term “obligation.”

36
37 References: § 6(b) (appointment where consent expressed in mortgage); § 25(a) (effects
38 of receivership/one-action and anti-deficiency rules).

39
40 19. “Security agreement.” The Act uses this term to include any agreement that creates or
41 provides for a lien.

42
43 Reference: § 10 (receivership property subject to pre-petition security agreement).

44
45 20. “Sign.” The Act uses the media-neutral version of the term commonly used in other
46 recent Uniform Acts.

1
2 References: § 6(b) (appointment where consent expressed in signed record); § 7(a)
3 (eligibility to serve as receiver); § 16(b) (sale, lease, license or other transfer by receiver other
4 than in ordinary course where consent expressed in signed record); § 20(b) (signature
5 requirement for submitted claims).
6

7 21. “State.” The Act uses the boilerplate ULC definition of the term. The existing definition
8 would not include tribal sovereigns. One commissioner at the Annual Meeting inquired whether
9 the definition should be expanded to include Indian tribes. The draft does not expand the
10 definition to include Indian tribes, consistent with the decision of the Drafting Committee in
11 November 2014 that such a change is not warranted absent an indication of interest in the Act
12 from one or more tribal organizations.
13

14 **SECTION 3. NOTICE AND OPPORTUNITY FOR A HEARING.**

15 (a) In this section, “after notice and an opportunity for a hearing” means after such notice
16 and such opportunity for a hearing as are appropriate in the particular circumstances.

17 (b) The court may issue an order under this [act] only after notice and an opportunity for
18 a hearing. The court may issue an order:

19 (1) without a hearing if no interested party timely requests a hearing; or

20 (2) before a hearing if the particular circumstances require the issuance of an
21 order before a hearing can be held.

22 **Reporter’s Note**

23 Principles of due process and fairness in judicial administration require that persons
24 affected by a receivership should have notice and an opportunity to be heard before a final
25 determination of their legal rights and responsibilities. However, because receivership is a
26 flexible remedy based in equity, it is not appropriate to implement a rule requiring a uniform
27 type of notice, duration of notice, or hearing requirement for every determination made in the
28 context of a receivership. Consistent with due process requirements, this Act incorporates the
29 idea that any order that the court makes with respect to a receivership under this Act may be
30 made only “after notice and an opportunity for a hearing.” Section 3(a) defines this term in a
31 flexible fashion that permits the appointing court to require notice and opportunity for a hearing
32 that is appropriate in the particular circumstances.
33

34 For example, where a receiver proposes to sell property free and clear of liens under
35 Section 16 of this Act, a court should not issue an order approving such a sale without prior
36 notice to interested persons and the actual conduct of a hearing on the proposed merits of the sale
37 terms. By contrast, in many circumstances, such as where the court is approving a routine

1 periodic report by the receiver, the court might require prior notice to interested persons, but
2 might indicate that no hearing would be held prior to the court's entry of the order unless an
3 interested party requested a hearing in a timely fashion.
4

5 Section 3 also addresses the possibility that in some circumstances, a court might enter an
6 order appointing or directing a receiver on an *ex parte* basis (without prior notice), where the
7 particular circumstances require that the court issue an order before notice can be given or a
8 hearing held. In such cases, to ensure compliance with due process, the Act still requires that
9 notice be sent after the order is entered and that prompt opportunity for a post-order hearing be
10 provided. See, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).
11

12 **SECTION 4. SCOPE; EXCLUSIONS.**

13 (a) Except as otherwise provided in subsection (b) or (c), this [act] applies to a
14 receivership for an interest in real property and personal property related to the real property or
15 used in its operation.

16 (b) This [act] does not apply to a receivership for an interest in real property improved
17 by one to four dwelling units unless:

18 (1) the interest is used for agricultural, commercial, industrial, or mineral
19 extraction purposes, other than incidental uses by an owner occupying the property as the
20 owner's primary residence;

21 (2) the interest secures an obligation incurred at a time when the property was
22 used or planned for use for agricultural, commercial, industrial, or mineral extraction purposes;

23 (3) the owner planned to develop the property into one or more dwelling units to
24 be sold or leased in the ordinary course of the owner's business; or

25 (4) the owner is collecting or has the right to collect rents or other income from
26 the property from a person other than an affiliate of the owner.

27 (c) This [act] does not apply to a receivership authorized by law of this state other than
28 this [act] in which the receiver is a governmental unit or an individual acting in an official
29 capacity on behalf of the unit [except to the extent provided by the other law].

1 (d) This [act] does not limit the authority of a court to appoint a receiver under law of
2 this state other than this [act].

3 (e) Unless displaced by a particular provision of this [act], the principles of law and
4 equity supplement this [act].

5 **Legislative Note:** *In many states, there may be existing statutory provisions under which a*
6 *governmental unit or governmental official may be appointed as a receiver for specific types of*
7 *organizations such as hospitals, insurance companies, or other organizations affected with some*
8 *public interest. The provisions of this [act] generally would not govern such receiverships, but*
9 *the bracketed language in subsection (c) would permit a state to modify its existing statutory*
10 *provisions for such receiverships to incorporate some or all of the provisions of this Act.*

11 **Reporter's Notes**

13 1. Subsection (a) reflects the current committee charge from the Executive Committee,
14 which is to address the appointment and powers of real estate receivers. Thus, subsection (a)
15 provides that except to the extent Section 4 otherwise limits, the Act will govern receivership of
16 real property and personal property that is related to the real property or used in the operation of
17 the real property. Thus, for example, if the mortgagee of real estate used by the mortgagor as a
18 hotel sought the appointment of a receiver following the mortgagor's default, the court could
19 appoint a receiver under this Act for both the real estate and any personal property of the owner
20 used in the operation of the hotel (e.g., furnishings, food/beverage inventories, and accounts
21 receivable.

22
23 2. Subsection (b) provides the Act's primary scope exclusion — this Act may not be used to
24 appoint a receiver for an interest in real property improved with one to four dwelling units,
25 unless (1) the interest is used for agricultural, commercial, industrial, or mineral extraction
26 purposes, other than incidental uses by an owner occupying the property as the owner's primary
27 residence; (2) the interest secures an obligation incurred at a time when the property was used or
28 planned for use for agricultural, commercial, industrial, or mineral extraction purposes; (3) the
29 owner planned to develop the property into one or more dwelling units to be sold or leased in the
30 ordinary course of the owner's business; or (4) the owner is collecting or has the right to collect
31 rents or other income from the property from a person other than an affiliate of the owner..

32
33 The amended language hopefully provides more clarity as to the precise scope of the Act
34 and draws an appropriate line with respect to properties to be included within the Act. Under the
35 amended section 4(b), the Act would include the following properties within its scope:

- 36
37 • It would cover any commercial building (even if the building was vacant and not
38 currently being "used") and any undeveloped land, on the theory that such land is not
39 residential in nature and thus should be covered by the Act.
40
41 • It would cover a failed/failing residential development in which the owner/developer had

1 expected to complete more than four dwelling units for sale or lease in the ordinary
2 course of the owner’s business, but actually completed four or fewer unsold dwelling
3 units. In this situation, the development is clearly commercial in character and should not
4 fall within the general exclusion for property improved by one to four dwelling units.
5

- 6 • It would cover a home that a builder built as a “spec” home that remains unsold. In that
7 situation, the owner’s use of the property is commercial and not residential in nature, and
8 the Act should apply.
9
- 10 • It would include a home, duplex, triplex or quadplex—even if the owner occupies a
11 portion of it as the owner’s residence—if the owner is collecting rents or has the right to
12 collect rents from persons other than an affiliate of the owner. In this situation, where the
13 owner is collecting rents from unrelated persons, the owner is effectively making a
14 commercial use of the property, and the Act should apply.
15
- 16 • It would include an interest in property that is improved by one to four dwelling units, if
17 the interest is used for agricultural, commercial, industrial, or mineral extraction
18 purposes. As drafted, Section 4(b) would thus include within the scope of the Act
19 property that is a farm, ranch, winery, or the like, even if there are one to four dwelling
20 units on the property. This draft reflects the Reporter’s understanding of the view
21 expressed in prior Committee meetings that such parcels were “commercial” and should
22 be covered by the Act.
23
- 24 • It would include an interest in property that is improved by one to four dwelling units and
25 is currently used only for residential purposes, if the interest secures an obligation that
26 was incurred at a time when the interest was used or planned for use for agricultural,
27 commercial, industrial, or mineral extraction purposes. Thus, for example, if the owner
28 borrowed money and granted a mortgage on land that it was using (or planned to use) as
29 a farm, Section 4(b) would permit a court to appoint a receiver for the land even if the
30 owner was no longer engaged in farming operations and the owner’s current use of the
31 land was exclusively residential in nature.
32

33 By contrast, the Act would exclude the following:
34

- 35 • It would exclude a home occupied only by the owner and used for residential purposes,
36 even if the owner made incidental use of a portion of the home other than for strictly
37 residential purposes (e.g., the owner uses a spare bedroom as a home office).
38
- 39 • It would exclude a home for which the owner was collecting rents only from one or
40 more children, parents, or other relatives that satisfy the definition of “affiliate” as
41 defined in this Act. Again, this language is intended to capture the view that the
42 Reporter has heard expressed in prior Committee meetings that the Act should not apply
43 to a home from which any rents are being collected only from family members (such
44 “rent” might more appropriately be viewed as intra-family support, rather than
45 commercial activity).
46

- It would exclude a vacation home that was not the owner’s primary residence but which the owner did not rent to non-affiliates.

3. Subsection (c) is intended to address the relationship of this Act to existing statutory regimes for the appointment of receivers for certain entities. See, e.g., N.H. Rev. Stat. § 401-B:11 (authorizing receivership of insurance company). The provisions of this Act would not apply to appointment of a receiver under an existing statutory regime, except to the extent that the other statutory regime or other law so provides. The bracketed language, by requiring the authorization to come from other law, is consistent with the Committee’s decision in September 2013 that this Act should not itself authorize courts to apply the provisions of the Act by analogy to cases outside the Act’s scope.

4. Subsection (d) makes clear that this Act is not intended to be the exclusive method by which a court may appoint a receiver.

SECTION 5. POWER OF COURT. The court that appoints a receiver under this [act]

has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property.

Legislative Note: Section 5 is appropriate in a state where a court in one county, circuit, or district may issue orders with statewide effect and has the power to act on property located in another county, circuit or district within the state. In a state where a court in one county, circuit, or district may appoint a receiver but order entered by the court in that county, circuit, or district lack statewide effect, the state should modify Section 5 to make clear that orders of a court appointing a receiver under this Act shall have statewide effect.

Reporter’s Notes

1. Section 5 provides a statement of the court’s powers in the context of a receivership. It is a substantial adaptation of Minnesota’s receivership statute, Minn. Stat. Ann. § 576.23. Under this section, the court has the authority to determine all controversies relating to the collection, preservation, improvement, disposition and distribution of receivership property, as well as all matters arising in or relating to the receivership, the receivership property, the exercise of the receiver’s powers, or the performance of the receiver’s duties. See also Wash. Rev. Code Ann. § 7.60.055(1).

Section 5 focuses only upon the appointing court’s exclusive judicial authority over the receiver and the receivership property. Section 5 does not displace the exercise of legitimate police powers over the receiver or receivership property.

2. In at least one state (Kentucky), while there is existing ancient case law that does confirm that the appointing court may empower a receiver to act with respect to receivership property located anywhere within the boundaries of the same state, some judges nevertheless hesitate to recognize a receiver’s ability to act outside the county in which he or she was appointed without express statutory authority. At the Committee’s direction, the Reporter has added a Legislative

1 Note to make clear that in states where certain county, district, or circuit courts may lack the
2 ability to issue orders with statewide effect, Section 5 should be revised to permit a court's
3 orders in receiverships covered by this Act to have statewide effect.
4

5 **SECTION 6. APPOINTMENT.**

6 (a) The court may appoint a receiver:

7 (1) before judgment, to protect a party that demonstrates an apparent right to real
8 property that is the subject of the action, if the property or its revenue-producing potential:

9 (A) is being subjected to, or is danger of, waste, loss, dissipation, or
10 impairment; or;

11 (B) has been or may be the subject of a voidable transaction.

