

DRAFT
FOR DISCUSSION ONLY

MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

For September 27 – 28, 2013 Drafting Committee Meeting

Copyright ©2013
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

August 21, 2013

MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

THOMAS S. HEMMENDINGER, 362 Broadway, Providence, RI 02909-1434, *Chair*
JACK P. BURTON, 119 E. Marcy St., Suite 200, Santa Fe, NM 87501-2046
STEPHEN C. CAWOOD, 108 Kentucky Ave., P.O. Drawer 128, Pineville, KY 40977-0128
ELLEN F. DYKE, 2125 Cabots Point Ln., Reston, VA 20191
THOMAS A. EDMONDS, 9401 Michelle Pl., Richmond, VA 23229
PATRICIA FRY, P.O. Box 3880, Edgewood, NM 87015-3880
DONALD E. MIELKE, 6534 S. Chase St., Littleton, CO 80123
FRED H. MILLER, 80 S. 8th St., 500 IDS Center, Minneapolis, MN 55402-3796
ROSEMARY S. SACKETT, 5401 Lake Shore Dr., Box 949, Okoboji, IA 51355-2599
MARK SANDLIN, 9301 Dayflower St., Prospect, KY 40059
M. GAY TAYLOR-JONES, 18 N. Foxhill Rd., North Salt Lake, UT 84054
R. WILSON FREYERMUTH, University of Missouri-Columbia School of Law, 215 Hulston Hall, Columbia, MO 65211, *Reporter*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-3017, *President*
LANE SHETTERLY, 189 SW Academy St., P.O. Box 105, Dallas, OR 97338, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

JOHN M. TROTT, 2049 Century Park E., 28th Floor, Los Angeles, CA 90067-3284, *ABA Advisor*
JEFFREY M. ALLEN, 436 14th St., Suite 1400, Oakland, CA 94612-2716, *ABA Section Advisor*
JAMES L. SCHWARTZ, 218 N. Jefferson St., Suite 300, Chicago, IL 60661-1307, *ABA Section Advisor*
KAY STANDRIDGE KRESS, 4000 Town Center, Suite 1800, Southfield, MI 48075-1505, *ABA Section Advisor*
JUSTIN G. WILLIAMS, P.O. Box 3206, Tuscaloosa, AL 35403-3206, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS

TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE.....	4
SECTION 2. DEFINITIONS.....	4
SECTION 3. SCOPE; EXCEPTIONS AND EXCLUSIONS.....	10
SECTION 4. POWERS OF THE COURT.....	12
SECTION 5. STANDING TO SEEK APPOINTMENT OF RECEIVER; APPOINTMENT; CASES WHERE APPOINTMENT IS AUTHORIZED OR REQUIRED.....	12
SECTION 6. EX PARTE APPOINTMENT.....	16
SECTION 7. PERSONS INELIGIBLE FOR APPOINTMENT.....	17
SECTION 8. RECEIVER’S BOND.....	18
SECTION 9. RECEIVER’S STATUS AS LIEN CREDITOR.....	20
SECTION 10. SECURITY INTERESTS ON AFTER-ACQUIRED PROPERTY.....	20
SECTION 11. TURNOVER OF RECEIVERSHIP PROPERTY.....	21
SECTION 12. POWERS AND DUTIES OF RECEIVER.....	21
SECTION 13. DUTIES OF RESPONDENT.....	24
SECTION 14. AUTOMATIC STAY.....	25
SECTION 15. EMPLOYMENT AND COMPENSATION OF PROFESSIONALS.....	27
SECTION 16. TRANSFER OF RECEIVERSHIP PROPERTY OTHER THAN IN ORDINARY COURSE OF BUSINESS.....	28
SECTION 17. EXECUTORY CONTRACTS.....	31
SECTION 18. UTILITY SERVICE.....	33
SECTION 19. IMMUNITY OF RECEIVER.....	33
SECTION 20. INTERIM REPORTS OF RECEIVER.....	34
SECTION 21. CLAIMS AGAINST RECEIVERSHIP.....	35
SECTION 22. REMOVAL OR RESIGNATION OF RECEIVER.....	37
SECTION 23. FINAL REPORT AND TERMINATION OF RECEIVERSHIP.....	37
SECTION 24. ANCILLARY RECEIVERSHIPS.....	39
SECTION 25. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	40
SECTION 26. EFFECTIVE DATE.....	40

1 **Prefatory Note**

2 Receivership is a fundamental equitable remedy sometimes used by one or more creditors
3 of an insolvent or financially distressed debtor. Receivership is also sought as a useful remedy in
4 a variety of other situations, such as collection of judgments, entity dissolutions, and shareholder
5 disputes. If a receiver is appointed, that receiver takes possession of the property described in
6 the court’s order of appointment and preserves and manages that property pending the
7 administration of the receivership.

8
9 Receivership is often sought by a mortgage lender which is seeking to enforce a mortgage
10 that is in default. Typically, a commercial real estate mortgage or deed of trust explicitly
11 provides that upon default, the mortgagee may seek the appointment of a receiver from a court
12 with jurisdiction over the mortgaged premises; frequently, the mortgage or deed of trust purports
13 to provide mortgagor consent for such appointment. Traditionally, mortgage lenders have sought
14 the appointment of a receiver pending foreclosure for one or more of several basic reasons:
15

16 • The mortgaged property is located in a state where the foreclosure process takes a
17 substantial period of time (e.g., six months or longer) and during such period, the mortgaged
18 premises will generate rents that have been assigned to the mortgagee as security for the loan and
19 could be applied to reduce the mortgage debt. Obtaining the appointment of a receiver allows the
20 mortgagee to prevent the mortgagor from diverting rents to other creditors or insiders of the
21 mortgagor pending a foreclosure sale.

22
23 • The property is subject to waste, deterioration, or some other immediate physical
24 harm that threatens to reduce the value of the mortgaged property and thus threatens the
25 mortgagee’s security.

26
27 • The property may have environmental contamination, and the mortgagee does not
28 want to be in the chain of title or rely solely on statutory “secured creditor exemptions” from
29 environmental laws.

30
31 • The project includes personal property (movables and/or intangible property), and
32 the mortgagee wants to foreclose judicially to avoid claims that it failed to liquidate its collateral
33 in a commercially reasonable manner.

34
35 Unfortunately, few states have comprehensive statutory guidance regarding the
36 appointment and powers of receivers for real estate. In most states, receivers are appointed
37 pursuant to a court’s general equitable power to appoint a receiver; only a few states provide
38 statutes that address the appointment and powers of real estate receivers in any detail. Although
39 the Uniform Assignment of Rents Act (promulgated in 2005) explicitly addresses the evidentiary
40 showing necessary to obtain the appointment of a receiver, UARA’s focus is limited to
41 appointment at the request of an assignee of rents. Further, UARA has obtained relatively
42 narrow enactment; thus, there remains significant state to state variation regarding the standards
43 for appointment of a receiver. Further, nothing in UARA explicitly addresses the scope of the
44 powers that a receiver of real estate may exercise prior to foreclosure. This Act seeks to provide
45 a more comprehensive set of statutory guidelines with respect to the standards for the

1 appointment of a receiver and the powers that a receiver may (or may not) exercise without prior
2 approval of the appointing court.

3
4 One source of uncertainty in recent case law concerns whether a receiver has the power
5 to sell real estate. Customarily, a receiver's ability to sell receivership property varied depending
6 upon the circumstances of the receivership. When a court appointed a general receiver for all of
7 the assets of an insolvent debtor, the court would commonly authorize the receiver to gather and
8 sell the assets of the debtor (in the same manner that a bankruptcy trustee might gather and
9 liquidate the debtor's nonexempt assets in a Chapter 7 bankruptcy case). By contrast, when a
10 court appointed a limited receiver to take possession of a specific asset — such as a receiver for
11 mortgaged property pending foreclosure sale — the receiver's role was typically viewed as
12 custodial. For this reason, receivers appointed in conjunction with foreclosure proceedings were
13 often viewed as having the power to operate, maintain, and preserve the property pending the
14 foreclosure sale, but not to sell the property in lieu of foreclosure.

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. 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 issuance of
23 mortgage-backed securities. The Internal Revenue Code forbids REMICs from issuing
24 new debt or making new loans, but do permit 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 subject to judicial review and confirmation could

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

6 Unfortunately, most existing state statutes do not specifically authorize a receiver to conduct a
7 sale of real property; further, courts have not consistently held that receivers have inherent
8 equitable authority to conduct such sales. This Act seeks to provide more explicit rules
9 addressing the extent to which a receiver can sell receivership property, either subject to or free
10 and clear of existing liens.

1 **MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Model Act on
3 Appointment and Powers of Real Estate Receivers.

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

5 (1) “After notice and a hearing” means after such notice as is appropriate in the
6 particular circumstances, and such opportunity for a hearing as is appropriate in the particular
7 circumstances.

8 (2) “Assignee of rents” means a person entitled to enforce an assignment of rents.

9 (3) “Assignment of rents” means a transfer of an interest in rents in connection with an
10 obligation secured by real property located in this state and from which the rents arise.

11 (4) “Assignor of rents” means a person who executes an assignment of rents or any
12 successor owner of the real property described in the assignment.

13 (5) “Document” means information that is inscribed on a tangible medium or that is
14 stored on an electronic or other medium and is retrievable in perceivable form.

15 (6) “Executory contract” means a contract, including a lease, where the obligations of
16 both the respondent and the other contracting party are not fully performed and the failure of
17 either party to complete performance of its obligations would constitute a material breach.

18 (7) “Good faith” means honesty in fact and the observance of reasonable commercial
19 standards of fair dealing.

20 (8) “Lien” means an interest in property to secure payment or performance of an
21 obligation. The term includes a security interest.

22 (9) “Mortgage” means a document, however denominated, that creates or provides for a
23 security interest in real property, whether or not it also creates or provides for a security interest

1 in personal property.

