

MEMORANDUM

TO: Uniform Law Commission

FROM: Thomas S. Hemmendinger, Chair, Drafting Committee
R. Wilson Freyermuth, Reporter, Drafting Committee

DATE: May 27, 2014

RE: Model Commercial Real Estate Receiverships Act – 2014 Annual Meeting Draft

This Act is scheduled for a first reading at our Annual Meeting in July. The draft includes an extensive Prefatory Note and detailed Reporter’s Notes. This memo is meant to be only a brief introduction to the Act and to the issues before the Drafting Committee.

Receivership is a centuries-old equitable remedy to preserve and liquidate property. A court may appoint a receiver to maintain the status quo during litigation or a mortgage foreclosure, or to liquidate property for the benefit of creditors. Receivership is also a common method to dissolve a business entity. However, many States lack comprehensive case law or statutes to guide courts and parties through the receivership process.

The purpose of this Act is to provide that guidance. The draft reflects the fact that receivership is an equitable remedy. Therefore, it does not purport to be a “receivership code.” Rather, it tries to clarify important questions, such as the receiver’s power to sell real property, while leaving courts the discretion and flexibility to resolve disputes in an equitable manner.

The Drafting Committee welcomes the ideas and suggestions on every aspect of the Act, but particularly invites input on the following points:

Scope (§ 3).

- ❖ The Drafting Committee’s charge is essentially to deal only with commercial property. Therefore, the Committee had three goals in drafting the scope provisions: first, to exclude single-family owner-occupied properties; second, to include mixed-use properties, such as farms, ranches, wineries, and motels where the owner also resides; and third, to prevent owners from gaming the system, by taking truly commercial or income-producing properties out of the Act, simply by moving into them or suspending business operations.
- ❖ The draft contains two alternative ways to accomplish these goals. One is adapted from the Home Foreclosure Protection Act project and excludes most one- to four-family properties. The other one focuses on the primary purpose or configuration of the property. The Drafting

Committee believes that either approach is consistent with our charge. The Committee has not yet decided which approach to incorporate into the Act. Which approach is better?

Grounds for Appointment (§ 5). Receivership is a discretionary remedy, and the Act generally preserves the court’s discretion. However, some States currently allow mortgagees to obtain a receiver as a matter of right, if the mortgagor consented to the appointment in a loan document. The Uniform Assignment of Rents Act (UARA) contains a comparable provision. The draft includes bracketed language on this point, based on UARA. Should this Act adopt this rule? If so, how (with or without brackets)?

Receiver as Lien Creditor (§ 9). The draft reflects the Drafting Committee’s belief that receivers should not have “strong-arm” type avoiding powers of a bankruptcy trustee, but that the Act should deal with unrecorded mortgages and unperfected security interests. For personal property, this draft defers to UCC Article 9. For real property, it defers to the enacting State’s recording act.

Automatic Stay (§ 13). The Act creates a relatively narrow automatic stay designed to protect the status quo, and gives the court power to expand, limit, or grant relief from the stay. The draft makes acts in violation of the stay voidable, rather than void.

Power to Use or Transfer Property (§§ 11 and 15).

- ❖ The draft distinguishes between property transfers based on whether they are in the ordinary course of business. Transfers outside the ordinary course require court approval. The Committee believes that the Act should give the courts flexibility to define “ordinary course of business” and set particular standards for approval of transfers, such as marketing efforts or appraisals.
- ❖ Because current law on the receiver’s power to sell is not uniform, the draft presents three Alternatives for the receiver’s power to transfer property outside the ordinary course of business. They are designed for the States to choose from when they enact this statute. Since the start of this drafting project, the Drafting Committee has considered many Alternatives, and narrowed them to these three. Are these the most appropriate—and enactable—Alternatives?

Executory Contracts (§ 17). The draft gives a receiver the power to adopt or reject most executory contracts. However, it also protects certain pre-receivership purchasers and time share owners, and it restricts the receiver’s ability to reject short-term, good faith residential leases. Are these appropriate limits on the receiver’s power to reject contracts?

Receiver’s Immunity (§ 18). The draft defers to other state law on the scope and contours of the receiver’s immunity. The draft also applies the *Barton* doctrine, which requires court approval before anyone sues a receiver in his/her individual capacity. The Act extends those protections after the receivership, and requires that any suit against the receiver should be in the appointing court.