12 (2) after judgment:

13 (A) to carry the judgment into effect; or

14 (B) to preserve nonexempt real property pending appeal or when an
15 execution has been returned unsatisfied and the owner refuses to apply the property in
16 satisfaction of the judgment; [and]

17 (3) in other actions in which receivers for real property may be appointed on
18 equitable grounds[; and]

19 (4) during the time allowed for redemption, to preserve real property sold in an
20 execution or foreclosure sale and secure its rents to the person entitled to the rents].

21 (b) In connection with the foreclosure or other enforcement of a mortgage, [a mortgagee
22 is entitled to appointment of][the court may appoint] a receiver for the mortgaged property if
23 there is a default under the mortgage and:

24 (1) appointment is necessary to protect the mortgaged property or rents arising
25 from the property from waste, loss, transfer, dissipation, or impairment;

1 (2) the mortgagor agreed in a signed record to the appointment of a receiver in the
2 event of default;

3 (3) the owner otherwise agreed in a signed record to the appointment of a
4 receiver;

5 (4) the property for which the receivership is sought is not sufficient, along with
6 other collateral held by the mortgagee, to satisfy the secured obligation;

7 (5) the owner fails to turn over to the mortgagee any rents the mortgagee was
8 entitled to collect; or

9 (6) the holder of a subordinate lien obtains appointment of a receiver for the
10 property.

11 (c) The court may condition the ex parte appointment of a receiver on the giving of
12 security by the person seeking the appointment, in the amount the court specifies, for the
13 payment of damages, including costs and reasonable attorneys' fees, incurred or suffered by any
14 person if the court finds that the appointment was not justified. If the court finds that the ex parte
15 appointment was justified, the court shall release the security.

16 **Legislative Note:** *Subsection (b) includes bracketed alternatives. Under the first, a mortgagee*
17 *would be entitled to appointment of a receiver under the six circumstances listed in subsection*
18 *(b); under the second, these six circumstances would justify the appointment of a receiver, but*
19 *such appointment would be subject to the court's discretion rather than an entitlement. Under*
20 *section 7 of the Uniform Assignment of Rents Act (UARA), an assignee of rents is entitled to*
21 *appointment of a receiver under the circumstances expressed in subsection (b). Thus, in*
22 *jurisdictions that have enacted UARA, subsection (b) should use the first bracketed alternative*
23 *under which the mortgagee is "entitled" to appointment, to avoid the risk that adoption of this*
24 *[act] might create an implied repeal of UARA section 7.*

25
26

Reporter's Notes

27 1. Traditionally, courts treated the appointment of a receiver as "an equitable remedy and
28 not a substantive right." 1 Clark on Receivers, § 46, at 48 (3d ed. 1959). As Clark stated:

29
30

The appointment of a receiver is the means and not the end. . . . Before a court will

1 appoint a receiver the litigant must bring a proper suit before the court and claim a
2 substantive right has been violated, and the court at its discretion appoints a receiver to
3 preserve the res in order that it may respond to the adjudication by the court concerning
4 the substantive right claimed by the party asking for a receiver. The appointment of a
5 receiver in itself determines no substantive right.
6

7 *Id.* § 48, at 52. As such, courts traditionally held that there was no specific right to the
8 appointment of a receiver, as the power of appointment “is a delicate one ... to be exercised with
9 great circumspection” by the court, which had to be “satisfied by affidavit or other suitable
10 evidence that a receiver is necessary to preserve the property, or in exceptional cases administer
11 the property, having in mind the rights and interests of all parties.” *Id.* § 49, at 53.
12

13 Consistent with this historical approach, section 6(a) describes the types of cases in which
14 a court is authorized to appoint a receiver pursuant to this act, and is based on a compilation of
15 numerous existing receivership statutes. In each of the situations reflected in subsection (a), the
16 determination that circumstances exist to justify the appointment of a receiver for the owner’s
17 property would be left to the discretion of the court.
18

19 Subsection (a)(3) authorizes the court to appoint a receiver under this Act in cases in
20 which courts of this state have appointed or may appoint receivers for real property on equitable
21 grounds. This would include, for example, the insolvency of the owner of the real property.
22

23 Subsection (a)(4) would be appropriate in states that provide a post-sale statutory
24 redemption right, and would permit the court to appoint a receiver for the property and its rents
25 during the redemption period.
26

27 2. As Clark described, courts traditionally held that “[s]ince no litigant can force a judge to
28 do a judicial act ... no litigant has an absolute right to have the court take another’s property into
29 its custody by the appointment of a receiver.” 1 Clark on Receivers, § 48, at 52 (3d ed. 1959).
30 Nevertheless, it is quite common for mortgage loan documents to contain “receivership clauses”
31 under which the mortgagor consents to the appointment of a receiver after default, without
32 regard to whether the mortgaged property is subject to waste or whether it provides adequate
33 security for repayment of the mortgage debt. Because appointment of a receiver traditionally
34 originated from within the court’s equitable discretion, some courts have refused to appoint a
35 receiver — despite the presence of a receivership clause — in cases where they would have
36 denied appointment of a receiver otherwise. See, e.g., *Dart v. Western Sav. & Loan Ass’n*, 438
37 P.2d 407 (Ariz. 1968); *Chromy v. Midwest Fed. Sav. & Loan Ass’n*, 546 So.2d 1172 (Fla. App.
38 1989); *Sazant v. Foremost Investments, N.V.*, 507 So.2d 653 (Fla. App. 1987) (receivership
39 clause not binding on court where mortgagor had not committed waste and default did not place
40 mortgagee at serious risk of noncollection); *Gage v. First Federal Sav. & Loan Ass’n*, 717 F.
41 Supp. 745 (D. Kan. 1989); *Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd.*, 644 A.2d 685
42 (N.J. Super. 1994) (receivership clause “usurps the judicial function” and thus violates public
43 policy).
44

45 Other courts have treated receivership clauses as presumptively but not conclusively
46 enforceable. *Barclays Bank v. Superior Court*, 137 Cal. Rptr. 743 (Cal. App. 1977); *Riverside*

1 Properties v. Teachers Ins. & Annuity Ass'n, 590 S.W.2d 736 (Tex. App. 1979); Okura & Co. v.
2 Careau Group, 783 F. Supp. 482 (C.D. Cal. 1991); Wellman Sav. Bank v. Roth, 432 N.W.2d 697
3 (Iowa App. 1988).
4

5 By contrast, there is significant recent authority supporting the view that a receivership
6 clause provides a sufficient basis to appoint a receiver after the mortgagor's default. See, e.g.,
7 Bank of America Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. Partnership, 830 P.2d
8 1138 (Colo. App. 1992); Fleet Bank v. Zimelman, 575 A.2d 731 (Me. 1990); Metropolitan Life
9 Ins. Co. v. Liberty Center Venture, 650 A.2d 887 (Pa. Super. 1994); Federal Home Loan
10 Mortgage Corp. v. Nazar, 100 B.R. 555 (D. Kan. 1989). Finally, federal courts have routinely
11 held receivership clauses in federally insured mortgages sufficient to justify the appointment of a
12 receiver. See, e.g., United States v. Berk & Berk, 767 F. Supp. 593 (D. N.J. 1991); United States
13 v. Drexel View II, Ltd., 661 F. Supp. 1120 (N.D. Ill. 1987). Consistent with this recent
14 authority, both the Restatement (Third) of Property — Mortgages and the Uniform Assignment
15 of Rents Act take the view that a mortgagee/assignee of rents is "entitled" to the appointment of
16 a receiver where the loan documents contain a clause under which the mortgagor consented to
17 appointment. Restatement (Third) of Property — Mortgages § 4.3(b); Uniform Assignment of
18 Rents Act § 7(a).
19

20 Furthermore, some state statutes explicitly make clear that the mortgagee is entitled to a
21 receiver following default as a matter of right. See, e.g., Ind. Code § 32-30-5-1 (court "shall"
22 appoint a receiver if "either the mortgagor or the owner of the property has agreed in the
23 mortgage or in some other writing to the appointment of a receiver"); Minn. Stat. Ann. § 559.17,
24 subd. 2 (where assignment of rents contains receivership clause, "the court shall, without regard
25 to waste, adequacy of the security, or solvency of the mortgagor, appoint a receiver"); N.Y. Real
26 Prop. Law § 254(10) (receivership clause "must be construed as meaning that the mortgagee, his
27 heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without
28 notice and without regard to adequacy of any security of the debt, to the appointment of a
29 receiver of the rents and profits of the premises covered by the mortgage"); N. Mex. Stat. Ann. §
30 44-8-4(A) (court "shall appoint a receiver in an action by a mortgagee or secured party ... where
31 such mortgage, security agreement, contract or other written agreement provides for the
32 appointment of a receiver").
33

34 Consistent with this recent trend, subsection (b) is based on the comparable provision of
35 § 7 of the Uniform Assignment of Rents Act. One of the bracketed alternatives provides that a
36 person seeking appointment of a receiver is entitled to a receiver as a matter of right in a
37 proceeding to foreclosure a mortgage or enforce an assignment of rents where one of the
38 following conditions exists: (1) appointment is necessary to protect the mortgaged property or
39 rents arising from the property from waste, loss, transfer, or dissipation; (2) the loan documents
40 contain a receivership clause; (3) the owner otherwise consents; (4) the property's value is not
41 sufficient to satisfy the secured obligation; (5) the owner has failed to turn over rents that the
42 creditor is entitled to collect; or (6) a subordinate creditor has obtained the appointment of a
43 receiver for the property.
44

45 At its November 2014 meeting, the Drafting Committee determined that subsection (b)
46 should provide two bracketed alternatives — one (as described above) under which the

1 preceding six factors gave the mortgagee the entitlement to a receiver as a matter of right, and
2 the other under which the presence of one or more of these six factors would be grounds for
3 appointment in the court’s discretion. The Reporter has added a Legislative Note to make clear
4 that in jurisdictions that have enacted the Uniform Assignment of Rents Act, the state should
5 make certain that Section 6(b) adopts the “matter of right” alternative, so as to avoid any
6 possibility that the enactment of this Act might work an implied repeal of the provisions of the
7 UARA giving the mortgagee an entitlement to appointment of a receiver. Likewise, to facilitate
8 enactment in states in which other case law or statutory law makes appointment of a receiver
9 mandatory in certain cases involving mortgage enforcement, the provisions of Section 5 should
10 facilitate the Act’s consistency with those existing state laws.

11
12 3. Traditionally, the appointment of a receiver was an ancillary remedy sought in the
13 context of a pending court proceeding. See, e.g., 1 Clark on Receivers § 75, at 106 (3d ed. 1959)
14 (“An order appointing a receiver ... presupposes a pending suit.”). In the context of a mortgage
15 foreclosure, the need for a pending action (to which the receivership could be ancillary) posed no
16 obstacle in judicial foreclosure states, as the foreclosing mortgagee could seek the appointment
17 of a receiver in the foreclosure action. In nonjudicial foreclosure states, however, there may be
18 no pending action to which a receivership motion could be made on an ancillary basis. In such
19 states, strict adherence to the traditional approach required the foreclosing mortgagee to bring an
20 action for specific performance of its assignment of rents before the mortgagee could then file a
21 motion for the appointment of a receiver.