2 (10) “Mortgagee” means a person that holds a mortgage.

3 (11) “Mortgagor” means a person that grants a mortgage or any successor owner of the
4 real property described in the mortgage.

5 (12) “Person” means an individual, estate, business or nonprofit entity, public
6 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
7 entity.

8 (13) “Property” means all of respondent’s right, title, and interest, both legal and
9 equitable, in real and personal property, regardless of the manner by which any of the same were
10 or are acquired. The term includes any proceeds, products, offspring, rents, or profits of or from
11 the original property. The term does not include: (a) a power that the respondent may exercise
12 solely for the benefit of another person, or (b) property impressed with a trust except to the
13 extent that the respondent has a residual interest.

14 (14) “Receiver” means a person appointed by the court as the court’s agent, and subject
15 to the court’s direction, to take possession of, manage, and, if authorized by this [act] or order of
16 the court, dispose of receivership property.

17 (15) “Receivership” means a proceeding in which a receiver is appointed.

18 (16) “Receivership property” means the property of the respondent [over which a
19 receiver is appointed] [described in the order appointing the receiver, or in any subsequent
20 order].

21 (17) “Residential real property” means real property improved with not more than four
22 dwelling units, including structures ancillary to a unit. The term includes an attached single-
23 family unit, [a single-family manufactured-housing unit treated as real property under [insert

1 reference to applicable state statute],] real property on which construction of not more than four
2 dwelling units has commenced, and a single-family unit in a common-interest community.

3 (18) “Respondent” means the person over whose property a receiver is appointed.

4 (19) “Secured obligation” means an obligation the payment or performance of which is
5 secured by a mortgage, an assignment of rents, or both.

6 (20) “Security interest” means an interest in property that arises by agreement and
7 secures payment or performance of an obligation.

8 (21) “Sign” means, with present intent to authenticate or adopt a document:

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

10 (B) to attach to or logically associate with the document an electronic
11 sound, symbol, or process.

12 (22) “State” means a state of the United States, the District of Columbia, Puerto Rico,
13 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction
14 of the United States.

15 (23) “State agency” means any office, department, division, bureau, board, commission,
16 or other agency of this state or any subdivision thereof, or any individual acting in an official
17 capacity on behalf of any state agency.

18 **Reporter’s Notes**

19 1. “After notice and a hearing.” The Act uses a definition similar to that found in the
20 Bankruptcy Code, 11 U.S.C. § 102(1). For actions requiring court approval or judicial
21 determination after notice and a hearing, the Act would not require a specified period of pre-
22 hearing notice, but would give the court discretion to require such notice as the court concludes
23 is necessary under the circumstances in light of the required approval or determination. The
24 Committee might consider whether it is appropriate to define this term by reference to
25 compliance with established court rules (or to use compliance with established court rules as an
26 alternative).

27
28 References: § 15(a); § 16(a), Alternatives B-E; § 19(b); § 21(c); § 22(c); § 23(a); § 23(c).

1 2. “Assignee of rents.” The Act uses the same definition as found in the Uniform
2 Assignment of Rents Act.

3
4 References: § 5(a)(3); § 5(d)(4); § 5(d)(5).

5
6 3. “Assignment of rents.” The Act uses the same definition as found in the Uniform
7 Assignment of Rents Act.

8
9 References: § 3(c); § 5(b); § 5(d); § 6(c); § 14(d); § 16(a), Alt. D; § 17(f).

10
11 4. “Assignor of rents.” This definition is used in Section 5(d), which provides that the court
12 must appoint a receiver whether the mortgage or assignment of rents contains the agreement of
13 the mortgagor/assignor to the appointment of a receiver after default.

14
15 The draft currently includes the terms “assignee of rents,” “assignment of rents,” and
16 “assignor of rents” because several of these terms are used in the Uniform Assignment of Rents
17 Act (which has provisions governing the appointment of a receiver) and the Committee should
18 be sensitive to ensure the consistency of this Act with UARA. Nevertheless, because the
19 definition of the term “mortgage” as used in this draft is broad enough to encompass an
20 assignment of rents, the Committee may wish to consider deleting the use of these terms and
21 using only the terms “mortgagor,” “mortgagee,” and “mortgage,” with the inclusion of
22 appropriate comments to reinforce that the breadth of the term would encompass an assignment
23 of rents. If the Committee so chooses, conforming amendments will be needed in Sections 3, 5,
24 6, 14, 16, and 17.

25
26 5. “Document.” The Act uses a media-neutral form that would encompass both paper and
27 electronic documents. This draft uses the term “document” rather than “record” to avoid
28 potential confusion due to the customary use of the term “record” in real estate practice.

29
30 References: § 5(d); § 12(a)(6); § 13(a)(2).

31
32 6. “Executory contract.” The Act defines the term to include an unexpired lease. The
33 definition is similar to the one contained in the Minnesota receivership statute, Minn. Stat. Ann.
34 § 576.21(d), but with a slight modification to more precisely track the traditional “Countryman”
35 formulation of the term.

36
37 References: § 12(b)(3); § 17.

38
39 7. “Good faith.” The Act uses the Uniform Commercial Code definition of good faith,
40 including both subjective and objective elements. The Committee may wish to discuss whether
41 the Act should use the UCC definition or instead leave the term undefined and thus subject to
42 judicial development.

43
44 Reference: § 16(d).

45
46 8. “Lien.” The Act defines “lien” to include any voluntary and involuntary interest in

1 property securing an obligation.

2
3 References: § 9; § 10; § 14(a); § 16(a), Alt. B-E; § 16(b); § 16(c); § 21(a); § 21(d).

4
5 9. “Mortgage.” The Act defines “mortgage” to mean any document, however denominated,
6 that creates a security interest in real property. The term would include a deed of trust or deed to
7 secure debt, and would include an installment land contract in states that treat installment land
8 contracts as creating a security interest.

9
10 References: § 3(c); § 5(a)(3); § 5(b)(4); § 5(d); § 6(c); § 14(d); § 16(a), Alt. D; § 17(f).

11
12 10. “Mortgagee.” The Act defines the term to include anyone holding a mortgage.

13
14 References: § 5(a); § 5(d); § 17(g).

15
16 11. “Mortgagor.” The Act defines “mortgagor” to mean the person granting a mortgage and
17 any successor owner of the mortgaged real property. The term appears in Section 5(d), which
18 provides that the court must appoint a receiver where the mortgagor or assignor of rents agreed
19 in writing to the appointment of a receiver after default. As discussed above, because the
20 definition of the term “mortgage” as used in this draft is broad enough to encompass an
21 assignment of rents, the Committee may wish to consider deleting the use of these terms and
22 using only the terms “mortgagor,” “mortgagee,” and “mortgage,” with the inclusion of
23 appropriate comments to reinforce that the breadth of the term. If the Committee so chooses,
24 conforming amendments will be needed in Sections 3, 5, 6, 14, 16, and 17.

25
26 12. “Person.” The Act uses the ULC-required definition for the term.

27
28 13. “Property.” The Act defines the term broadly to include all legally-recognized interests,
29 but explicitly carves out any property over which the respondent merely holds a power capable
30 of being exercised in favor of third parties or trust property in which the respondent holds no
31 beneficial interest. The definition is comparable to the definition of the term in Minnesota’s
32 receivership statute, Minn. Stat. Ann. § 576.21(o).

33
34 14. “Receiver.” The definition derives from the one contained in Minn. Stat. Ann. §
35 576.21(p).

36
37 15. “Receivership.” The definition derives from the one contained in Minn. Stat. Ann. §
38 576.21(q).

39 16. “Receivership property.” The draft provides alternative bracketed formulations of the
40 term. The latter is adapted from the Minnesota statute, Minn. Stat. Ann. § 576.21(r), which
41 defines the term by reference to the property identified in the order of appointment or a
42 subsequent court order. The former is more general and a substantial adaptation of the
43 Washington statute’s definition of “estate.” Wash. Rev. Code Ann. § 7.60.005(3). The
44 Committee should consider which alternative is preferable.

45
46 References: § 4; § 8(a); § 8(b); § 9; § 11; § 12(a); § 12(b); § 12(c); § 13(a); § 14(a); §

1 16(a), Alt. A-E; § 16(c); § 16(d); § 18; § 19(b); § 20(a); § 21(a); § 21(d); § 22(c); § 23(a); §
2 24(a).

3
4 17. “Residential real property.” The draft uses the definition of “residential property”
5 reflected in the current draft of the proposed Home Foreclosure Procedures Act. The language
6 regarding manufactured-housing units has been bracketed as arguably unnecessary in this Act
7 (given that a receivership is unlikely in cases involving manufactured-housing units);
8 comparable language might well be placed in a comment instead. The term is primarily used in
9 Section 3(b)’s scope exclusion, to reflect the intent of the Committee (as expressed in April
10 2013) that the Act generally should not apply to single-family units.

11
12 18. “Respondent.” The definition derives from the one contained in Minn. Stat. Ann. §
13 576.21(s). The Act uses the term to describe the person over whose property the receiver is
14 appointed. While Model and Uniform Acts typically do not use defined terms that identify
15 persons using procedural labels, the term “respondent” is so commonly used in receivership
16 practice that its familiarity may facilitate enactability and thus its use here seems appropriate. By
17 contrast, the Washington receivership statute does not use the term “respondent” at all, but this
18 choice resulted in more cumbersome verbiage in some of the substantive sections of that statute.
19 See, e.g., Wash. Rev. Code Ann. § 7.60.080 (discussing the duties of the “person over whose
20 property the receiver is appointed”).

21
22 References: § 3(b); § 3(c); § 5(a); § 5(b); § 5(d); § 10; § 12(b); § 13(a); § 13(b); § 14(a);
23 § 14(b); § 14(d); § 17(a); § 17(b); § 17(f); § 22(a).

