

## MEMORANDUM

TO: Appointment and Powers of Real Estate Receivers Drafting Committee, Advisors and Observers

CC: Michael Houghton, Harriett Lansing, Richard Cassidy, and John Sebert

FROM: Thomas S. Hemmendinger and R. Wilson Freyermuth

DATE: October 29, 2012

RE: Summary of First Meeting of the APRER Drafting Committee

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The Drafting Committee on a Model Act on the Appointment and Powers of Real Estate Receivers held its first meeting by conference call on October 24, 2012. Those attending included Committee members Thomas Hemmendinger (Chairperson), John Burton, Stephen Cawood, Ellen Dyke, Thomas Edmonds, Pat Fry, Donald Mielke, Fred Miller, Mark Sandlin, Gay Taylor-Jones, and Pamela Bertani (Division Chair); Reporter R. Wilson Freyermuth; ABA Section Advisors Jeffrey Allen, Cheryl Kelly, James Schwartz, and Justin Williams; Observers Gordon Dunfee, Scott Sackett, Samuel Levine, and Grant Nelson; and Executive Director John Sebert and Staff Liaison Ben Orzeske. Commissioner Rosemary Sackett, ABA Advisor John Trott, ABA Section Advisor Kay Kress, and Observer Nancy Hotchkiss could not attend.

After introductions, the meeting went as follows:

- 1) John Sebert described the ULC processes and the roles of ABA Advisors and Observers.
  - a) The plan is to have our first in-person meeting on April 19 and 20, 2013, with probably two further meetings before the 2014 ULC annual meeting. The first reading of the draft Act will probably be done at that annual meeting, with the second (final) reading at the 2015 ULC annual meeting.
  - b) The ABA Advisors should provide their individual expertise and communicate with the ABA on the Committee's actions and decisions, and provide timely comments from leadership as this process goes forward.
  - c) The Committee also looks to the Observers for similar help in this process, including liaison work with the leadership of organizations they may represent. Observers who are not representing organizations also provide valuable help to the Committee.
- 2) We reviewed the charge from the ULC Executive Committee to the Drafting Committee:

- a) “RESOLVED, that . . . a drafting committee on a Model Act on the Appointment and Powers of Real Estate Receivers be formed, and that the act not cover receivers appointed with respect to owner-occupied residences.”
  - b) We discussed the fact that the ULC has designated this as a Model Act, rather than a Uniform Act, because the arguments for uniformity appear more limited for this type of Act. Nevertheless, the ULC Legislative Council will energetically promote this Act, and we should aim to produce an Act that is widely enactable, regardless of its designation.
- 3) We discussed a number of substantive issues, including issues on which the Committee would like further information:
- a) The inclusion of tangible and intangible personal property related to the real estate. The consensus was that it is essential that a receiver be able to administer all such assets.
  - b) The role of equity as a supplement to the statutory provisions. The working consensus was that this Act should not be a receivership code, but rather a straightforward act that clarifies various points, supplemented by equitable principles. The group felt this was particularly true regarding the grounds for appointment of receivers, and that the Act should probably not be the exclusive means of obtaining appointment of a real estate receiver.
  - c) The scope limitation regarding owner-occupied residences. Identifying the appropriate bounds of the scope limitation contained in the Executive Committee’s charge will not be simple, and further discussion on this will be necessary before the Committee can give the Reporter specific directions.
  - d) Who has standing to seek appointment of a receiver. The sense of the group was that we should start with a fairly discrete list of parties who have interests in the real property, such as mortgagees, mechanics lien claimants, judgment creditors, and possibly tenants and the property owner. The degree to which this list would expand will be left for further discussion.
  - e) Whether one can obtain the appointment of a receiver as a matter of right, or whether it is left to the court’s discretion. Concerns were expressed that if the Act departs from current practice in most states (where the court has discretion), then enactment may be jeopardized.
  - f) The receiver’s power to sell real estate. This may be the most controversial issue in this project. The consensus was that we should include sale provisions in the draft Act, but consider whether those provisions should be presented as optional, as alternatives, or with a legislative note. Some states with judicial foreclosure laws may see a receiver’s power to sell as an unacceptable alternative to foreclosure. Other states, however, already permit receivers’ sales and would not likely oppose a statutory power to sell.

- g) The receiver's power to borrow and to encumber the property. Concerns were expressed that the Act should provide protections for owners. One suggestion was to require court approval for borrowing and encumbering the property, as well as for certain other actions (including sale of property).
  - h) The role of the receiver as an instrumentality of the secured creditor or of the court. The consensus was that the receiver should be the latter.
- 4) On these and other issues, participants expressed a strong desire for the type of background information on the states that a survey could provide.
- a) It was noted that the Study Committee had considered this and had started work on a questionnaire to circulate to practitioners in the states.
  - b) Cheryl Kelly reported that ACREL had started a survey process but had not gone forward with it. The draft survey was intended to collect the type of information that this Committee could use, but ACREL abandoned the project after deciding that the TriGild receivership manual and the Baxter Dunaway treatise covered these matters sufficiently. Cheryl Kelly indicated that she would gather the materials on this and report back to the Chair with a copy of the ACREL draft survey.
  - c) The Chair and the Reporter will review those materials and the Study Committee's draft, and circulate a proposal to the group. The Committee can then have a conference call on whether a survey is worthwhile, and if so what form it should take and how we should get answers.
- 5) Throughout the discussion, the group was highly sensitive to enactability concerns.
- 6) We also discussed what additional Observers to recruit. We already have Observers from ALTA, ACREL, ACFA, ACMA, and the California Receivers Forum. Representatives from the trial courts, business courts, and property managers were mentioned, and the Chair asked everyone to submit further suggestions.
- 7) Next steps:
- a) Review the survey materials and decide whether and how to conduct a survey (within the next few weeks). The Chair and the Reporter will report back after reviewing the materials from Cheryl Kelly.
  - b) If we do the survey, evaluate the results in early 2013 by conference call, and provide the Reporter with guidance on preparing materials for our first in-person meeting next April.