22
23 Subsection (b) authorizes the court to appoint a receiver “in connection with foreclosure
24 or other enforcement of a mortgage that is in default” The section is intended to permit a
25 mortgagee foreclosing nonjudicially to petition to the court directly for the appointment of a
26 receiver without having to institute an entirely separate action for specific performance of an
27 assignment of rents or some other civil action to which the receivership could serve as an
28 ancillary remedy.

29
30 4. Subsection (c) would authorize (but not require) the court to condition the *ex parte*
31 appointment of a receiver upon the giving of security by the person seeking appointment.

32
33 The Act does not contain a provision requiring *ex parte* appointment simply because the
34 loan documents contain the mortgagor’s consent to *ex parte* appointment. Nevertheless, Section
35 3 would allow the court to appoint a receiver on an *ex parte* basis if the particular circumstances
36 justified *ex parte* appointment, and nothing in this Act would preclude a court from concluding
37 that a clause in the mortgage consenting to *ex parte* appointment would constitute a relevant
38 “particular circumstance” justifying *ex parte* appointment.”

39
40 Subsection (c) would allow a party injured by the unjustified appointment of an *ex parte*
41 receiver to recover damages, including costs and reasonable attorney’s fees.

42
43 **SECTION 7. IDENTITY OF RECEIVER; DISCLOSURE OF INTEREST.**

44 (a) The court may not appoint a person as receiver unless the person provides evidence

1 under penalty of perjury that the person is independent.

2 (b) A person is not independent under subsection (a) if the person:

3 (1) is an affiliate of a party;

4 (2) has an interest materially adverse to the interests of a party;

5 (3) has a material financial interest in the outcome of the action, other than
6 compensation the court may allow to the receiver;

7 (4) has a debtor-creditor relationship with a party; or

8 (5) holds an equity interest in a party, other than a noncontrolling interest in a
9 publicly-traded company.

10 (c) Notwithstanding subsection (b), a person is not disqualified under subsection (a) from
11 appointment as receiver solely because the person:

12 (1) was appointed receiver or is owed compensation in an unrelated matter
13 involving a party or was engaged by a party in a matter unrelated to the receivership; or

14 (2) is an individual obligated to a party on a debt which is not in default and was
15 incurred primarily for personal, family, or household purposes.

16 (d) A person seeking appointment of a receiver may nominate a person to serve as
17 receiver, but the court is not bound by the nomination.

18 **Reporter's Notes**

19 1. Traditionally, the receiver is an independent third party who serves as an officer of the
20 court and owes a fiduciary duty to the mortgagor and the mortgagee. See, e.g., 1 Clark on
21 Receivers § 34, at 35 (3d ed. 1959); 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance
22 Law § 4.33 (6th ed. 2014). Consistent with the traditional approach, Section 7 requires the
23 receiver's "independence." This concept is adapted (with substantial simplification) from
24 Minnesota's receivership statute, Minn. Stat. Ann. § 576.26, subdivisions 1 and 3.

25

26 2. Subsection (a) requires the prospective receiver to provide sworn evidence of its
27 independence. Subsection (b) sets forth the circumstances that would disqualify a person from
28 service as a receiver, at least absent consent of all parties in a signed record. Subsection (c)

1 makes clear that a person is not disqualified as a receiver merely because that person has served
2 as a receiver or is owed compensation relating to a prior unrelated dispute. Subsection (c) has
3 also been modified from the prior draft to make clear that an individual receiver is not
4 disqualified merely because the receiver is obligated on a consumer loan that is not in default.
5 For example, an individual would not be disqualified from serving as receiver in a case involving
6 Last National Bank as a creditor merely because the receiver’s home mortgage was originated or
7 is serviced by Last National Bank.
8

9 In most jurisdictions, it is customary for the person seeking the receiver’s appointment to
10 nominate a prospective receiver. Subsection (d) contemplates such a practice, but makes clear
11 that the identity of the receiver is ultimately subject to the court’s discretion. 1 Clark on
12 Receivers, § 48, at 52 (3d ed. 1959) (“the power of determining who the receiver shall be rests
13 with the court”).
14

15 SECTION 8. RECEIVER’S BOND.

16 (a) The receiver shall post with the court a bond, effective as of the date of the receiver’s
17 appointment, in the amount the court specifies, with one or more sureties approved by the court,
18 conditioned on the receiver’s faithful discharge of the receiver’s duties in accordance with the
19 orders of the court and law of this state. The court may authorize the receiver to act before the
20 receiver has posted the bond.

21 (b) A claim against a receiver’s bond must be made not later than [one year] after the
22 date the receiver is discharged.

23 *Legislative Note:* Section 23 of this [act] provides that the court’s approval of the receiver’s
24 final report discharges the receiver for all matters contained in the report. Approval of the
25 receiver’s final report, however, does not absolve the receiver for actions taken during the
26 period in which the bond was in place but which were not disclosed or discovered until after the
27 receiver’s discharge. Subsection (b) creates a limitations period for claims against the bond
28 based on such actions by the receiver. The time period for this limitations period should be
29 identical to the state’s limitations period for obtaining relief from a judgment.
30

31 Reporter’s Notes

32 1. Nearly all of the existing state receivership statutes or rules require that the receiver must
33 post a bond in an amount determined by the court, but provide no specific guidance to the court
34 with respect to the amount of the bond. See, e.g., Alaska Stat. § 09.40.250; Ariz. R. Civ. Proc.
35 66(b)(2); Ark. R. Civ. Proc. 66(a); Cal. Code Civ. Proc. § 567(b); Colo. R. Civ. Proc. 66(b);
36 Idaho Code § 8-604; Ind. Code § 32-30-5-3; Iowa Code Ann. § 680.3; Kan. Stat. Ann. § 60-
37 1302; Mich. Comp. Laws Ann. § 600.2926; Minn. Stat. Ann. § 576.27; Miss. Code Ann. § 11-5-

1 159; Mo. Rev. Stat. § 515.250; Mont. Code Ann. § 27-20-301; N.C. Gen. Stat. § 1-504; N.D.
2 Cent. Code § 32-10-03; Ohio Rev. Code § 2735.03; Okla. Stat. tit. 12, § 1553; R.I. R. Civ. Proc.
3 66(k); S.D. Codif. Laws § 21-21-8; Tex. Civ. Prac. & Rem. Code § 64.023; Wash. Rev. Code
4 Ann. § 7.60.045; W.Va. Code § 53-6-1. By contrast, only a few statutes provide some
5 requirement regarding the size of the bond. See, e.g., Va. Code Ann. § 8.01-587 (bond must be
6 “sufficient at least to cover the probable amount under [the receiver’s] control in any one year);
7 Wis. Stat. Ann. § 813.16(6) (bond must be in an amount “sufficient to cover all property likely to
8 come into the receiver’s hands”).

9
10 Subsection (a) reflects the Committee’s instructions, at the September 2013 meeting, that
11 the amount of the receiver’s bond should be left to the discretion of the judge based on the
12 particular circumstances of the case.

13
14 2. Subsection (a) has been modified to reflect the Committee’s determination, in November
15 2014, that the receiver’s bond must be effective as of the date of appointment, although the court
16 may authorize the receiver to act before the bond has actually been posted with the court.

17
18 3. Based upon the suggestions of observers that it is unnecessary, this draft deleted the
19 former subsection (b), which would have authorized the posting of a letter of credit or alternative
20 security.

21
22 4. Subsection (b) (formerly subsection (c) provides a one-year period for filing claims
23 against the bond, and is modeled upon a similar provision in Wash. Rev. Code Ann. § 7.60.045.
24 At the Committee’s direction, a legislative note now makes clear the proper relationship between
25 Section 8 and Section 23’s provisions regarding discharge.

26
27 **SECTION 9. RECEIVER’S STATUS AS LIEN CREDITOR.** At the time a receiver
28 is appointed, the receiver has the status of a lien creditor:

29 (1) under [Uniform Commercial Code Article 9] as to receivership property that is
30 personal property or fixtures; and

31 (2) under [the recording statute of this state] as to receivership property that is real
32 property.

33 **Reporter’s Notes**

34 1. As a general rule, upon appointment a receiver takes the receivership property subject to
35 all valid liens, priorities, equities, charges and encumbrances against the property. 1 Clark on
36 Receivers, § 269, at 413 (3d ed. 1959). For this reason, “[p]rior liens are not divested by the
37 appointment of a receiver in cases in which the lienholders are not parties and have not had their
38 day in court.” *Id.* This principle also includes voluntary liens such as security interests, as Clark
39 explains:

1
2 The appointment of a receiver does not void contracts between the plaintiff and
3 defendant, neither does it void contracts between the defendant and third parties. It,
4 therefore, follows that under ordinary circumstances, without a governing statute, a third
5 person having an interest in the res or a part of the res by reason of a [security interest] is
6 not deprived of his contractual right by reason of the appointment of a receiver. [*Id.* §
7 274.2, at 425.]
8

9 Nevertheless, Uniform Commercial Code Article 9 requires that a security interest be
10 perfected to ensure its enforceability versus certain third parties. As a result, a receiver “has the
11 power to disregard [an unperfected security interest in] personal property which the receiver
12 finds in his possession.” *Id.* § 274.2, at 426.
13

14 2. Consistent with the principles noted in Comment 1, Section 9 (which is a
15 simplified version of Minnesota’s receivership statute, Minn. Stat. Ann. § 576.30) provides that
16 the receiver has the status of a lien creditor as to both personal and real property. Under Article 9
17 of the Uniform Commercial Code, the term “lien creditor” includes “a receiver in equity from the
18 time of appointment.” U.C.C. § 9-102(a)(52)(D). Section 9 is intended to make clear that a
19 receiver appointed under this Act would also have the status and priority of a “lien creditor” as to
20 personal property under Article 9.
21

22 Section 9 would enable the receiver to establish priority not only against subsequent
23 creditors, but also a prior unperfected secured party, as that unperfected secured party would be
24 subordinate to a person who acquires the rights of a lien creditor before the conflicting security
25 interest is perfected. U.C.C. § 9-317(a)(2). Section 9 does not create (and is not intended to
26 create) an “avoiding power” in the receiver analogous to the strong-arm power exercisable by a
27 bankruptcy trustee under Bankruptcy Code § 544(a).
28

29 Section 9 also gives the receiver the status and priority of a lien creditor under the state’s
30 recording statute with respect to receivership property that is real property. The application of
31 Section 9 would produce different results in different states with respect to an unrecorded interest
32 in real property (such as an unrecorded mortgage). In the majority of states, an unrecorded
33 mortgage would nevertheless have priority over a subsequent judgment lien. See Stoebuck &
34 Whitman, *The Law of Property* § 11.10, at 880-881 (“Often this conclusion is based on the literal
35 language of the pertinent judgment lien statute, which typically imposes the lien on ‘the
36 defendant’s real property—not the record property, the courts frequently hold, but the actual
37 property as depleted by unrecorded conveyances. An alternative basis for the same result is that
38 the creditor is simply not a ‘purchaser’ in the sense used by the recording statute.”). In a
39 minority of states, an unrecorded mortgage would be subordinate to a subsequent judgment lien,
40 either because the recording statute explicitly so provides or has been so interpreted by the
41 state’s courts. See *Schleuter Co. v. Sevigny*, 564 N.W.2d 309 (S.D. 1997); *Solans v.*
42 *McMenimen*, 951 N.E.2d 999 (Mass. Ct. App. 2011); *McDuff Estate v. Kost*, 158 A. 373 (R.I.
43 1932).
44

45 SECTION 10. SECURITY AGREEMENT COVERING AFTER-ACQUIRED

1 **PROPERTY.** Except as otherwise provided by law of this state other than this [act], property
2 that a receiver or owner acquires after appointment of the receiver is subject to a security
3 agreement entered into before the appointment to the same extent as if the court had not
4 appointed a receiver.