24
25 19. “Secured obligation.” The Act uses this term (commonly used in other real estate-related
26 acts, see, e.g., Uniform Assignment of Rents Act § 2(13); Uniform Residential Mortgage
27 Satisfaction Act § 102(15)) rather than “mortgage debt.” The current draft of the proposed
28 Home Foreclosure Procedures Act instead merely uses the term “obligation.”

29
30 References: § 5(d).

31
32 20. “Security interest.” The Act uses the term to include any lien arising by agreement.

33
34 References: § 16(b); § 21(a).

35
36 21. “Sign.” The Act uses the media-neutral version of the term commonly used in other
37 recent Model and Uniform Acts.

38
39 References: § 5(d)(2); § 21(b).

40
41 22. “State.” The Act uses the boilerplate ULC definition of the term.

42
43 23. “State agency.” See Minn. Stat. Ann. § 576.21(t).

44
45 References: § 3(d); § 5(a).

1 **SECTION 3. SCOPE; EXCEPTIONS AND EXCLUSIONS.**

2 (a) **[Scope.]** Except as otherwise provided in section, this [act] governs a receivership
3 for real property located in this state and for personal property that is related to the real property
4 or used in its operation.

5 (b) **[Exclusion for Residential Real Property.]** Except as otherwise provided in
6 subsection (c), this [act] does not apply to a receivership for an interest in residential real
7 property that is occupied by the respondent as the respondent's primary residence.

8 (c) **[Applicability to Mixed Real Property.]** If a person seeks appointment of a
9 receiver pursuant to the foreclosure of a mortgage or the enforcement of an assignment of rents,
10 and a portion of the property for which a receiver is sought is occupied by the respondent as the
11 respondent's primary residence, the court may appoint a receiver under this [act] only for the
12 portion of the property that is not occupied by the respondent as the respondent's primary
13 residence, and such a receiver may not recover imputed rent from the respondent for the portion
14 of the property occupied as the respondent's primary residence [unless the mortgage or
15 assignment of rents provides otherwise].

16 (d) **[State agency as receiver.]** This [act] does not apply to a receivership in which the
17 receiver is a state agency or in which the receiver is appointed, controlled, or regulated by a state
18 agency unless otherwise provided by law.

19 (e) **[Receiverships under other law.]** Nothing in this [act] limits the authority of a
20 court to appoint a receiver under law other than this [act].

21 (f) **[Applicability of supplemental principles.]** Unless displaced by particular
22 provisions of this [act], the provisions of other statutory law and the principles of law and equity
23 supplement its provisions.

1 **Reporter’s Notes**

2 1. This scope provision is intended to reflect what appeared to be the general consensus of
3 Committee discussion at the April 2013 meeting. Subsection (a) reflects the current committee
4 charge from the Executive Committee, which is to address the appointment and powers of real
5 estate receivers. Thus, subsection (a) provides that except to the extent Section 3 otherwise
6 limits, the Act will govern receivership of real property and associated personal property.
7

8 Many of the provisions of the draft may well be appropriate for use as rules to govern a
9 receivership where the receiver was not taking possession and control of real property (e.g.,
10 purely an operating business on leased land). The Committee may wish to consider whether it is
11 prudent or desirable to seek guidance or approval from the Executive Committee with respect to
12 making the act a generic “receivership” act rather than one limited to receivership of real estate
13 and related personal property.
14

15 2. Subsection (b) provides the Act’s primary scope exclusion — this Act may not be used to
16 appoint a receiver for residential real property occupied by its owner as the respondent’s
17 principal residence, although subsection (e) does provide that the Act does not prohibit
18 appointment of a receiver under other law.
19

20 The Committee may wish to give further consideration to whether this Act should be the
21 exclusive means for appointing a receiver for real estate, or whether it should merely provide an
22 alternative approach. Further, if the Act is to provide that a court may appoint a receiver for real
23 estate under law other than this Act, the Committee may also wish to discuss whether the Act
24 should contain a provision allowing courts to apply provisions of this statute.
25

26 3. Subsection (c) reflects an attempt to address “split” property, where a portion of the
27 property is occupied as the respondent’s principal residence and another portion is used for
28 income-producing activity (generating rent or operation of a business). As the section is
29 currently drafted, it provides that if the entire property is covered by a mortgage or assignment of
30 rents, and the receiver is being sought ancillary to a foreclosure proceeding or the enforcement of
31 an assignment of rents, then the court can appoint a receiver under this Act to take possession of
32 the property, but only such portion of the property as is not being occupied by the respondent as
33 its residence. It further provides that the receiver cannot charge the respondent rent for the
34 portion of the property occupied as the respondent’s primary residence, unless the mortgage or
35 assignment of rents provides to the contrary (reflected as bracketed language).

36 An alternative approach for subsection (c) could involve allowing the court to appoint a
37 receiver over the entire property, but subject to specific protections for the respondent-occupier
38 (i.e., whether the occupier must pay rent, the occupier’s liability to the receiver to pay utilities,
39 etc.). The Committee may wish to consider whether such an alternative approach is desirable
40 (and, if so, whether the provisions regarding the occupier’s rights and duties should be located
41 elsewhere in the Act rather than in its scope provision).
42

43 4. Subsections (b) and (c) do not attempt to define “primary residence,” but would leave
44 definition of this term to judicial development.

1 5. Subsection (d) is intended to address the relationship of this Act to existing statutory
2 regimes for the appointment of receivers for certain entities. See, e.g., N.H. Rev. Stat. § 401-
3 B:11 (authorizing receivership of insurance company). The provisions of this Act would not
4 apply to appointment of a receiver under an existing statutory regime, except to the extent that
5 statute or other law so provides.
6

7 **SECTION 4. POWERS OF THE COURT.** The court has the exclusive authority to
8 direct the receiver and the authority over all receivership property wherever located including
9 authority to determine all controversies relating to the collection, preservation, improvement,
10 disposition, and distribution of receivership property, and all matters otherwise arising in or
11 relating to the receivership, the receivership property, the exercise of the receiver’s powers, or
12 the performance of the receiver’s duties.

13 **Reporter’s Notes**

14 1. Section 4 provides a brief synopsis of the court’s powers in the context of a receivership,
15 and is adapted from Minnesota’s receivership statute, Minn. Stat. Ann. § 576.23. See also Wash.
16 Rev. Code Ann. § 7.60.055(1).
17

18 **SECTION 5. STANDING TO SEEK APPOINTMENT OF RECEIVER;**
19 **APPOINTMENT; CASES WHERE APPOINTMENT IS AUTHORIZED OR**
20 **REQUIRED.**

21 (a) **[Standing to seek appointment.]** The following persons may seek the appointment
22 of a receiver under this [act]:

23 (1) the respondent;

24 (2) a creditor of the respondent;

25 (3) any person holding an ownership interest in or lien on property for which a
26 receivership is sought[, including a mortgagee, assignee of rents, creditor holding a lien,
27 cotenant, or tenant];

28 (4) where the respondent is not an individual, a person holding an ownership

1 interest in the respondent;

2 (5) a person who is a party to a pending action involving the respondent [or the
3 property for which a receivership is being sought]; and

4 (6) a state agency, to the extent authorized by law other than this [act].

5 (b) **[Cases in which a receiver may be appointed.]** A receiver may be appointed by the
6 court under this [act]:

7 (1) before judgment, to protect any party to an action who demonstrates an
8 apparent right to property that is the subject of the action and is in the possession of an adverse
9 party, and that the property or its revenue-producing potential is being subjected to waste or is in
10 danger of loss or material impairment;

11 (2) in a judgment or after judgment to carry the judgment into effect, to preserve
12 property pending an appeal, or when an execution has been returned unsatisfied and the
13 respondent refuses to apply the property in satisfaction of the judgment;

14 (3) in an action against any person who is not an individual if the object of the
15 action is the dissolution of that person, or if that person has been dissolved, or if that person is
16 insolvent or is not generally paying the person's debts as those debts become due [unless they are
17 the subject of bona fide dispute], or if that person is in imminent danger of insolvency;

18 (4) in a proceeding to foreclose a mortgage or enforce an assignment of rents;
19 [and]

20 (5) in other cases as may be provided by law or in which receivers have been
21 appointed by the usages of courts of equity[.][; and]

22 [(6) to preserve, during the time allowed for redemption, any real property sold in
23 an execution or foreclosure sale and to secure its rents to the person entitled to them.]

1 (c) **[Standard for appointment: general.]** Except as provided in subsection (d), or in
2 any case in which a receiver's appointment is expressly required by law other than this [act], a
3 receiver shall be appointed only if the court determines that the appointment is reasonably
4 necessary and that other remedies either are not available or are inadequate to protect the person
5 seeking the appointment.

6 (d) **[Standard for appointment: mortgage enforcement.]** In a proceeding to foreclose
7 a mortgage or enforce an assignment of rents, the court shall appoint a receiver if there is a
8 default under the mortgage or assignment of rents and:

9 (1) the mortgagor or assignor of rents agreed in a signed document to the
10 appointment of a receiver in the event of default;

11 (2) the respondent has otherwise agreed in a signed document to the appointment
12 of a receiver;

13 (3) it appears likely that the property for which the receivership is sought may not
14 be sufficient to satisfy the secured obligation;

15 (4) the respondent has failed to turn over to the mortgagee or assignee of rents
16 any rents that the mortgagee or assignee of rents was entitled to collect; or

17 (5) a subordinate assignee of rents or mortgagee obtains the appointment of a
18 receiver for the property.

19 **Reporter's Notes**

20 1. Subsection (a) identifies the persons who have standing to seek appointment of a receiver
21 under this act (subject to the obligation to demonstrate the necessary grounds for appointment
22 under subsections (c) or (d)).

23
24 As presently drafted, Section 5 addresses both standing (subsection (a)) as well as
25 grounds for appointment of a receiver (subsections (b) through (d)). The draft treats the issues
26 together in one section because to a significant extent, the issues of standing and grounds are
27 closely related. Nevertheless, the Committee may wish to discuss whether standing and grounds

1 should be addressed in separate sections.
2

3 Section 5(a)(3) recognizes standing for those claiming an ownership interest in or a lien
4 upon the property for which a receiver is being sought. The Committee may wish to discuss
5 whether this subsection needs a nonexclusive list of persons satisfying this standard, as reflected
6 in the bracketed language.
7

8 2. Subsection (b) describes the cases in which a court is authorized to appoint a receiver
9 pursuant to this act, and is based on a compilation of numerous existing receivership statutes.
10 Subsection (b)(6) would be appropriate in states that provide a post-sale statutory redemption
11 right, and would permit the court to appoint a receiver for the property and its rents during the
12 redemption period.
13

14 3. Subsection (c) derives from the Washington receivership statute, Wash. Rev. Code Ann.
15 § 7.60.025(1), and provides the default standard for appointment of a receiver. As drafted, it
16 requires the petitioner to demonstrate that appointment of a receiver is reasonably necessary to
17 protect the petitioner and that the petitioner's legal remedies are unavailable or inadequate. The
18 Committee may wish to discuss whether it considers this to be the appropriate default standard,
19 or whether to adopt a less stringent standard that would not require the petitioner to demonstrate
20 the inadequacy or unavailability of other remedies.
21

22 This default standard does not apply if provisions of other law specify a different
23 standard, or if the receiver is appointed under subsection (d) pursuant to a receivership clause in
24 a mortgage or assignment of rents.
25

26 4. Subsection (d) is based on the comparable provision of § 7 of the Uniform Assignment of
27 Rents Act. It provides that appointment of a receiver is mandatory where the receiver is sought
28 in a proceeding to foreclosure a mortgage or enforce an assignment of rents and where one of the
29 following conditions exists: (1) the loan documents contain a receivership clause; (2) the
30 respondent otherwise consents; (3) the property's value is not sufficient to satisfy the secured
31 obligation; (4) the respondent has failed to turn over rents that the creditor is entitled to collect;
32 or (4) a subordinate creditor has obtained the appointment of a receiver for the property.
33

34 In this draft, items (1)-(5) are phrased as alternatives (as in UARA); the committee may
35 wish to consider whether item (1) (the presence of a receivership clause) should be required in all
36 circumstances to trigger mandatory appointment.
37

38 In addition, as drafted, subsection (d) would leave the existence of "default" triggering
39 mandatory appointment to the terms of the governing loan documents. At the April 2013
40 meeting, there was discussion (but not consensus) regarding whether the Act should limit such a
41 mandatory appointment to cases involving either a "payment" default (i.e., nonpayment of
42 principal/interest, or other sums such as real estate taxes, insurance, etc.) or cases where the
43 default meets some "materiality" standard. The Committee may wish to give further
44 consideration to the appropriate standard for triggering mandatory appointment under subsection
45 (d).
46

47 Subsection (d), as drafted, does not draw a distinction between gross rents and net rents
48 (rents net of property operating expenses), because the UARA as drafted does not draw such a

1 distinction. Under the UARA, an assignor of rents is obligated to turn over all rents (i.e., gross
2 rents) collected by the assignor after the assignee has enforced its right to collect rents under
3 UARA, not merely net rents, and so the assignor’s failure to turn over gross rents would be a
4 trigger for the assignee’s right to have a receiver appointed. The Committee may wish to
5 discuss whether consistency between this Act and UARA is required and whether the appropriate
6 standard should focus upon net rents (recognizing that such an approach may necessitate a
7 potential amendment to UARA).

8
9 **SECTION 6. EX PARTE APPOINTMENT.**

10 (a) **[Standard for ex parte appointment; hearing.]** The court may appoint a receiver
11 ex parte where the person seeking the appointment establishes that an [emergency] [urgency]
12 exists requiring the immediate appointment. In that event, the court shall set a hearing [as soon
13 as practicable] [to be held within __ days following the appointment].

14 (b) **[Security for ex parte appointment.]** The court may condition the ex parte
15 appointment of a receiver upon the giving of security by the person seeking the appointment, in
16 such amount as the court may specify, for the payment of costs and damages incurred or suffered
17 by any person should it later be determined that the appointment was without sufficient cause. If
18 the court concludes, following the hearing specified in subsection (a), that appointment was
19 justified, the security shall be released.

20 (c) **[Effectiveness of agreement for ex parte appointment.]** In a proceeding to
21 foreclose a mortgage or enforce an assignment of rents, if the secured creditor is entitled to the
22 appointment of a receiver and seeks the appointment of a receiver ex parte, the court shall
23 appoint the receiver ex parte if the mortgagor or assignor of rents agreed in a signed document to
24 the appointment of a receiver on an ex parte basis.]

25 **Reporter’s Notes**

26 1. Subsection (a) derives from the Minnesota receivership statute, Minn. Stat. Ann. §
27 576.25, subd. (7), which permits ex parte appointment in “emergency” situations, leaving the
28 scope of that term to judicial development. The Committee may wish to discuss whether a
29 standard for ex parte appointment is necessary and, if so, whether the appropriate standard

1 should be general or specific in nature. Some states specify no standard. See, e.g., S.D. Codif.
2 Laws § 21-21-6 (no specific standard required for ex parte appointment). Others require a more
3 specific showing. See, e.g., N.M. Rev. Stat. § 44-8-5(C) (ex parte appointment only where “it
4 clearly appears from specific facts shown by affidavit or by the verified application that
5 immediate and irreparable injury, loss or damage will result to the applicant or others before the
6 adverse party's attorney can be heard in opposition”).

7
8 2. Subsection (b) authorizes the court to condition the ex parte appointment of a receiver
9 upon the giving of security by the petitioner. At present, the draft contemplates the possibility of
10 such security only where the receivership is sought ex parte. Some statutes, however, authorize
11 the court to require such security for any application for appointment of a receiver. See, e.g.,
12 Neb. Stat. Ann. § 25-1083; Wash. Rev. Code Ann. § 7.60.025(5). The Committee should discuss
13 whether to give the court discretion to require the applicant to post security in all cases, or only
14 in cases in which the applicant seeks appointment ex parte.

15
16 3. Subsection (c), which is bracketed, would mandate ex parte appointment in proceedings
17 to foreclose a mortgage or enforce an assignment of rents where the loan documents contain the
18 mortgagor’s consent to ex parte appointment. If the Committee wishes to retain subsection (c),
19 either generally or as bracketed language, further amendment to subsection (a) may be required
20 to accommodate the mandatory nature of appointment in this context (as contrasted with the
21 general standard required under subsection (a)).

22 23 **SECTION 7. PERSONS INELIGIBLE FOR APPOINTMENT.**

24 (a) [**Independence of receiver required.**] [Except by written consent of all parties,] a
25 court may not appoint a person as receiver unless that person is independent as to the parties and
26 the underlying dispute.

27 (b) [**Standards of independence.**] The proposed receiver is not independent if the
28 proposed receiver:

29 (1) is a party to the action, a family member of a party, or an officer, director,
30 member, employee, or controlling shareholder of a party;

31 (2) has an interest materially adverse to the interests of any party;

32 (3) has any material financial interest, other than any compensation allowed by
33 the court, in the outcome of the underlying dispute;

34 (4) has a debtor-creditor relationship with, or holds an equity interest [other than

1 a noncontrolling interest a publicly-traded company] in, any party.

2 (c) [**Independence; prior employment.**] Notwithstanding subsection (b), the proposed
3 receiver is not disqualified solely because of having been appointed receiver in other unrelated
4 matters involving any party, or having been engaged by any party in matters unrelated to the
5 underlying dispute.

6 **Reporter’s Notes**

7 1. The concept of “independence” comes from Minnesota’s receivership statute, Minn. Stat.
8 Ann. § 576.26, subdivisions 1 and 3. The Committee should discuss whether this approach is
9 preferable to a more streamlined provision such as Ind. Code § 32-30-5-2 (“A court may not
10 appoint: (1) a party; (2) an attorney representing a party; or (3) another person interested in an
11 action; as a receiver in that action.”).

12
13 2. The “except by written consent of all parties” caveat comes from Okla. Stat. Ann. tit. 12,
14 § 1552. The Committee should discuss whether to: (a) include such an exception as part of the
15 Act; (b) delete it altogether; or (c) include it as a bracketed term. In addition, if the Committee
16 determines to keep this caveat, it should discuss the intended breadth of the term “parties” (who
17 are the persons whose consent is necessary/appropriate?) and determine whether further
18 clarification is required.

19
20 3. In subsection (b), the term “family member” is not defined. The term “relative” could be
21 substituted, but could raise a similar question of scope/degree. The Committee should discuss
22 whether greater precision here is necessary or desirable.

23
24 4. Presently, the draft contemplates only an “independence” threshold for the receiver. The
25 Committee may wish to give further consideration to whether the Act should also provide a
26 “competence” standard and, if so, what standard. For example, the Minnesota receivership
27 statute merely requires that the proposed receiver be “qualified” and then expresses that in
28 determining the proposed receiver’s qualification, the court may consider, inter alia, the
29 proposed receiver’s knowledge and experience, financial ability to post the required bond, prior
30 disqualification, conviction of felony or crime involving moral turpitude, or liability for fraud,
31 breach of duty, civil theft, etc. Minn. Stat. Ann. § 576.26, subd. (2). New Mexico’s statute
32 provides only that the proposed receiver must not be “otherwise disqualified under applicable
33 state or federal law to administer the receivership estate.” N.M. Rev. Stat. Ann. § § 44-8-6.
34 Washington’s statute also has a disqualification for felony convictions and crimes involving
35 moral turpitude. Wash. Rev. Code Ann. § 7.60.035(1).