5 **Reporter's Notes**

6 1. Section 10 is derived from Washington's receivership statute, Wash. Rev. Code Ann. §
7 7.60.240. Section 10 provides that where the owner had entered into a pre-appointment security
8 agreement covering after-acquired property, that agreement is effective against property acquired
9 after the receiver's appointment to the extent provided under other law. Section 10 ensures that
10 the appointment of a receiver should have no impact on the effectiveness of an after-acquired
11 property clause in a pre-petition security agreement. Thus, for example, if the owner had granted
12 Bank (pre-receivership) a security interest in present and after-acquired equipment and
13 inventory, the appointment of a receiver for all or part of the owner's property should have no
14 impact on the "after-acquired" clause in that security agreement, either as to similar property
15 acquired by the receiver or by the owner.

16
17 **SECTION 11. COLLECTION AND TURNOVER OF RECEIVERSHIP**

18 **PROPERTY.**

19 (a) Unless the court orders otherwise, on demand by a receiver:

20 (1) a person that owes a debt that is receivership property and is matured or
21 payable on demand or on order shall pay the debt to or on the order of the receiver, except to the
22 extent the debt is subject to setoff or recoupment; and

23 (2) subject to subsection (b), a person that has possession, custody, or control of
24 receivership property shall turn the property over to the receiver.

25 (b) A person that has notice of the receiver's appointment and owes a debt that is
26 receivership property may not satisfy that debt by payment to the owner.

27 (c) If a creditor has possession, custody, or control of receivership property and the
28 validity or perfection of the creditor's lien on the property depends on the creditor's possession,
29 custody, or control, the creditor may retain possession, custody, or control until the court enters

1 an order providing adequate protection of the creditor’s lien.

2 (d) Unless there is a bona fide dispute with respect to a receiver's right to possession,
3 custody, or control of receivership property, the court may sanction a person’s failure to turn the
4 property over when required by this section as a civil contempt of court.

5 **Reporter’s Notes**

6 1. Section 11 facilitates the ability of the receiver to gather receivership property and to
7 collect debts that are receivership property. Subsection (a)(1) governs the receiver’s ability to
8 collect debts that constitute receivership property. The obligor on a debt that is matured, payable
9 on demand, or payable on order must pay the debt to the receiver upon demand, except to the
10 extent that the obligor has a right of setoff or recoupment under other law. Subsection (a)(1) thus
11 provides the receiver with an ability to collect debts that is comparable to that possessed by a
12 trustee or debtor-in-possession under Section 542(b) of the Bankruptcy Code, 11 U.S.C. §
13 542(b).

14
15 Subsection (a)(2) obligates anyone in possession, custody, or control of receivership
16 property to turn that property over to the receiver upon demand, unless the court orders
17 otherwise. Subsection (a)(2) provides a receiver with an ability to compel the turnover of
18 receivership property that is comparable to that possessed by a trustee or debtor-in-possession
19 under Section 542(a) of the Bankruptcy Code, 11 U.S.C. § 542(a).

20
21 2. As directed by the Committee at its November 2014 meeting, subsection (b) now clarifies
22 that a person owing money to the owner and who has notice of the receiver’s appointment may
23 not satisfy that obligation by paying the owner.

24
25 3. Subsection (c) makes clear that if a creditor holds a lien upon receivership property in the
26 creditor’s possession, custody, or control, and the validity or perfection of its lien depends upon
27 the creditor’s retention of that possession, custody, or control, the creditor may retain possession,
28 custody, or control until such time as the court enters an order providing for the adequate
29 protection of the creditor’s lien. Thus, for example, a creditor with a statutory artisan’s lien on a
30 vehicle could retain possession of the vehicle despite a turnover demand by the receiver until the
31 court entered an order preserving the validity of the creditor’s lien on the vehicle (which would
32 otherwise be lost if the creditor released possession of the vehicle). Section 10 thus avoids the
33 result of cases such as *In re WEB2B Payment Solutions, Inc.*, 488 B.R. 387 (Bankr. 8th Cir.
34 2013) (creditor’s turnover of funds in deposit account, without order providing for adequate
35 protection of creditor’s interest, rendered creditor’s security interest unperfected).

36
37 4. Under subsection (d), a person’s failure to turnover receivership property upon demand
38 by the receiver may be sanctioned by the court as contempt unless there is a bona fide dispute
39 with respect to the receiver’s right to possession, custody, or control of the property. This draft
40 reflects a minor change from the Annual Meeting draft, which spoke of a person’s failure to turn
41 over property as being “punishable as a contempt of court,” based on input from the Annual

1 Meeting that the term “punishable” might imply that a court should use criminal rather than civil
2 contempt.

3

4 **SECTION 12. POWERS AND DUTIES OF RECEIVER.**

5 (a) Except as limited in any order of the court that appointed a receiver or by law of this
6 state other than this [act], a receiver may:

7 (1) collect, control, manage, conserve, and protect receivership property;

8 (2) operate a business constituting receivership property, including the
9 preservation, use, sale, lease, collection, license, or other disposition of the property in the
10 ordinary course of business;

11 (3) in the ordinary course of business, incur unsecured debt and pay expenses
12 incidental to the receiver's preservation, use, sale, lease, collection, license, or other disposition
13 of receivership property;

14 (4) assert a right, claim, cause of action, or defense of the owner that relates to
15 receivership property;

16 (5) seek and obtain instruction from the court concerning receivership property,
17 the exercise of the receiver's powers, or performance of the receiver's duties;

18 (6) by subpoena, compel a person to submit to examination under oath, or to
19 produce and permit inspection and copying of designated documents or tangible things, with
20 respect to receivership property or any other matter that may affect administration of the
21 receivership;

22 (7) engage professionals as provided in Section 15;

23 (8) apply to a court of another state for appointment as ancillary receiver with
24 respect to receivership property located in that state; and

25 (9) exercise any power conferred by this [act] or any order of the court that

1 appointed the receiver.

2 (b) With court approval, a receiver may:

3 (1) incur debt for the use or benefit of the receivership other than in the ordinary
4 course of business;

5 (2) recommend allowance or disallowance of a claim of a creditor as provided in
6 Section 20;

7 (3) make a distribution of receivership property or the proceeds of receivership
8 property as provided in Section 20;

9 (4) pay compensation to the receiver as provided in Section 19 or 23, or to each
10 professional engaged by the receiver as provided in Section 15;

11 (5) make improvements to receivership property;

12 (6) adopt or reject an executory contract of the owner as provided in Section 17;

13 and

14 (7) use or transfer receivership property other than in the ordinary course of
15 business as provided in Section 16.

16 (c) A receiver shall:

17 (1) prepare and retain appropriate business records, including records of all
18 receipts, disbursements, and other dispositions of receivership property;

19 (2) account for receivership property, including the proceeds of a sale, lease,
20 collection, license, or other disposition of the property;

21 (3) file with the [appropriate real property recording office] a copy of the order
22 appointing the receiver, together with a legal description of the real property if a description is
23 not included in the order; and

1 (4) perform any duty imposed by court order, this [act], or law of this state other
2 than this [act].

3 (d) The powers and duties of a receiver may be expanded, modified, or limited by court
4 order.

5 **Reporter’s Notes**

6 1. The existing receivership laws in most states do not adequately set forth the powers that a
7 receiver may (or may not) exercise, either with or without prior approval of the appointing court.
8 This can result in potential uncertainty regarding the ability of a receiver to borrow money, to
9 approve or reject executory contracts entered into by the owner of the property (including
10 unexpired leases), to sell receivership property either in or outside of the ordinary course of
11 business, or to make improvements to receivership property. Those adhering to best practices in
12 preparing receivership orders of appointment typically ensure that their orders address the
13 powers identified in this section, and thus subsections (a) and (b) are designed to incorporate
14 these principles of best practice into receiverships arising under this Act.
15

16 Subsection (a) sets forth the general powers that the receiver may exercise as a matter of
17 the receiver’s default powers, except to the extent that the receivership order or other law
18 explicitly restricts the receiver. Subsection (a) addresses the receiver’s authority to sell, lease,
19 license, or otherwise transfer receivership property in the ordinary course of business. This
20 provision would allow the receiver to conduct ordinary course sales (such as sales of inventory)
21 in the process of operating a business, and would also permit the receiver of a partially-
22 completed condominium project to sell completed units. The draft does not contain a definition
23 of “ordinary course of business,” but leaves the term to judicial development.
24

25 Subsection (b) sets forth specific powers that the receiver can exercise only if specifically
26 authorized by the court (following notice and an opportunity for a hearing as prescribed in
27 Section 3). These powers include the power to sell, lease, license or otherwise transfer
28 receivership property other than in the ordinary course of business, the power to make
29 improvements to receivership property, adopt or reject executory contracts of the owner, allow or
30 disallow claims against the receivership, pay compensation to professionals, and to make
31 distributions of receivership property.
32

33 Sections 12(a) and 12(b) derive from a compilation of various subsections of the
34 Minnesota, Washington, and New Mexico receivership statutes. See, e.g., Minn. Stat. Ann. §
35 576.29, subd. 1(a), (b); Wash. Rev. Code Ann. § 7.60.060(1); N.M. Rev. Stat. Ann. § 44-8-7(H).
36

37 2. Section 12(c), which describes the receiver’s duties, is based on Minn. Stat. Ann. §
38 576.29, subd. (2). Subsection (c) includes a duty for the receiver to record a certified copy of the
39 order of appointment in the real estate records in any county in which real property that is
40 receivership property is located.
41

1 3. Subsection (d), which permits the appointing court to expand, modify, or limit the
2 receiver's powers or duties, is based on Minn. Stat. Ann. § 576.29, subd. (3).

3
4 **SECTION 13. DUTIES OF OWNER.**

5 (a) An owner shall:

6 (1) assist and cooperate fully with the receiver in the administration of the
7 receivership and the discharge of the receiver's duties;

8 (2) preserve and turn over to the receiver all tangible and intangible receivership
9 property in the owner's possession, custody, or control;

10 (3) make available to the receiver all documents and information relating to
11 receivership property, including passwords and other information needed to obtain or maintain
12 access to or control of receivership property;

13 (4) by subpoena, submit to examination under oath by the receiver concerning the
14 acts, conduct, property, liabilities, and financial condition of the owner or any matter relating to
15 receivership property or the receivership; and

16 (5) perform any duty imposed by court order, this [act], or law of the state other
17 than this [act].

18 (b) If an owner is a person other than an individual, this section applies to each officer,
19 director, manager, member, partner, trustee, or other individual exercising or having the power to
20 exercise control over the affairs of the owner.

21 (c) If a person knowingly fails to perform a duty imposed by this section, the court may:

22 (1) award the receiver actual damages caused by the person's failure, including
23 costs and reasonable attorney's fees; and

24 (2) sanction the failure as a civil contempt of court.

25 **Reporter's Notes**

1 1. Section 13, which describes the duties of the owner, derives from the provisions of the
2 Washington receivership statute, Wash. Rev. Code Ann. § 7.60.080.

3
4 **SECTION 14. STAY.**

5 (a) Except as otherwise provided in subsection (d) or ordered by the court, an order
6 appointing a receiver operates as a stay, applicable to all persons, of:

7 (1) an act to obtain possession of, exercise control over, or enforce a judgment
8 against receivership property; and

9 (2) an act to enforce a lien against receivership property to the extent the lien
10 secures a claim against the owner which arose before entry of the order.

11 (b) In addition to the stay provided in subsection (a), the court may order a stay of an act,
12 action, or proceeding against or relating to receivership property if necessary to protect the
13 property and facilitate administration of the receivership.

14 (c) A person whose act, action, or proceeding is stayed under this section may apply to
15 the court for relief from the stay for cause.