36 **SECTION 8. RECEIVER’S BOND.**

37
38 (a) [**Bond required; amount.**] Except as provided by law other than this [act], [before

1 commencing its duties] [within ___ days of commencing its duties], a receiver shall execute a
2 bond with one or more sureties approved by the court, and conditioned upon the receiver's
3 faithful discharge of its duties in accordance with the orders of the court and the laws of this
4 state. The bond shall be in an amount specified by the court, but in no event less than the total
5 amount of funds expected to be administered by the receiver during the term of the receivership.
6 Unless otherwise ordered by the court, the receiver's bond runs in favor of all persons having an
7 interest in the receivership property.

8 (b) [**Alternative security.**] In lieu of the bond described in subsection (a), the court may
9 approve the posting of alternative security including a letter of credit or a deposit of funds with
10 the court. No part of the receivership property may be used as alternative security. Any interest
11 that may accrue on deposited funds shall be paid to the receiver upon the receiver's discharge.

12 (c) [**Time for claim against bond.**] A claim against the receiver's bond must be made
13 within [one year] from the date the receiver is discharged.

14 **Receiver's Notes**

15 1. Subsection (a) reflects the committee's discussions at the April meeting to the effect that
16 the appropriate amount of the receiver's bond should be the amount of funds that the receiver is
17 expected to administer during the receivership. Thus, where the receiver is purely a custodial
18 receiver for commercial rental property, the receiver's bond should be no less than the total rents
19 accruing during the anticipated duration of the receivership. By contrast, where the receiver
20 anticipates selling the property, the bond would need to be in an amount equal to the value of the
21 receivership property. The Committee may wish to consider gathering further information on
22 bonding costs (particularly vis-à-vis the costs of alternative security) to determine whether this
23 standard is the appropriate one.

24
25 2. As drafted, subsection (a) contains two possible approaches: one requiring bonding
26 before the receiver commences any actions, and another providing a grace period. The
27 Committee may wish to discuss whether variations in local practice would merit retaining two
28 such approaches. If the latter (grace period) approach is taken, an additional provision may be
29 needed providing for the termination of the receivership or the receiver's authority if the
30 bond/security is not provided during the grace period.

31
32 3. Subsection (b) is consistent with the committee's April discussions and would authorize

1 the posting of a letter of credit or alternative security, and derives from Wash. Rev. Code Ann. §
2 7.60.045.

3
4 4. Subsection (c) provides a one-year period for filing claims against the bond, consistent
5 with Wash. Rev. Code Ann. § 7.60.045.

6
7 **SECTION 9. RECEIVER'S STATUS AS LIEN CREDITOR.** Upon appointment, a
8 receiver has the powers and priority as to all receivership property as if it were a creditor that
9 obtained a judicial lien as to that property at the moment of appointment.

10 **Reporter's Notes**

11 1. This section derives from Minnesota's receivership statute, Minn. Stat. Ann. § 576.30,
12 but is a simplified version of that section. It provides that the receiver has the status of a lien
13 creditor as to both personal and real property. The Committee may wish to discuss whether the
14 receiver should have any duty with respect to real property to record a lis pendens or other
15 evidence of the receiver's appointment. See, e.g., Minn. Stat. Ann. § 576.30, subd. (2) (requiring
16 recording of lis pendens to assure receiver the status of lien creditor with respect to real
17 property).

18
19 This status would permit a receiver to take action to subordinate an unperfected security
20 interest against personal property within the receivership estate, U.C.C. § 9-317(b)(2). As
21 drafted, however, it would not necessarily permit the receiver to subordinate the lien of an
22 unrecorded mortgage, as not all state recording statutes operate to protect persons holding the
23 status of lien creditors. In this regard, the draft does not effectively create an avoiding power
24 analogous to Bankruptcy Code § 544(a)(3), which gives the bankruptcy trustee to the power to
25 avoid any interest in real estate that could be avoided by a bona fide purchaser under state law.
26 The Committee may wish to discuss whether the Act should accord the receiver with the status
27 of a bona fide purchaser under state law.

28
29 **SECTION 10. SECURITY INTERESTS ON AFTER-ACQUIRED PROPERTY.**

30 Except as provided in Section 9 or by law other than this [act], property acquired by the receiver
31 or by the respondent after the entry of the order of appointment is subject to any security
32 agreement entered prior to the order of appointment to the same extent as would be the case in
33 the absence of the receiver's appointment.

34 **Reporter's Notes**

35 1. This Section is derived from Washington's receivership statute, Wash. Rev. Code Ann. §
36 7.60.240, and provides that where the respondent had entered into a pre-appointment security

1 agreement covering after-acquired property, that agreement would be effective against property
2 acquired after the receiver's appointment to the extent provided under other law.

3
4 **SECTION 11. TURNOVER OF RECEIVERSHIP PROPERTY.** Upon demand by a

5 receiver, any person who has possession, custody, or control of receivership property shall turn
6 the property over to the receiver, unless otherwise ordered by the court for good cause shown.

7 Unless there is a bona fide dispute with respect to the receiver's right to possession, custody, or
8 control of receivership property, the failure to relinquish possession, custody, and control to the
9 receiver shall be punishable as a contempt of the court.

10 **Reporter's Notes**

11 1. Section 11 derives from Wash. Rev. Code Ann. § 7.60.070, and requires the turnover of
12 any receivership property to the receiver.

13
14 **SECTION 12. POWERS AND DUTIES OF RECEIVER.**

15 (a) [**General powers.**] Except as limited in the order of appointment or by law other
16 than this [act], a receiver has the following powers:

17 (1) the power to collect, control, manage, conserve, and protect receivership
18 property;

19 (2) the power to operate any business constituting receivership property in the
20 ordinary course of business, including the use, sale, or lease of the property in the ordinary
21 course of business;

22 (3) the power to incur and pay expenses incidental to the receiver's exercise of its
23 powers or the performance of its duties;

24 (4) the power to assert rights, claims, causes of action, or defenses that relate to
25 receivership property or the conduct of the receivership;

26 (5) the power to seek and obtain instruction from the court with respect to any

1 matter relating to the receivership property, the exercise of the receiver's powers, or the
2 performance of the receiver's duties;

3 (6) the power by subpoena to compel any person to submit to an examination
4 under oath, or to produce and permit inspection and copying of designated documents or tangible
5 things, with respect to receivership property or any other matter that may affect the
6 administration of the receivership;

7 (7) the power to engage and retain attorneys, accountants, appraisers, brokers or
8 other professionals and pay their compensation or fees; and

9 (8) any other powers specifically conferred by the order of appointment, other
10 provisions of this [act], or by other law.

11 (b) [**Powers if authorized by court.**] If authorized by an order of the court following
12 notice and a hearing, or as otherwise permitted by other provisions of this [act], a receiver has
13 the following powers:

14 (1) the power to borrow money for use or benefit of the receivership, allow or
15 disallow claims of creditors against the receivership, make distributions of receivership proceeds,
16 or pay compensation to the receiver;

17 (2) the power to make improvements to receivership property; [and]

18 (3) the power to assume or reject executory contracts of the respondent as
19 provided in Section __[.][; and]

20 [(4) the power to use or transfer receivership property other than in the ordinary
21 course of business.]

22 (c) [**Duties.**] A receiver has the duty to prepare and retain appropriate business records,
23 including records of all receipts and disbursements or other dispositions of receivership property,

1 and any other duties specifically conferred by this [act] or otherwise by statute, rule, or court
2 order.

3 (d) **[Modification of powers and duties.]** The powers and duties of the receiver may be
4 expanded, modified, or limited by order of the court for good cause shown.

5 **Reporter’s Notes**

6 1. Subsections (a) and (b) derive from a compilation of various subsections of the
7 Minnesota, Washington, and New Mexico receivership statutes. See, e.g., Minn. Stat. Ann. §
8 576.29, subd. 1(a), (b); Wash. Rev. Code Ann. § 7.60.060(1); N.M. Rev. Stat. Ann. § 44-8-7(H).
9

10 Subsection (a) sets forth the general powers that the receiver may exercise as a matter of
11 the receiver’s default powers, except to the extent that the receivership order or other law
12 explicitly restricts the receiver. The Committee may wish to consider whether other powers need
13 to be listed, or whether there should be a reference to “incidental” powers (powers incidental to
14 the enumerated ones). Subsection (a)(3)’s power “to incur and pay expenses incidental to the
15 receiver’s exercise of its powers or the performance of its duties” is intended to encompass the
16 receiver’s ability to incur unsecured debt in the ordinary course of the receivership; the
17 Committee may also wish to consider whether more explicit language is needed.
18

19 Subsection (a) addresses the receiver’s authority to sell receivership property in the
20 ordinary course of business. This provision is intended not only to allow the receiver to conduct
21 ordinary course sales (such as sales of inventory) in the process of operating a business, but also
22 would (for example) permit the receiver of a partially-completed condominium project to sell
23 completed units. The draft currently does not contain a definition of “ordinary course of
24 business.” The Committee should discuss whether definition of the term is necessary or whether
25 the term should be left to judicial development.
26

27 Subsection (b) sets forth specific powers that the receiver can exercise only if specifically
28 authorized by the court following notice and a hearing, or by other provisions of the Model Act.
29

30 Subsection (c), which describes the receiver’s duties, is based on Minn. Stat. Ann. §
31 576.29, subd. (2).
32

33 Subsection (d) is based on Wash. Rev. Code Ann. § 7.60.060(3). Minnesota’s statute
34 provides similar authority, but without a “good cause shown” requirement. Minn. Stat. Ann. §
35 576.29, subd. (3). The Committee may wish to address whether the “good cause” requirement
36 here is necessary or appropriate.
37

38 2. At the initial meeting, there was discussion and general consensus among the committee
39 members and observers that the Act should provide a model receivership order. The existing
40 draft does not include such an order, principally because the contents of such an order will be a
41 product of the Committee’s ultimate conclusions regarding the scope of the receiver’s powers.

1 In this regard, the Chair expects that after the Committee’s further discussions on the substance
2 of Section 12 and the receiver’s powers, a subcommittee will be appointed to develop the
3 language of a model receivership order.
4

5 In addition, the ULC’s drafting guidelines generally contain a policy that forms should
6 not be included in the text, but in the comments only. The Committee should discuss (although
7 not necessarily in the September meeting) whether inclusion of a model order in the comments is
8 sufficient or whether a model order would need to be part of the official text of the Act.
9

10 3. Section 12(b)(1) addresses (among other items) the receiver’s power to allow or disallow
11 claims. Section 21 provides some minimal provisions regarding the obligation of unsecured
12 creditors to file claims, but does not contain the expansive claim evaluation, determination, and
13 priority procedures reflected in the Minnesota and Washington receivership statutes. The
14 Committee should address whether greater detail regarding allowance and priority of claims is
15 necessary or appropriate.
16

17 **SECTION 13. DUTIES OF RESPONDENT.**

18 (a) **[Duties.]** The respondent has the following duties:

19 (1) to assist and cooperate fully with the receiver in the administration of the
20 receivership and the discharge of the receiver’s duties, and comply with all orders of the court;

21 (2) to deliver to the receiver all receivership property in the respondent’s
22 possession, custody, or control, including, but not limited to, all accounts and documents;

23 (3) to submit to examination by the receiver, under oath, concerning the acts,
24 conduct, property, liabilities, and financial condition of the respondent or any matter relating to
25 receivership property or the receivership; and

26 (4) to comply with any other duties arising under this [act], law other than this
27 [act], or imposed in an order of the court.

28 (b) **[Duties applicable to managing agents of respondent.]** If the respondent is not an
29 individual, each officer, director, manager, member, partner, or other individual exercising or
30 having the power to exercise control over the affairs of the respondent is subject to the
31 requirements of this section.

1 **Reporter's Notes**

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

4
5 **SECTION 14. AUTOMATIC STAY.**

6 (a) [**Scope of stay: general.**] Except as otherwise ordered by the court, the order of
7 appointment operates as a stay, applicable to all persons, of:

8 (1) any act to obtain possession of, interfere with, exercise control over, or
9 enforce a judgment against receivership property, and

10 (2) any act to create, perfect, or enforce any lien or claim against receivership
11 property to the extent that the lien secures a claim against the respondent that arose before the
12 entry of the order.

13 (b) [**Scope of stay: general receiverships.**] Except as otherwise ordered by the court, if
14 the court has appointed a receiver for all property of the respondent, the order of appointment
15 also operates as a stay, applicable to all persons, of:

16 (1) the commencement or continuation of a judicial, administrative, or other
17 action or proceeding against the respondent that was or could have been commenced before the
18 entry of the order, or to recover a claim against the respondent that arose before the entry of the
19 order;

20 (2) the enforcement against the respondent of a judgment obtained before the
21 entry of the order; and

22 (3) any act to collect, assess, or recover a claim against the respondent that arose
23 before the entry of the order.

24 (c) [**Relief from stay.**] A person whose action or proceeding is stayed under subsections
25 (a) or (b) may by motion seek relief from the stay for good cause shown.

1 (d) **[Exclusions from stay.]** The entry of an order appointing a receiver does not operate
2 as a stay of:

3 (1) any act to foreclose a mortgage or enforce an assignment of rents, if the act
4 was initiated by the person seeking the receiver’s appointment;

5 (2) the commencement or continuation of a criminal proceeding against the
6 respondent;

7 (3) the commencement or continuation of an action or proceeding to establish
8 paternity, or to establish or modify an order for alimony, maintenance, or support, or to collect
9 alimony, maintenance, or support under any judicial order;

10 (4) the commencement or continuation of an action or proceeding by a
11 governmental unit to enforce its police or regulatory power;

12 (5) the enforcement of a judgment, other than a money judgment, obtained in an
13 action or proceeding by a governmental unit to enforce its police or regulatory power; and

14 (6) the establishment by a governmental unit of any tax liability and any appeal
15 thereof.

16 **Reporter’s Notes**

17 1. This section is comprised of portions of the stay provision from the Washington
18 receivership statute, Wash. Rev. Code Ann. § 7.60.110. It reflects an attempt to address the
19 Committee’s wish (as expressed in the April meeting) that the draft include some provision for
20 an automatic stay, but one not as comprehensive and detailed as the Minnesota/Washington
21 statutes or section 362 of the Bankruptcy Code.
22

23 As drafted, the order of appointment would trigger a stay as to all receivership property
24 under subsection (a). If the court appoints a receiver for all assets of the respondent (the
25 traditional “general” receivership), then the stay would also reach actions against the respondent.
26 The Act does not currently define the term “general receivership,” so the Committee may wish to
27 consider whether use of that label is appropriate in the caption to subsection (b), or whether
28 alternative language would be preferable.
29

30 2. The Committee may wish to discuss whether the Act should provide any guidance on the

1 consequences of a stay violation.

2
3 **SECTION 15. EMPLOYMENT AND COMPENSATION OF PROFESSIONALS.**

4 (a) **[Employment; qualification.]** Unless the court orders otherwise after notice and a
5 hearing, the receiver may employ attorneys, accountants, appraisers, auctioneers, brokers and
6 other professionals that do not hold or represent an interest adverse to the receivership to assist
7 the receiver in carrying out its duties. [The receiver shall file with the court and send notice to
8 the parties of the retention, any potential conflict of interest, and the proposed compensation.] A
9 person is not disqualified from employment under this section solely because of that person's
10 employment by, representation of, or other relationship with the receiver, a creditor, or other
11 party if the court determines that the employment is appropriate. Nothing in this [act] precludes
12 the receiver from providing services as an attorney, accountant, appraiser, auctioneer, or broker
13 where licensed to do so.

14 (b) **[Payment of fees and expenses.]** The receiver and any professionals employed by
15 the receiver may file with the court an itemized statement indicating both the time spent, billing
16 rates of all who perform work to be compensated, and a detailed list of expenses. [A copy of the
17 statement shall be sent to all parties, accompanied by a notice indicating that unless objections
18 are filed with the court, the receiver may make the payments specified in the statement.] [Unless
19 the court orders otherwise after notice and a hearing, the receiver may make the payments
20 specified in the statement.] If the receiver is appointed in a proceeding to foreclose a mortgage
21 or enforce an assignment of rents, payment of the statement may be allowed upon the written
22 consent of the mortgagee or assignee of rents.

23 (c) **[Interim payments.]** Except to the extent fees and expenses have been approved by
24 the court, any interim payments of fees and expenses to the receiver are subject to approval in

1 connection with the receiver's final report.

2 **Reporter's Notes**

3 1. Subsection (a) derives from provisions of the Minnesota receivership statute. It does not
4 specifically require prior court approval of the receiver's retention of professionals, but provides
5 a procedure for notice, objection, and disapproval where an appointment would be improper.
6 Minn. Stat. Ann. § 576.32, subd. 1. Subsection (a) also makes clear that the receiver may
7 provide professional services to the estate (and be compensated for those services) where
8 licensed to do so. Wash. Rev. Code Ann. § 7.60.180(3).

9
10 2. Subsection (b), which permits the receiver to pay statements without specific court
11 approval unless an interested party has objected, derives from the Washington statute. Wash.
12 Rev. Code Ann. § 7.60.180(4). The Committee may wish to consider whether it is necessary to
13 make it explicit that such a payment would have to come from rents and profits of the mortgaged
14 property.

15
16 3. Subsection (c) derives from Minn. Stat. Ann. § 576.32, subd. 2(b).

17
18 **SECTION 16. TRANSFER OF RECEIVERSHIP PROPERTY OTHER THAN IN**
19 **ORDINARY COURSE OF BUSINESS.**

20 **Alternative A**

21 (a) **[When authorized.]** Unless specifically authorized by law other than this [act], a
22 receiver may not transfer receivership property other than in the ordinary course of business
23 except with the written consent of all persons holding an interest in the property.

24 **Alternative B**

25 (a) **[When authorized.]** A receiver, with the court's approval after notice and a hearing,
26 may transfer receivership property other than in the ordinary course of business. Any such
27 transfer shall be subject to existing liens and rights of redemption, except to the extent that the
28 holder of a lien or right of redemption consents to the transfer.

29 **Alternative C**

30 (a) **[When authorized.]** A receiver, with the court's approval after notice and a hearing,
31 may transfer receivership property other than in the ordinary course of business. If so approved

1 by the court, the transfer shall be free and clear of liens and all rights of redemption.

2 **Alternative D**

3 (a) **[When authorized.]** A receiver, with the court’s approval after notice and a hearing,
4 may transfer receivership property other than in the ordinary course of business if the receiver
5 was appointed in a proceeding to foreclose a mortgage or to enforce an assignment of rents and
6 the mortgagor or assignor of rents agreed in a signed document to sale of the property by a
7 receiver [pursuant to this [act]]. Such a transfer shall be free and clear of liens and all rights of
8 redemption unless the terms of the transfer agreement provide otherwise.

9 **Alternative E**

10 (a) **[When authorized.]** A receiver, with the court’s approval after notice and a hearing,
11 may transfer receivership property other than in the ordinary course of business. Such a transfer
12 shall be free and clear of liens and all rights of redemption unless the terms of the transfer
13 agreement provide otherwise, provided that the transfer occurs no sooner than [XX] days
14 following the appointment of the receiver.

15 [(b) **[Transfer of liens to proceeds.]** Subject to Section 21(d), upon any transfer free
16 and clear of liens under subsection (a), all security interests and other liens encumbering the
17 property shall attach to the proceeds of the transfer, net of reasonable expenses incurred in the
18 transfer, in the same order, priority, and validity as the liens had with respect to the property
19 immediately prior to the transfer.]