16 (d) A stay under subsection (a) or entry of an order staying an act, action, or proceeding
17 under subsection (b) does not operate as a stay of:

18 (1) an act to foreclose or otherwise enforce a mortgage by the person seeking
19 appointment of the receiver;

20 (2) an act to perfect, or maintain or continue the perfection of, an interest in
21 receivership property;

22 (3) commencement or continuation of a criminal proceeding;

23 (4) commencement or continuation of an action or proceeding, or enforcement of
24 a judgment other than a money judgment in an action or proceeding, by a governmental unit to
25 enforce its police or regulatory power; or

1 (5) establishment by a governmental unit of a tax liability and an appeal of the
2 liability.

3 (e) On motion of a party, the court may declare void an act that violates a stay under this
4 section.

5 (f) If a person knowingly violates a stay under this section, the court may:

6 (1) award the receiver actual damages caused by the violation, including costs and
7 reasonable attorney's fees; and

8 (2) sanction the violation as a civil contempt of court.

9 **Reporter's Notes**

10 1. As the leading treatise explains, it is customary that the order appointing a receiver
11 expresses an injunction against acts, actions, or proceedings that could interfere with the
12 receiver's possession and management of receivership property or the performance of the
13 receiver's duties:

14
15 The order of appointment may properly include an order directed against the
16 defendant, if an individual and if a corporation against its officers, servants, agents and
17 employees, ordering each and all of them to deliver up the defendant's property to the
18 receiver and enjoining each and all of them from interfering with the control and
19 possession of the property, and if a corporation, from exercising any privileges or
20 franchises granted to the corporation. The injunction may go further and enjoin each and
21 all of them from collecting or receiving any debts due to the defendant, individual or
22 corporation and from paying out, selling, or transferring any property of the estate
23 including monies, funds, lands, tenements or effects of any kind whatsoever of the
24 defendant.

25
26 The court may protect its possession and control of property within its territorial
27 jurisdiction even without a specific injunction. The order of appointment impliedly
28 enjoins parties to the cause and warns any other person from interfering with the court's
29 control and possession. [2 Clark on Receivers, § 625.1(a), at 1024 (3d ed. 1959).]

30
31 Consistent with this practice, Section 14 provides that the order of appointment operates as a stay
32 against any act to obtain possession or control of receivership property (including any attempt to
33 enforce a judgment against receivership property) and any act to enforce a lien against
34 receivership property on account of a claim arising prior to the receivership.

35
36 In this regard, Section 14 creates an automatic stay that is much narrower in scope than
37 the automatic stay that would be applicable in bankruptcy. This stay provided by this Act does

1 not prevent the owner from seeking bankruptcy protection, nor does it prevent creditors of the
2 owner from seeking to place the owner into bankruptcy, even if the bankruptcy filing would
3 result in an interference with the receiver’s possession, custody, or control of receivership
4 property. See, e.g., *Gilchrist v. GE Capital Corp.*, 262 F.3d 295 (4th Cir. 2003) (federal court
5 receivership order does not bar creditors from filing involuntary petition against debtor).
6

7 2. Subsection (b) authorizes the court to expand the scope of the stay as necessary to protect
8 receivership property or facilitate the administration of the receivership. Subsection (b) is
9 limited, however, to acts, actions, or proceedings against receivership property, the receiver, or
10 the owner; therefore, subsection (b) would not authorize the court to stay an action against a
11 guarantor or co-obligor.
12

13 3. Subsection (c) permits any person subject to the automatic stay to apply to the appointing
14 court for relief from the automatic stay for cause. The Act does not define “cause,” but leaves to
15 judicial development the circumstances that would justify relief from the stay.
16

17 4. Subsection (d) provides a list of exceptions to the automatic stay created by subsection
18 (a). Subsection (d)(1) makes clear that the stay does not prevent the appointing creditor from
19 foreclosing its mortgage or enforcing its assignment of rents. Subsection (d)(2) permits a person
20 with a security interest in receivership property to perfect that interest following appointment.
21 Likewise, subsection (d)(2) would permit a creditor to file a continuation statement to maintain
22 its perfection so long as that continuation statement was filed within the applicable period to
23 ensure that the creditor maintained continuous perfection. Further, subsection (d)(2) would
24 permit a creditor holding a possessory lien on receivership property to retain possession, as
25 authorized under Section 11(c) of this Act, until such time as the court enters an order providing
26 adequate protection of the creditor’s lien. Subsection (d)(3) would permit the commencement or
27 continuation of criminal proceedings against the owner. Subsection (d)(4) would permit
28 governmental actors to take actions or enforce nonmonetary judgments pursuant to police and
29 regulatory powers. Subsection (d)(5) would permit a governmental unit to establish a tax liability
30 against the owner or receivership property, but would not permit the governmental unit to
31 conduct a tax sale of receivership property without obtaining approval from the court that
32 appointed the receiver.
33

34 5. Subsection (e) permits the court to declare an act void as being in violation of the stay
35 under subsection (a). Subsection (e) thus currently reflects the judgment of the Drafting
36 Committee, at its March 2014 meeting, to provide that an act in violation of the automatic stay is
37 merely voidable rather than void.
38

39 6. Subsection (f) permits the receiver to recover actual damages, including costs and
40 attorney fees, from a person that willfully violated the stay. In addition, subsection (f) would
41 permit the court to sanction any willful violation by civil contempt, without regard to whether the
42 receiver suffered actual damages as a result.
43

44 **SECTION 15. ENGAGEMENT AND COMPENSATION OF PROFESSIONAL.**

45 (a) With court approval in the order appointing a receiver or otherwise, the receiver may

1 engage an attorney, accountant, appraiser, auctioneer, broker, or other professional to assist the
2 receiver in performing the receiver’s duties. The receiver shall disclose to the court the identity
3 and qualifications of the professional, the scope and nature of the proposed engagement, the
4 proposed compensation, and any potential conflict of interest. A person is not disqualified from
5 engagement under this section solely because of the person’s engagement by, representation of,
6 or other relationship with the receiver, a creditor, or other party if the court finds the engagement
7 is appropriate. This [act] does not preclude the receiver from serving as an attorney, accountant,
8 auctioneer, or broker when licensed to do so.

9 (b) A receiver or a professional engaged under subsection (a) shall file with the court an
10 itemized statement of the time spent, work performed, billing rates of all persons that performed
11 the work, and an itemized list of expenses. With court approval, the receiver shall pay the
12 amounts itemized in the statement.

13 **Reporter’s Notes**

14 1. Section 15(a) provides that the receiver must obtain the court’s approval to engage and
15 retain professionals, but contemplates that this approval may come in the order of appointment
16 itself. If the authorization is not contained in the order of appointment, subsection (a) would
17 require notice and a hearing for appointment.

18
19 The final sentence of subsection (a) also makes clear that the receiver may provide
20 certain types of professional services to the estate (and be compensated for those services) where
21 licensed to do so. See, e.g., Wash. Rev. Code Ann. § 7.60.180(3). The omission of “appraiser”
22 from this sentence is intentional based on input from observers that dual service as both a
23 receiver and appraiser would be inappropriate.

24
25 While subsection (a) uses the singular (“the receiver may engage an attorney . . .”), the
26 Act contemplates that where the nature of the receivership so demands, the receiver may engage
27 more than one attorney or other professional as needed.

28
29 2. Subsection (b) provides that the receiver’s payment of the fees and expenses of
30 professionals can occur only after the submission to the court of an itemized statement and court
31 approval.

32
33 **SECTION 16. USE, SALE, LEASE, LICENSE OR OTHER TRANSFER OF**

1 **RECEIVERSHIP PROPERTY OTHER THAN IN ORDINARY COURSE OF BUSINESS.**

2 (a) With court approval, a receiver may use receivership property other than in the
3 ordinary course of business.

4 (b) With court approval, a receiver may sell, lease, license, or otherwise transfer
5 receivership property other than in the ordinary course of business. Unless the agreement of sale
6 provides otherwise, a sale under this section is free and clear of a lien of the person that obtained
7 the appointment of the receiver, any subordinate lien, and any rights of redemption, but is subject
8 to a valid senior lien.

9 (c) A lien on receivership property which is extinguished by a transfer under subsection
10 (b) attaches to the proceeds of the transfer with the same validity, perfection, and priority as the
11 lien had on the property immediately before the transfer, without regard to whether the proceeds
12 are sufficient to satisfy all extinguished liens.

13 (d) A transfer under subsection (b) may occur by means other than a public auction sale.
14 A creditor holding a valid lien on the property to be transferred may purchase the property and
15 offset against the purchase price part or all of the allowed amount secured by the creditor's lien,
16 if the creditor tenders cash sufficient to satisfy in full the reasonable expenses of transfer and any
17 senior lien extinguished by the transfer.

18 (e) A reversal or modification of an order approving a transfer under subsection (b)
19 neither affects the validity of the transfer to a person that acquired the property in good faith nor
20 revives against the person any lien extinguished by the transfer, whether or not the person knew
21 before the transfer of the request for reversal or modification, unless the court stayed the order
22 before the transfer.

23 **Reporter's Notes**

1 1. Traditionally, a receiver’s ability to sell receivership property varied depending upon the
2 circumstances of the receivership. For example, when a court appointed a general receiver for all
3 of the assets of an insolvent debtor, the court would typically empower the receiver to gather and
4 sell the assets of the debtor. By contrast, when a court appointed a limited receiver to take
5 possession of a specific asset — such as a receiver for mortgaged property pending foreclosure
6 sale — the receiver’s role was more typically viewed as custodial. For this reason, receivers
7 appointed in conjunction with foreclosure proceedings were often viewed as having the power to
8 operate, maintain, and preserve the property pending the foreclosure sale—but not to sell the
9 property, as the sale would instead take place under the applicable foreclosure procedures. See,
10 e.g., *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964); *Andrick Dev. Corp. v. Maccaro*,
11 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). A recent Florida court went further, holding that
12 the court lacks the authority to empower a receiver appointed in a foreclosure case to sell the
13 property free and clear of liens and rights of redemption. *Shubh Hotels Boca, LLC v. Federal*
14 *Deposit Ins. Corp.*, 46 So.3d 163 (Fla. Dist. Ct. App. 2010). See also *Todd Enters., LLC v.*
15 *MidCountry Bank*, 2013 WL 4045765 (Minn. Ct. App. 2013) (not reported in N.W.2d) (court
16 order authorizing receiver’s sale free and clear of borrower’s statutory right of redemption was
17 contrary to state mortgage foreclosure statute).

18
19 In the context of the recent real estate crisis, however, some commentators have
20 advocated that receivership can be an effective way to dispose of real estate—and particularly,
21 that it may in some cases provide a more effective way of disposing of mortgaged real property
22 than the foreclosure process. Under current foreclosure law in all American jurisdictions, a
23 foreclosure sale is a “distress sale,” i.e., a public auction sale on the courthouse steps (or at some
24 other public place). Foreclosure by public sale is traditionally justified as a means to protect the
25 mortgagor’s equity in the mortgaged property, particularly by comparison to the historical
26 approach under which a defaulting borrower simply forfeited its interest in the mortgaged
27 property (and any equity the borrower may have accumulated either through principal reduction
28 or market appreciation). Nevertheless, public foreclosure sales do not consistently produce
29 prices that approximate the market value that might be obtained in an arms-length, non-distress
30 sale. By contrast, a receiver of mortgaged commercial real property could readily market that
31 property to potential buyers in the context of operating the property during the receivership. Such
32 marketing could permit potential buyers to perform more meaningful and complete due
33 diligence. Further, a sale subject to judicial review and confirmation could produce greater
34 finality regarding the title acquired by the buyer at the sale. Thus, there is certainly reason to
35 expect that at least in some contexts, receiver sales of mortgaged real estate might produce
36 higher sale prices than public foreclosure sales.