20 [(c) **[Manner of sale; purchase by person obtaining receiver.]** A transfer under
21 subsection (a) may occur by a public sale or by a private sale. A creditor holding a valid lien
22 against the property to be sold may purchase the property at a public sale and may offset against
23 the purchase price part or all of the allowed amount secured by its lien, provided that the creditor

1 tenders cash sufficient to satisfy in full the reasonable expenses of sale and all liens payable out
2 of the proceeds of sale having priority over the lien of that creditor. The person obtaining the
3 appointment of the receiver may not purchase the receivership property at a private sale.]

4 [(d) **[Bona fide purchaser.]** The reversal or modification on appeal of an authorization
5 to transfer receivership property under this section does not affect the validity of a transfer under
6 the authorization to a person that acquired the property in good faith, unless the authorization and
7 transfer were stayed pending appeal.]

8 **End of Alternatives**

9 **Reporter's Notes**

10 1. The alternatives provided for subsection (a) reflect the range of potential alternatives
11 discussed in the April 2013 meeting. Alternative A would be appropriate in a state that wanted
12 to forbid any nonordinary course sale, except with the consent of all persons holding an interest
13 in the property. Alternative B would permit a nonordinary course sale with court approval, but
14 subject to the rights of nonconsenting lienholders or redemptioners. Alternative C would permit
15 a nonordinary course sale with court approval, free and clear of the rights of lienholders and
16 redemptioners. Alternative D permits a nonordinary course sale, even without court approval, if
17 the receivership is ancillary to a mortgage foreclosure or the enforcement of an assignment of
18 rents and the mortgage or assignment of rents contains a clause explicitly authorizing a receiver
19 sale, either generally or under the specific authority of this Act. Alternative E would permit a
20 nonordinary course sale, even without court approval, if the sale took place more than a specified
21 period of time following the appointment of the receiver. This phrasing is intended to reflect the
22 committee's preference for a provision that would permit a receiver sale free and clear, but only
23 if the sale occurred no sooner than the period during which a redemptioner could have acted to
24 redeem during a foreclosure. Thus, for example, in a state that authorized nonjudicial
25 foreclosure within 120 days and provided no statutory redemption right, subsection (a)
26 [Alternative E] would specify a 120-day period.

27
28 Under Alternative C, no transfer by the receiver other than in ordinary course may occur
29 without court approval. The Washington and Minnesota statutes contain a provision that limits
30 the authority of the court to approve a sale "free and clear" of liens and redemption rights if the
31 mortgagor or a junior lienholder objects and can demonstrate that they would receive less from
32 the receiver's sale than they would have received within a reasonable time in the absence of the
33 receiver's sale (e.g., through a foreclosure proceeding). Minn. Stat. Ann. § 576.46, subd. 1(a);
34 Wash. Rev. Code Ann. § 7.60.260(2). The committee should consider whether to incorporate
35 such a limitation into the statutory text, or instead to have a broad "subject to court approval"
36 clause and state in the comments that court approval should not be forthcoming if an objecting
37 party can demonstrate that a foreclosure sale would likely produce a greater recovery.

1 Under alternatives B through E (under which sale other than in ordinary course is
2 available), the intent of the provision is to preserve to the receiver the ability to seek authority to
3 sell either free and clear or subject to liens, depending upon the situation.
4

5 3. Subsections (b) through (d) would be needed in states that authorized receivers to sell
6 property free and clear (which would be possible under Alternatives B through E). Subsection
7 (b) provides for the transfer of liens to sale proceeds (subject to the possibility, recognized in
8 Section 21, that surcharge of the collateral may be appropriate in some circumstances).
9 Subsection (c) recognizes that the receiver might sell by public sale (i.e., an auction sale at which
10 members of the general public may bid) or private sale (i.e., any sale other than a public sale),
11 provides for credit bidding at a public sale, and provides that the person obtaining the
12 appointment of a receiver cannot acquire the property in a private sale. The rules in subsection
13 (c) track the substance of the provisions of UCC Article 9 foreclosure sales. The Committee
14 may wish to discuss (a) whether these provisions are appropriate in the receivership context,
15 given the necessity for court approval of the sale, and (b) whether the Act should draw any
16 distinction between “public sale” and “private sale” in the receivership context.
17

18 Subsection (d) provides that the title of a good faith purchaser from the receiver is not
19 affected by reversal of the sale order on appeal unless the authorization and sale were stayed
20 pending appeal.
21

22 SECTION 17. EXECUTORY CONTRACTS.

23 (a) **[Receiver as successor.]** Unless the order of appointment provides otherwise, a
24 receiver succeeds to all of the rights and duties of the respondent under any executory contract.
25 The court may condition the continued performance by the receiver on terms that are appropriate
26 under the circumstances.

27 (b) **[Assignment.]** For good cause shown, following notice and a hearing, the court may
28 authorize a receiver to assign an executory contract under the same circumstances and under the
29 same conditions as the respondent was permitted to do so under the and law other than this [act]
30 prior to the appointment.

31 (c) **[Rejection; effect; claims.]** Except as otherwise provided in subsections (f) and (g),
32 with court approval following notice and a hearing, a receiver may reject an executory contract
33 for good cause. The receiver’s right to possess or use property pursuant to the contract
34 terminates upon rejection of the contract. Rejection creates a claim equal to the damages, if any,

1 for a breach of contract as if the breach had occurred immediately prior to the receiver’s
2 appointment. Any claim for rejection of the contract must be filed by the later of: (1) the time
3 set for filing of claims in the receivership; or (2) [30] days after the court approval of the
4 rejection.

5 (d) **[Performance prior to court approval.]** A receiver’s performance of an executory
6 contract prior to court approval of its assumption or rejection does not constitute an assumption
7 or agreement to assume, and does not preclude the receiver from seeking the court’s approval to
8 reject it.

9 (e) **[Ipso facto clause; effect.]** A receiver’s power to perform an executory contract
10 under subsection (a) is not affected by any provision in the contract that would effect or permit a
11 forfeiture, modification, or termination of it on account of either the receiver’s appointment, the
12 financial condition of the person over whose property the receiver is appointed, or an assignment
13 for the benefit of creditors by that person.

14 (f) **[Rejection of unexpired lease.]** A receiver may reject an unexpired lease only if:
15 (1) the lease violates a provision of a prior mortgage or assignment of rents; or
16 (2) the lease was made or amended while the respondent was in default under a
17 mortgage or assignment of rents and the lease was not commercially reasonable when it was
18 consummated.

19 (g) **[Nondisturbance agreement.]** A receiver may not reject an unexpired lease if the
20 tenant is not in default and has an enforceable nondisturbance agreement with the mortgagee.

21 **Reporter’s Notes**

22 1. This provision is based upon the more streamlined “executory contract” provisions of the
23 Minnesota receivership statute, Minn. Stat. Ann. § 576.45, as contrasted with the more extensive
24 provisions from the Washington statute, Wash. Rev. Code Ann. § 7.60.130.

1 2. Under this section, an executory contract is treated as having been assumed until it is
2 rejected, although subsection (d) provides that the receiver’s temporary performance of the
3 contract does not prevent the receiver from later seeking court approval to reject it.
4

5 3. Under subsection (b), the receiver can assign an executory contract only to the extent
6 permitted by the contract and applicable law.
7

8 4. Subsection (c) provides a general “good cause” standard for the rejection of executory
9 contracts, while subsections (f) and (g) specifically address rejection of unexpired leases.
10

11 Subsection (f) (which permits rejection only if the lease violates a prior recorded
12 mortgage/assignment of rents or if the lease is a “sweetheart lease” that took effect while the
13 mortgagor was in default) is based on Restatement of Mortgages § 4.4(b), (c). It would not
14 permit the receiver to reject an otherwise valid lease simply because the lease currently bore a
15 below-market rent. The Committee may wish to discuss whether the Act should provide the
16 receiver with rejection power in this circumstance, as well as whether the Act should draw a
17 distinction with respect to residential and commercial leases (e.g., allowing rejection of a
18 commercial lease but not permitting rejection of a residential lease).
19

20 It is customary for many commercial lenders to enter into subordination, nondisturbance
21 and attornment (SNDA) agreements with tenants under commercial leases. Subsection (g)
22 provides that a receiver cannot reject a lease if the rejection would violate the terms of an
23 enforceable SNDA agreement.
24

25 **SECTION 18. UTILITY SERVICE.** A utility providing service to receivership
26 property that has received written notice of the appointment of the receiver may not alter, refuse,
27 or discontinue service to the receivership property without court approval following notice and a
28 hearing. The court shall prohibit the alteration, refusal, or discontinuance of utility service if the
29 receiver furnishes adequate assurance of payment for service to be provided after the time of
30 appointment.

31 **Reporter’s Notes**

32 1. Section 18 derives from Minn. Stat. Ann. § 576.43.

33 **SECTION 19. IMMUNITY OF RECEIVER.**

34 (a) [**Immunity.**] A receiver is entitled to all defenses and immunities provided at
35 common law for acts or omissions within the scope of the receiver’s appointment.

1 (b) **[Actions against receiver.]** A receiver may be sued in its capacity as receiver with
2 respect to the receiver’s acts, omissions, or transactions in administering receivership property
3 only with court approval after notice and a hearing.

4 **Reporter’s Notes**

5 1. Subsection (a) is based on the Minnesota receivership statute, Minn. Stat. Ann., as
6 contrasted with Washington’s statute, Wash. Rev. Code Ann. § 7.60.170, which provides more
7 detailed and specific provisions regarding the scope of a receiver’s liability. The committee may
8 wish to review the provisions of § 7.60.170 and consider whether greater detail here is desirable,
9 or whether enactability would be enhanced by leaving the scope of the receiver’s liability subject
10 to common law development on a case-by-case basis (as would be the case under the proposed
11 draft).