37
38 Another potential advantage to receiver sales arises out of the structure of the
39 securitization of commercial mortgages. Commercial mortgage-backed securities (CMBS) loans
40 are held in real estate mortgage investment conduits (“REMICs”), which are special purpose
41 vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed securities.
42 The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, at the
43 risk of losing their tax status as pass-through entities. Thus, if a REMIC ends up having to
44 purchase the mortgaged property at a foreclosure sale, it cannot make a new loan to a potential
45 buyer on a seller-financing basis. However, the Internal Revenue Code does permit a REMIC to
46 make limited modifications to an existing defaulted loan. Thus, if the property can be sold

1 through a receiver or by the borrower directly, with the buyer assuming the mortgage, the
2 mortgage loan can be modified and restructured without threatening the REMIC's tax status.
3 Thus, a CMBS lender may have good reason to believe a receiver sale can produce higher price
4 by comparison to a public foreclosure (cash) sale, making such a sale attractive to a CMBS
5 lender that does not wish to foreclose (and possibly take ownership) of a property that is worth
6 less than the outstanding mortgage debt.

7
8 Existing federal statutes explicitly authorize a receiver appointed by a federal court to sell
9 mortgaged property, in either a public or private sale. 28 U.S.C.A. § 2001 et seq. By contrast,
10 under existing state laws, the authority for receiver sales is much less clear. There are a few
11 states with statutory provisions that explicitly grant the power of sale to a receiver. See, e.g.,
12 Ind. Code § 32-30-5-7; N.C. Gen. Stat. § 1-505; Wash. Rev. Code Ann. § 7.60.260. Despite
13 having no clear statutory authority, courts in Ohio and Michigan have upheld court-authorized
14 receiver sales free and clear of liens and statutory redemption rights. See, e.g., *CSB Bank v.*
15 *Christy*, No. 305869 (Mich. Ct. App. Oct. 18, 2012) (unpublished); *Park Nat'l Bank v. Cattani,*
16 *Inc.*, 187 Ohio App.3d 186, 931 N.E.2d 623 (2010); *Huntington Nat'l Bank v. Motel 4 BAPS,*
17 *Inc.*, 191 Ohio App.3d 90, 944 N.E.2d 1210 (2010).

18
19 Section 16(b) seeks to provide much-needed clarity to this issue, providing a range of
20 alternatives that a state could adopt. Section 16(b) would authorize the receiver (with court
21 approval after notice and opportunity for a hearing) to sell, lease, license or otherwise transfer
22 receivership property free and clear of liens and rights of redemption, other than a lien that is
23 senior in priority to the lien of the creditor that obtained the receiver's appointment. The intent of
24 the provision is to preserve to the receiver the ability to seek authority to sell either free and clear
25 or subject to liens, depending upon the situation. This would facilitate the ability, for example,
26 for the senior mortgagee of a securitized mortgage loan to seek a receiver to facilitate a sale of
27 the property subject to the existing CMBS loan, with that loan being modified in the context of
28 the receiver's sale.

29
30 2. Subsection (c) provides for the transfer of any liens extinguished by the sale to sale
31 proceeds. The extinguished liens would be transferred to the sale proceeds, with the same order
32 of priority as the liens had with respect to the real property, without regard to whether the
33 proceeds are sufficient to satisfy all liens. Subsection (d) recognizes that the receiver may sell
34 other than by a public auction sale, and provides for the right of a lienholder to credit bid.

35
36 3. Subsection (e) provides that the title of a good faith purchaser from the receiver is not
37 affected by reversal of the transfer order on appeal unless the authorization and transfer were
38 stayed pending appeal.

39
40 4. Subsection (a) would permit the receiver, with court approval after notice and a hearing,
41 to use receivership property other than in the ordinary course of business.

42 43 **SECTION 17. EXECUTORY CONTRACT.**

44 (a) In this section, "timeshare interest" means an interest granting its holder the right to

1 use and occupy an accommodation, facility, or recreational site, whether improved or not, for a
2 specific period less than a full year during any given year, and having a duration of more than
3 three years.

4 (b) Except as otherwise provided in subsection (h), with court approval, a receiver may
5 adopt or reject an executory contract of the owner relating to receivership property. If the
6 receiver does not request court approval to adopt or reject a contract within a reasonable time
7 after the receiver's appointment, the receiver is deemed to reject the contract. The court may
8 condition the receiver's adoption and continued performance of the contract on terms appropriate
9 under the circumstances.

10 (c) A receiver's performance of an executory contract before court approval under
11 subsection (b) of its adoption or rejection is not an adoption of the contract and does not preclude
12 the receiver from seeking approval to reject the contract.

13 (d) A provision in an executory contract which effects or permits a forfeiture,
14 modification, or termination of the contract because of the appointment of a receiver or the
15 financial condition of the owner does not affect a receiver's power under subsection (b) to adopt
16 the contract.

17 (e) A receiver's right to possess or use receivership property pursuant to an executory
18 contract terminates on rejection of the contract. Rejection is a breach of the contract effective
19 immediately before the appointment of the receiver. A claim for damages for rejection of the
20 contract must be filed by the later of:

21 (1) the time set for filing a claim in the receivership; or

22 (2) [30] days after the court approves the rejection.

23 (f) If an owner had the right to assign an executory contract relating to receivership

1 property under the contract and law of this state other than this [act] at the time a receiver was
2 appointed, the receiver may assign the contract with court approval.

3 (g) If a receiver rejects an executory contract for the sale of receivership property that is
4 real property of which the purchaser is in possession or a real property timeshare interest, the
5 purchaser may:

6 (1) treat the rejection as a termination of the contract, in which case the purchaser
7 has a lien on the property for the recovery of any part of the purchase price the purchaser paid; or

8 (2) retain the purchaser's right to possession under the contract, in which case the
9 purchaser shall continue to perform all obligations arising under the contract and may offset any
10 damages caused by nonperformance of an obligation of the owner after the date of the rejection,
11 but the purchaser has no right or claim against other receivership property or the receiver on
12 account of the damages.

13 (h) A receiver may not reject an unexpired lease of real property to a tenant if:

14 (1) the tenant occupies the leased premises as the tenant's primary residence;

15 (2) the receiver was appointed at the request of a person other than a mortgagee;

16 or

17 (3) the receiver was appointed at the request of a mortgagee, and

18 (A) the lease is superior to the lien of the mortgage;

19 (B) the tenant has an enforceable agreement with the mortgagee, or the
20 holder of a senior lien, that the tenant's occupancy will not be disturbed as long as the tenant
21 performs its obligations under the lease;

22 (C) the mortgagee has consented to the lease, either in a signed record or
23 by its failure to timely object that the lease violated a provision of the mortgage; or

1 (D) the terms of the lease were commercially reasonable at the time the
2 lease was agreed to, and the tenant neither knew nor had reason to know that the lease violated a
3 provision of the mortgage.

4 **Reporter's Notes**

5 1. This provision is adapted from the more streamlined “executory contract” provisions of
6 the Minnesota receivership statute, Minn. Stat. Ann. § 576.45, as contrasted with the more
7 exhaustive provisions from the Washington statute, Wash. Rev. Code Ann. § 7.60.130.
8

9 2. Traditionally, a receiver does not automatically or inherently become bound to the
10 owner’s existing executory contracts upon appointment. See 2 Clark on Receivers, § 423, at 710
11 (3d ed. 1959) (“A receiver is not strictly speaking the successor of the defendant, individual or
12 corporation and an executory contract of the defendant is not binding on the receiver but may be
13 broken by the receivership and give rise to damages resulting in a claim against the assets in the
14 hands of the receiver.”).
15

16 Consistent with this traditional rule, subsection (b) permits the receiver to evaluate
17 whether an executory contract relating to receivership property is beneficial or burdensome, and
18 to either adopt or reject (with court approval) the contract accordingly based upon the receiver’s
19 evaluation. In this regard, the Act differs from the Minnesota receivership statute, Minn. Stat.
20 Ann. § 576.45, under which the receiver succeeds to the duties of the owner under any executory
21 contract unless the receiver can demonstrate “good cause” to terminate that contract.
22

23 Subsection (b) permits the court to condition the receiver’s adoption of a contract upon
24 appropriate terms regarding assurance of the receiver’s ability to perform.
25

26 The prior versions of the Act did not provide a “default” position on adoption or
27 rejection, nor did the Act provide an explicit timetable for when that determination occurs.
28 Because the Act provides that rejection gives rise to a claim against the receivership estate, the
29 Act effectively must resolve the status of the contract by no later than some reasonable period of
30 time prior to the claims deadline. As directed by the Committee at its November 2014 meeting,
31 this draft closes this gap by modifying subsection (b) to provide that if the receiver does not
32 request approval to accept or reject the contract within a reasonable time following appointment,
33 the contract is deemed to be rejected.
34

35 3. Subsection (c) provides that the receiver’s temporary performance of the contract does
36 not prevent the receiver from later seeking court approval to reject it. Subsection (d) makes clear
37 that the receiver’s ability to adopt an executory contract is not affected by contractual provisions
38 that would otherwise permit the counterparty to terminate the contract based upon the
39 appointment of a receiver or the owner’s financial condition.
40

41 4. Subsection (d) provides that a counterparty may not exercise an “ipso facto” clause and
42 thereby use the receiver’s appointment as a basis to terminate or modify an executory contract

1 and thereby prevent its adoption by the receiver. The prohibition on modification would likewise
2 prevent the counterparty from using the receiver’s appointment as a basis for imposing a
3 contractual penalty to thereby increase the effective cost of the receiver’s adoption of the
4 contract. Thus, if the contract in question was a service contract that purported to permit the
5 counterparty to increase the agreed price by 100% in the event a receiver was appointed, the
6 receiver could adopt the contract at the original contract price.

7
8 5. Under subsection (e), the receiver’s rejection of the contract constitutes a breach of the
9 contract and allows the counterparty to file a claim against the receivership estate. In this regard,
10 subsection (e) addresses only the potential liability of the receivership estate and not the
11 underlying liability of the owner. The Act would not (1) discharge the liability of the owner to
12 the counterparty, (2) preclude the counterparty from proceeding against nonreceivership property
13 of the owner, or (3) preclude the counterparty from proceeding against guarantors or third-party
14 assets securing the owner’s obligation to the counterparty.

15
16 6. Under subsection (f), the receiver can assign an executory contract, but only to the extent
17 permitted by the contract and applicable law. See, e.g., 2 Clark on Receivers, § 441.1, at 733 (3d
18 ed. 1959) (“If a contract is ordinarily assignable between A & B there seems no reason why the
19 receiver under proper orders of court cannot assign the contract.”). The receiver thus cannot
20 assign an executory contract if the contract and applicable law would excuse the counterparty
21 from accepting performance or rendering performance to an entity other than the owner.

22
23 7. Subsection (g) addresses situations in which the receiver attempts to reject an executory
24 contract for the sale of receivership real property of which the purchaser is in possession (i.e., an
25 executory installment land contract or “contract for deed”) or an executory contract for a
26 timeshare interest. It gives the purchaser the choice to (a) treat the rejection as a termination of
27 the contract (in which case the purchaser has a lien against the property for the recovery of
28 purchase money already paid) any portion of the purchase price that the purchaser had paid; or
29 (b) retain its rights under the contract. If the purchaser takes the latter option, it must continue to
30 perform its obligations, and may offset against its liability thereon any damages caused by the
31 owner’s nonperformance of the contract following rejection, but has no claim or right against
32 other receivership property or the receiver.

33
34 Subsection (g) would provide these purchasers with protection comparable to that which
35 such purchasers would have under Section 365(i) of the Bankruptcy Code, 11 U.S.C.A. § 365(i),
36 and its inclusion responds to concerns that the Act should be sensitive to “forum shopping”
37 concerns (i.e., that it not provide a contracting party with the incentive to seek appointment of a
38 receiver to permit termination of contracts that could not be terminated under bankruptcy law).
39 The definition of “timeshare interest” in this section is a simplified version of the definition
40 contained in the Bankruptcy Code, 11 U.S.C.A. § 101(53D).

41
42 8. Subsection (h) protects tenants holding unexpired leases of real property from having
43 their leases rejected by the receiver. Under no circumstances can the receiver reject the lease of
44 a tenant that is occupying the property as its primary residence. Where the receiver is appointed
45 at the behest of an involuntary lienholder (such as a judgment creditor or mechanics’ lienor), the
46 receiver likewise cannot reject the tenant’s lease. Where the receiver is appointed at the behest

1 of a mortgagee, the receiver cannot reject the lease under any of the following circumstances:
2 (a) the lease is senior to the mortgage; (b) the tenant has a nondisturbance agreement with the
3 mortgagee or the holder of a senior lien; (c) the mortgagee has consented, either in a signed
4 record or by its failure to timely object that the lease violates the terms of the mortgage; or (d)
5 the lease was commercially reasonable at the time of the agreement and the tenant did not know
6 or have reason to know that the lease violated the terms of the mortgage.

7
8 In this regard, subsection (h) is consistent with Section 4.4(b) and 4.4(c) of the
9 Restatement (Third) of Property: Mortgages.

10
11 **SECTION 18. IMMUNITY OF RECEIVER.**

12 (a) A receiver is entitled to all defenses and immunities provided by law of this state
13 other than this [act] for an act or omission within the scope of the receiver's appointment.

14 (b) A receiver may be sued for an act, omission, or transaction in administering
15 receivership property only with approval of the court that appointed the receiver.

16 **Reporter's Notes**

17 1. As an officer of the appointing court, a receiver is shielded by judicial immunity for
18 actions performed under the lawful authority of the appointment order. As explained in the
19 leading treatise:

20
21 On the highest grounds of necessity and public policy judges cannot be held liable
22 for acts done by them in their judicial capacity.... It follows that courts managing
23 property through a receiver cannot be held liable as courts for imperfect management.
24 Officers of the courts, such as sheriffs, constables, receivers and other officers, who act in
25 obedience to the lawful mandate of the court or in obedience to lawful process of any
26 sort, are protected or privileged in respect to acts done under such lawful authority. [2
27 Clark on Receivers, § 388, at 648 (3d ed. 1959).]

28
29 Consistent with this approach, the Act provides the receiver with immunity for acts or omissions
30 within the scope of the order appointing the receiver. Subsection (a) is based on the Minnesota
31 receivership statute, Minn. Stat. Ann., as contrasted with Washington's statute, Wash. Rev. Code
32 Ann. § 7.60.170, which provides more detailed and specific provisions regarding the scope of a
33 receiver's liability.

34
35 2. Determining the breadth of a receiver's immunity could create a conceptual problem in a
36 case in which a receiver has been appointed as a primary receiver by a court in one state and an
37 ancillary receiver by a court in another state. If the primary state's law provides the receiver
38 with broader immunity than does the ancillary state's law, a question might arise as to whether
39 the receiver would be entitled to the broader immunity available under the law of the primary
40 state (or only the narrower immunity available under the law of the ancillary state). In these

1 cases, courts should resolve these issues by reference to conflicts-of-laws principles.

2
3 3. Subsection (b) is an adaptation of Wash. Rev. Code Ann. § 7.60.160(1), and is meant to
4 incorporate into the Act the *Barton* doctrine, which derives from the decision of the United
5 States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881). In *Barton*,
6 the Supreme Court held that to sue a court-appointed receiver, the would-be plaintiff must first
7 seek approval of the appointing court. The doctrine rests upon the notion that the appointing
8 court has *in rem* jurisdiction over the receivership property; thus, a forum other than the
9 appointing court would lack subject-matter jurisdiction over the action. See also 2 Clark on
10 Receivers, § 549, at 890 (3d ed. 1959) (“The custody of property by the court through its receiver
11 is the custody of the sovereign power or government acting through the courts. Possession by the
12 court of the res gives jurisdiction over the res to the court appointing the receiver and gives such
13 court power to determine all questions concerning the ownership and disposition of this property.
14 No other court can interfere with the possession of the res. The general rule of law, therefore,
15 naturally follows that a receiver as an officer of court cannot in the absence of an enabling statute
16 be sued without leave of the court appointing him.”).

17
18 The appointing court may grant leave to sue the receiver without regard to the merits of
19 the would-be plaintiff’s claims. The would-be plaintiff need not demonstrate a substantial
20 likelihood of prevailing on the merits to obtain permission to sue the receiver. Correspondingly,
21 a decision by the appointing court to give permission to sue the receiver is not a conclusion that
22 the would-be plaintiff’s claim is meritorious.

23
24 **SECTION 19. INTERIM REPORT OF RECEIVER.** The receiver may file at the
25 receiver’s initiative, or shall file if ordered by the court, an interim report including:

- 26 (1) the activities of the receiver since appointment or a previous report;
- 27 (2) cash receipts and disbursements, including a payment made to or proposed to be
28 made to a professional engaged by the receiver;
- 29 (3) receipts and dispositions of receivership property;
- 30 (4) fees and expenses of the receiver and, if not filed separately, a motion for approval of
31 payment of the fees and expenses; and
- 32 (5) other matters specified in an order of the court.

33 **Reporter’s Notes**

34 1. This section derives from the provisions of Minnesota’s receivership statute, Minn. Stat.
35 Ann. § 576.36. It does not automatically require the receiver to prepare interim reports, except
36 as ordered by the court. This approach provides flexibility to accommodate different judicial

1 approaches — courts that have traditionally required only a final report could continue with such
2 an approach, while courts that have traditionally required periodic reporting could specify an
3 appropriate period in the order of appointment.

4
5 **SECTION 20. CLAIM AGAINST RECEIVERSHIP; DISTRIBUTION TO**
6 **CREDITORS.**

7 (a) Except as otherwise provided in subsection (e), a receiver shall give notice of
8 appointment of the receiver to creditors of the owner by:

9 (1) giving notice of the appointment by first class mail or other commercially
10 reasonable delivery method to the last known address of each creditor; and

11 (2) publishing notice of the appointment, at least once a week for three
12 consecutive weeks, in a newspaper having general circulation in the [county] where the
13 appointing court is located.

14 (b) Except as otherwise provided in subsection (e), a creditor holding a claim against the
15 owner which arose before a receiver's appointment may submit the claim to the receiver on or
16 before the date specified in the notice required by subsection (a). The date specified must be at
17 least [90] days after the later of the mailing or last publication of the notice under subsection (a),
18 unless the court reduces or extends the period. Unless the court orders otherwise, a claim that is
19 not timely submitted is not entitled to a distribution from the receivership. The claim must:

20 (1) set forth the name and address of the creditor;

21 (2) set forth the amount and the basis of the claim;

22 (3) identify any property securing the claim;

23 (4) be signed by the creditor under penalty of perjury; and

24 (5) include a copy of any record on which the claim is based.

25 (c) An assignment of a claim is effective against the receiver only if the assignee gives

1 timely notice of the assignment to the receiver in a signed record.

2 (d) At any time before entry of an order approving a receiver's final report, the receiver
3 may file with the court an objection to a claim of a creditor, setting forth the basis for the
4 objection. The court shall allow or disallow the claim according to law of this state other than
5 this [act].

6 (e) If the court concludes that receivership property is likely to be insufficient to satisfy
7 the claims of creditors holding perfected liens on the property, the court may order that:

8 (1) the receiver need not give notice of the appointment to all creditors of the
9 owner, but only such creditors as the court directs; and

10 (2) unsecured creditors need not submit claims under this section.

11 (f) Subject to Section 21, any distribution of receivership property to a creditor holding
12 a perfected lien on the property shall be made in accordance with the creditor's priority under
13 law of this state other than this [act]. Any distribution of receivership property to creditors with
14 allowed unsecured claims shall be made as the court directs according to law of this state other
15 than this [act].

16 **Reporter's Notes**

17 1. This draft includes a claims provision that is substantially simplified relative to the more
18 comprehensive provisions found in the Minnesota and Washington statutes. Section 13(b)(1)
19 provides that if the court so orders, the receiver has the power to recommend the allowance and
20 disallowance of claims. Combined with this section, the receiver thus has the flexibility to seek
21 allowance or disallowance of claims in a fashion suitable to the circumstances of the
22 receivership.

23
24 2. Subsection (a) provides that if ordered by the court, the receiver will give notice of
25 appointment to creditors by first class mailing to the last known address of each creditor and by
26 publication. Subsection (b) then directs any creditors holding claims that arose prior to
27 appointment to file a proof of that claim with the receiver within 90 days of the notice, except as
28 provided in subsection (e) (which permits the appointing court to obviate the entire claims
29 process in cases where the receivership will not generate sufficient funds to result in a
30 distribution to unsecured creditors).

1
2 By requiring newspaper publication in subsection (a), the Act’s intention is to require
3 “publication” as a court may interpret that term in light of technological evolution and changing
4 economics in the publishing industry. Ten years following the enactment of this Act, it may well
5 be that the only “newspapers” of circulation in a county may publish only in electronic form, and
6 current subsection (a) is intended to permit a court to treat electronic publication in that context
7 as being sufficient newspaper publication. Rather than try to account for or require electronic
8 publication at a time when publication in newsprint remains the dominant medium, this draft has
9 consciously chosen not to be more specific about the medium in which the publication will
10 occur.

11 Subsection (b) provides minimal requirements for the creditor’s proof of claim.

12
13
14 3. Subsection (c) makes clear that while the Act does not prohibit the assignment of claims
15 against the receivership, an assignment is effective against the receiver only if the assignee gives
16 the receiver timely notice of the assignment.

17
18 4. Subsection (e) permits the receiver to forgo the entire claims process if the court
19 concludes that the expected net proceeds from the receivership will be insufficient to satisfy the
20 claims of creditors holding secured claims against receivership property. In such a case, the
21 court may order that the receiver need not comply with the process for the filing and
22 determination of claims and that unsecured creditors need not submit claims. A creditor holding
23 a secured claim against receivership property must file a proof of claim with the receiver, so that
24 the receiver can have the necessary information to facilitate the receiver’s ability to make
25 recommendations to the court regarding the appropriate distribution of receivership property or
26 the proceeds of such property.

27
28 5. Subsection (f) provides that any distribution of receivership property to a creditor with a
29 perfected lien on that property shall be made according to the state’s applicable priority rules as
30 determined by law other than this Act. This would apply both to the distribution of proceeds
31 from the sale of receivership property under Section 15 as well as to the distribution of collected
32 rents that are the subject of an assignment of rents.

33
34 Subsection (f) also provides that allowed unsecured claims shall receive distribution from
35 the residue of the receivership estate as the court directs in accordance with law other than this
36 Act. The draft took this approach to avoid including the extensive priority provisions included in
37 the Minnesota and Washington statutes, see Minn. Stat. Ann. § 576.51; Wash. Rev. Code Ann. §
38 7.60.230. This decision was based on a perceived consensus at the April 2013 Drafting
39 Committee meeting that the Act should seek to avoid the “exhaustive” comprehensiveness
40 reflected in the Minnesota and Washington statutes. At the same time, subsection (f) makes
41 clear that the court should respect any rules of administrative priority for certain unsecured
42 claims that might exist under other applicable law of the state.

43
44 **SECTION 21. FEES AND EXPENSES.**

45 (a) The court may award the receiver from receivership property or proceeds the

1 reasonable and necessary fees and expenses of preserving, protecting, or transferring the property
2 or proceeds.