12
13 2. Subsection (b) is an adaptation of Wash. Rev. Code Ann. § 7.60.160(1), and is meant to
14 incorporate into the Act the *Barton* doctrine, which derives from the decision of the United
15 States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881). In *Barton*,
16 the Supreme Court held that to sue a court-appointed receiver, the would-be plaintiff must first
17 seek approval of the appointing court. The doctrine rests upon the notion that the appointing
18 court has *in rem* jurisdiction over the receivership property; thus, a forum other than the
19 appointing court would lack subject-matter jurisdiction over the action.

20
21 **SECTION 20. INTERIM REPORTS OF RECEIVER.**

22 (a) **[Content of interim reports.]** The court may order the receiver to prepare and file
23 interim reports addressing:

24 (1) the activities of the receiver since the previous report;

25 (2) cash receipts and disbursements, including payments made to or proposed to
26 be made to professionals retained by the receiver;

27 (3) receipts and dispositions of receivership property;

28 (4) if not filed separately, a motion for approval of the payment of fees and
29 expenses of the receiver; and

30 (5) other matters as specified by court order.

31 (b) **[Waiver of objections.]** The failure of any person to object to a matter addressed in

1 an interim report constitutes a waiver of such objection.

2 **Reporter’s Notes**

3 1. This section derives from the provisions of Minnesota’s receivership statute, Minn. Stat.
4 Ann. § 576.36. It does not automatically require the receiver to prepare interim reports, except
5 as ordered by the court. This approach provides flexibility to accommodate different judicial
6 approaches — courts that have traditionally required only a final report could continue with such
7 an approach, while courts that have traditionally required periodic reporting could specify an
8 appropriate period in the order of appointment.

9
10 **SECTION 21. CLAIMS AGAINST RECEIVERSHIP.**

11 (a) **[Filing requirement.]** All creditor claims arising prior to the receiver’s appointment,
12 whether contingent, liquidated, unliquidated, or disputed, other than claims of creditors holding
13 security interests in or other liens against receivership property, must be filed under this section.
14 Any claim not timely filed as required is barred from participating in any distribution to creditors
15 from the receivership.

16 (b) **[Time for filing; content.]** Except as otherwise provided in Section 17(c), claims
17 must be filed with the receiver within [90] days from the date notice is given, unless the court
18 reduces or extends the period for good cause shown. The claim must set forth the name and
19 address of the creditor, the nature and amount of the claim, be signed by the creditor [under
20 penalty of perjury], and must include a copy of any documents on which the claim is based. [A
21 claim filed in accordance with this subsection constitutes prima facie evidence of the validity and
22 amount of the claim.]

23 (c) **[Objections.]** At any time prior to the entry of an order approving the receiver’s
24 final report, the receiver or any party may file with the court a written objection to a claim setting
25 forth the grounds for the objection, to be determined after notice and a hearing. Claims properly
26 filed with the receiver and not disallowed by the court shall share in any distributions from the
27 receivership on a pro rata basis, unless the court’s order provides otherwise.

1 (d) **[Distribution to secured creditors; surcharge.]** Creditors with duly perfected liens
2 on receivership property shall receive the proceeds from the disposition of their collateral in
3 accordance with their respective priorities under law other than this [act]. However, the receiver
4 may recover from property securing an allowed secured claim the reasonable, necessary
5 expenses of preserving, protecting, or disposing of the property to the extent of any benefit to the
6 creditors.

7 **Reporter’s Notes**

8 1. This draft includes a claims provision that is substantially simplified relative to the more
9 comprehensive provisions found in the Minnesota and Washington statutes. Section 12(b)(1)
10 provides that if the order of appointment so authorizes, the receiver has the power to allow and
11 disallow claims, following notice and hearing. Combined with this section, the receiver thus has
12 the flexibility to seek allowance or disallowance of claims in a fashion suitable to the
13 circumstances of the receivership.

14
15 2. Subsection (a) requires unsecured creditors to file a proof of claim. The Committee may
16 wish to discuss whether the Act should require a filing from secured creditors and, if so, whether
17 there should be any consequence stated for failure to file or an explicit savings provision.

18
19 Subsection (b) provides minimal requirements for the creditor’s proof of claim. Under
20 the bracketed language in subsection (b), a claim would be valid unless objected to by the
21 receiver and ultimately disallowed by the court. This prima facie validity of the claim derives
22 from the Washington statute, Wash. Rev. Code Ann. § 7.60.210(4). The Minnesota statute
23 provides no comparable presumption of validity. The Committee may wish to discuss whether a
24 claim should be treated as prima facie evidence of its validity.

25
26 Subsection (c) provides that allowed claims shall be entitled to distribution from the
27 residue of the receivership estate on a pro rata basis, unless the court’s order specifies otherwise.
28 The draft took this approach to avoid including the extensive priority provisions included in the
29 Minnesota and Washington statutes, see Minn. Stat. Ann. § 576.51; Wash. Rev. Code Ann. §
30 7.60.230. The draft took this approach based on a perceived consensus at the April meeting that
31 the Act should seek to avoid the “exhaustive” comprehensiveness reflected in the Minnesota and
32 Washington statutes. The Committee should discuss whether a more detailed priority provision
33 is necessary or desirable.

34
35 Subsection (d) provides a surcharge provision comparable in its application and scope to
36 a bankruptcy trustee’s surcharge authority under 11 U.S.C. § 506(c).

1 and any receivership property added thereafter;

2 (3) a list of all distributions proposed to be made from the receivership on
3 account of creditor claims; and

4 (4) if not filed separately, a motion or application for approval of the payment of
5 fees and expenses of the receiver.

6 (b) **[Discharge.]** The court’s approval of the final report discharges the receiver and the
7 surety on the receiver’s bond for all matters related to or contained in the report.

8 [(c) **[Discharge for good cause; costs.]** Upon motion of any party and for good cause
9 shown after notice and a hearing, the appointing court may discharge the receiver and terminate
10 the court’s administration of the receivership property. If the court determines that the
11 appointment of the receiver was procured wrongfully or in bad faith, the court may assess against
12 the person who procured the receiver’s appointment all of the receiver’s fees and other costs of
13 the receivership and any other sanctions the court determines to be appropriate.]

14 **Reporter’s Notes**

15 1. Subsection (a) provides for the termination of the receivership and discharge of the
16 receiver upon notice and hearing. The receiver’s final report would be based on the same
17 general template as any interim reports filed by the receiver. Subsection (b) provides that the
18 court’s approval of the report discharges the receiver and the receiver’s bond.

19
20 2. Subsection (c) would permit a court to discharge the receiver and terminate the
21 receivership for good cause shown, after notice and a hearing. Provisions analogous to
22 subsection (c) are found in both the Washington and Minnesota statutes. The Committee may
23 wish to discuss whether the Act should identify or limit with specificity the persons who might
24 have standing to seek termination of the receivership. The Committee may also wish to discuss
25 whether these provisions would be more appropriately contained in Section 22.

26
27 Section 6 already contains a provision permitting the court to require an ex parte
28 applicant to post a bond or other security to protect the respondent against loss or damage
29 suffered from wrongful appointment. This section, if included, would go marginally further and
30 permit the imposition of costs/sanctions even if the court appointed the receiver following notice
31 and a hearing.

1 3. The Committee may wish to discuss whether to include a “petitioner pays” rule that
2 imposes the excess costs on the petitioner if there are not sufficient receivership funds to pay all
3 receivership expenses.

4
5 **SECTION 24. ANCILLARY RECEIVERSHIPS.**

6 (a) **[Receiver may seek appointment in another state.]** A receiver appointed by a
7 court of this state may, without first seeking approval of the court, apply to a court of another
8 state for appointment as receiver with respect to any receivership property which is located in
9 that state.

10 (b) **[Receiver appointed by another state.]** A person appointed as a receiver in another
11 state may obtain appointment by a court of this state as a receiver with respect to any property
12 located in this state or subject to the jurisdiction of the court if:

13 (1) the person would be eligible to serve as receiver under this [act]; and

14 (2) the appointment is in furtherance of the person’s possession, control, or
15 disposition of property subject to the receivership in the other state and in accordance with orders
16 of the appointing court in the other state.

17 (c) **[Administration of ancillary receivership in this state.]** A court of this state that
18 appointed an ancillary receiver under subsection (b) may enter any order necessary to effectuate
19 orders entered by the appointing court in another state. Unless the court orders otherwise, an
20 ancillary receiver under subsection (b) shall have the powers and duties set forth in this [act] and
21 shall otherwise comply with this [act].

22 **Reporter’s Notes**

23 1. Section 24 is based in significant part upon the provisions of the Minnesota receivership
24 statute, Minn. Stat. Ann. § 576.41.

25
26 2. Subsection (a) permits a receiver appointed by this state to seek appointment as an
27 ancillary receiver to take possession of property in another state without first seeking approval of
28 the appointing court.

1 3. Subsection (b) addresses the appointment in this state of an ancillary receivership to a
2 receivership appointed in another state. It provides that the foreign receiver may be appointment
3 as an ancillary receiver for property in this state, as long as the receiver would be eligible for
4 appointment under the Act and appointment would be in furtherance of the purposes of the
5 foreign receivership. The Committee may wish to address eligibility issues that might arise
6 where the ancillary state's receivership statute has an atypical eligibility or competency standard
7 and the primary state's receivership statute does not.
8

9 The Committee may wish to consider whether or to what extent the Act should address
10 conflict principles. For example, suppose that X was appointed a receiver in State A for
11 mortgaged property that was cross-collateralized/cross-defaulted with property in State B, and
12 the creditor seeks to have X appointed an ancillary receiver in State B. An issue could arise if
13 State A's law requires mandatory appointment but State B's law requires proof of waste and/or
14 inadequacy of legal remedies. In this circumstance, should State A's law control or is the court
15 of State B free to refuse appointment based purely upon the provisions of the mortgage?
16

17 4. The Committee may wish to discuss whether the provisions of subsection (c) are
18 sufficient to facilitate appropriate communication and coordination between the primary and
19 ancillary courts.
20

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

27 **SECTION 26. EFFECTIVE DATE.** This [act] takes effect on [date].