3 (b) If the receivership does not produce sufficient funds to pay the fees and expenses of
4 the receivership, the court may order the person who requested the receiver's appointment to pay
5 the fees and expenses, including attorney fees.

1 **Reporter’s Note**

2 1. Under section 21(a), the court may allow the receiver to recover the reasonable and
3 necessary fees of preserving, protecting, or transferring the property prior to distribution to
4 secured creditors. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) (“A sale by
5 the receiver free from liens is for most practical purposes equivalent to a foreclosure sale and if
6 and when the property is realized under such circumstances and if and when the mortgagees or
7 lienholders avail themselves of the advantage of the receivership to effect the sale of the
8 mortgaged premises, this means they have saved themselves similar expenses in a foreclosure
9 suit or otherwise and, therefore, should pay for the advantage they have received.”). Subsection
10 (a) is not substantively changed from the prior draft, but has been relocated from former section
11 16, which was deleted.

12
13 2. Section 21(b) is new to this draft, based on instructions from the Committee at its
14 November 2014 meeting that the Act should make clear that if anyone seeks appointment of a
15 receiver and the receipts are insufficient to pay the costs of the receivership, the shortfall should
16 be assessed to the petitioner.

17
18 **SECTION 22. REMOVAL OF RECEIVER; REPLACEMENT; TERMINATION**
19 **OF RECEIVERSHIP.**

20 (a) The court may remove a receiver for good cause, including the refusal or failure to
21 fulfill the receiver’s duties.

22 (b) The court shall replace a receiver if the receiver dies, resigns, or is removed.

23 (c) If the court finds that a receiver replaced under subsection (b) has accounted fully for
24 and turned over to the successor receiver all receivership property and has filed a report of all
25 receipts and disbursements during the replaced receiver’s tenure, the court shall enter an order
26 discharging the replaced receiver from all further duties as receiver.

27 (d) The court may discharge a receiver and terminate the court’s administration of the
28 receivership property if the court finds that appointment of the receiver was improvident or that
29 the circumstances no longer warrant continuation of the receivership. If the court finds that the
30 appointment was procured wrongfully or in bad faith, the court may:

31 (1) assess against the person that procured the appointment the fees and expenses

1 of the receivership, including attorney fees; and
2 (2) award the owner actual damages caused by the appointment, including
3 attorney fees.

4 **Reporter's Notes**

- 5 1. Section 22 section is adapted with some minor changes from the Washington receivership
6 statute, Wash. Rev. Code Ann. § 7.60.280.
7
- 8 2. Subsection (a) permits the removal of the receiver for good cause. Subsection (b)
9 provides for the replacement of a receiver upon the receiver's death or resignation or the
10 receiver's removal by the court for failure to carry out its duties as receiver. 3 Clark on
11 Receivers, § 692, at 1272 (3d ed. 1959). Once a removed receiver has provided a full accounting
12 for all receivership property and a full report of all receipts and disbursements during its tenure,
13 3 Clark on Receivers, § 699.1, at 1285 (3d ed. 1959), subsection (c) provides that the court shall
14 discharge the receiver from further duties as receiver.
15
- 16 3. Subsection (d) permits the court to discharge a receiver and terminate the receivership if
17 the court finds that the receiver's appointment was improvident or that the receivership is no
18 longer warranted. See, e.g., 3 Clark on Receivers, § 692.1, at 1274-1277 (3d ed. 1959). If the
19 court terminates a receivership as having been improvidently granted and the court further finds
20 that the person who procured the receiver's appointment acted wrongfully or in bad faith, the
21 court may impose on such person the costs of the receivership and may assess against them
22 damages in favor of the owner, including attorney fees.
23

24 **SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.**

- 25 (a) On completion of a receiver's duties, the receiver shall file a final report including:
26 (1) a description of the activities of the receiver in the conduct of the receivership;
27 (2) a list of all receivership property at the commencement of the receivership and
28 any receivership property received thereafter;
29 (3) a list of expenditures, including all payments to professionals retained by the
30 receiver;
31 (4) a list of all dispositions of receivership property;
32 (5) a list of all distributions made or proposed to be made from the receivership
33 for creditor claims;

1 (6) if not filed separately, a request for approval of the payment of fees and
2 expenses of the receiver; and

3 (7) any other information required by the court.

4 (b) The court may approve a final report filed under subsection (a). After the receiver
5 has distributed all receivership property, the approval discharges the receiver for all matters in
6 the report.

7 **Reporter's Notes**

8 1. Subsection (a) provides for the termination of the receivership and discharge of the
9 receiver upon notice and hearing. The receiver's final report would be based on the same
10 general template as any interim reports filed by the receiver. Subsection (b) provides that the
11 court's approval of the report discharges the receiver once the receiver makes all distributions.
12

13 **SECTION 24. ANCILLARY RECEIVERSHIP.**

14 (a) The court may appoint a person appointed as a receiver in another state, or that
15 person's nominee, as an ancillary receiver with respect to property located in this state or subject
16 to the jurisdiction of the court, and for which a receiver could be appointed under this [act], if:

17 (1) the person or nominee would be eligible to serve as receiver under Section 7;

18 and

19 (2) the appointment furthers the person's possession, custody, control, or
20 disposition of property subject to the receivership in the other state.

21 (b) A court may enter any order necessary to effectuate a judicial order entered in
22 another state appointing or directing a receiver.

23 (c) Unless the court orders otherwise, an ancillary receiver appointed under subsection
24 (a) has the rights, powers, and duties of a receiver appointed under this [act].

25 **Reporter's Notes**

26 1. State boundary lines provide an inherent jurisdictional limitation to the ability of a

1 receiver to exercise control over receivership property located outside the boundaries of the state
2 in which the receiver was appointed. As the Clark treatise explains:

3
4 Although a court having jurisdiction of the defendant owner of property in another state
5 may make an order appointing a receiver of the defendant's property wherever situated,
6 such an order does not immediately or directly bind tangible personal property or real
7 estate outside the territorial jurisdiction of the appointing court. Such an order does not of
8 itself cut off rights of local creditors to proceed against the defendant's property in the
9 foreign jurisdiction. [1 Clark on Receivers § 294, at 483 (3d ed. 1959).]

10
11 Thus, a court cannot immediately exercise jurisdiction over real estate and/or tangible personal
12 property outside of its territorial jurisdiction. In this circumstance, it may become necessary for
13 the person who sought the receiver's appointment to apply to a court in the situs state (the state
14 where the real estate and/or tangible personal property is located) for the appointment of an
15 ancillary receiver. 1 Clark on Receivers § 318 (3d ed. 1959).

16
17 2. Section 24 is based in significant part upon the provisions of the Minnesota receivership
18 statute, Minn. Stat. Ann. § 576.41. Subsection (a) addresses the appointment in this state of an
19 ancillary receivership to a receivership already existing in another state. It provides that the
20 foreign receiver (or that receiver's nominee) may be appointment as an ancillary receiver for
21 property in this state, as long as the receiver or nominee would be eligible for appointment under
22 the Act and appointment would further the purposes of the foreign receivership.

23
24 Subsection (b) authorizes the court to enter any order necessary to give effect to an order
25 of another state appointing a receiver or directing the receiver's conduct. For example, under
26 subsection (b), the court could enter an order authorizing a foreign receiver to repossess personal
27 property collateral in this state (rather than requiring the petitioning receiver to incur the cost of
28 having to obtain the appointment of an ancillary receiver in this state).

29
30 3. Subsection (c) provides that an ancillary receiver's powers and duties are determined by
31 this Act.

32
33 **SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE.**

34 [(a)] A request by a mortgagee for appointment of a receiver, appointment of a receiver
35 by the court, or application by the mortgagee of receivership property or proceeds to the secured
36 obligation does not:

- 37 (1) make the mortgagee a mortgagee in possession of the real property;
38 (2) make the mortgagee an agent of the owner;
39 (3) constitute an election of remedies that precludes a later action to enforce the

1 secured obligation;
2 (4) make the secured obligation unenforceable; [or]
3 (5) limit any right available to the mortgagee with respect to the secured
4 obligation[;]; or]
5 [(6) constitute an action within the meaning of [cite the “one-action” statute of
6 this state][; or]]
7 [(7) except as provided in subsection (b), bar a deficiency judgment pursuant to
8 law of this state other than this [act] governing or relating to deficiency judgments following the
9 enforcement of a lien].

10 [(b) If a receiver transfers receivership property free and clear of a lien pursuant to
11 Section 16(b), law of this state other than this [act] governing or relating to a deficiency
12 judgment after the enforcement of a lien applies to the holder of the extinguished lien.]

13 *Legislative Note: A state whose law does not prohibit or otherwise limit the ability of a*
14 *lienholder to obtain a deficiency judgment following the enforcement of a lien should enact this*
15 *Section without subsection (b) and without subsection (a)(7). A state that does not have a “one*
16 *action” statute should omit subsection (a)(6).*

17
18

Reporter’s Note

19 1. Section 25 is an adaptation of Section 11 of the Uniform Assignment of Rents Act
20 (UARA), which provides that certain actions taken by an assignee of rents to enforce its security
21 interest in rents (such as direct collection of rents after notification to tenants or through
22 appointment of a receiver) does not itself make the assignee a “mortgagee in possession,”
23 constitute an election of remedies, waive other security held by the assignee, violate a state’s
24 “one-action” rule, or constitute a foreclosure sale for purposes of triggering a state’s anti-
25 deficiency rule. Section 25 assures that this Act does not conflict with UARA by making clear
26 that the decision of a mortgagee or an assignee of rents to pursue its right to a receiver under the
27 Act should not trigger a state’s one-action rule or bar the mortgagee or assignee of rents from an
28 action to enforce the debt. Section 25 is consistent with Cal. Code Civ. Proc. § 564(d), which
29 provides that “Any action by a secured lender to appoint a receiver pursuant to this section shall
30 not constitute an action within the meaning of subdivision (a) of section 726.”

31
32
33

2. Subsection (b) is appropriate in states that have enacted legislation prohibiting an action
for a deficiency judgment following the foreclosure of some or all liens. Under Section 16(b), a

1 sale of receivership property by the receiver could, in some circumstances, have the effect of
2 extinguishing one or more liens on the property. Such a receivership sale is not a foreclosure
3 sale under this Act, but could have an effect similar to the title-clearing effect of a foreclosure
4 sale. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) (“A sale by the receiver
5 free from liens is for most practical purposes equivalent to a foreclosure sale . . .”). In those
6 situations, the obligor should be protected by a state’s prohibition on deficiency judgments to the
7 same extent as would have been the case following a foreclosure sale, and subsection (b)
8 accomplishes this result.

9
10 Subsection (b) would also be appropriate in states that place a “fair value” limit on the
11 ability of a foreclosing creditor to obtain a deficiency judgment following a foreclosure sale. In
12 such states, the foreclosing creditor’s deficiency judgment is calculated by reference to the
13 difference between the outstanding balance of the debt and the appraised “fair market value” of
14 the property (rather than the difference between the outstanding balance of the debt and the
15 foreclosure sale price). If a receiver sells receivership property free and clear of a lien under
16 Section 16(b), subsection (b) of this Section would provide the obligor with the benefit of the
17 state’s “fair value” rule in a subsequent action on the debt by the holder of the extinguished lien.
18

19 **SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
20 applying and construing this uniform act, consideration must be given to the need to promote
21 uniformity of the law with respect to its subject matter among states that enact it.

22 **SECTION 27. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
23 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
24 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
25 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
26 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
27 Section 7003(b).

28 **SECTION 28. SAVINGS PROVISION.** This [act] does not apply to a receivership for
29 which the receiver was appointed before [the effective date of this
30 [act]].

31 **SECTION 29. REPEALS.** This [act] repeals

32 **SECTION 30. EFFECTIVE DATE.** This [act] takes effect on