

D R A F T

FOR DISCUSSION ONLY

**UNIFORM COMMERCIAL REAL ESTATE
RECEIVERSHIP ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FOURTH YEAR
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**UNIFORM COMMERCIAL REAL ESTATE
RECEIVERSHIP ACT**

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 27, 2015

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

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1 **Prefatory Note**

2 **Introduction.** A receiver is a person appointed by a court to take possession of the
3 property of another and to “receive, collect, care for, and dispose of the property or the fruits of
4 the property.” 1 Clark on Receivers § 11(a), at 13 (3d ed. 1959). Courts exercising general
5 equity jurisdiction have traditionally appointed receivers in a variety of different contexts:
6

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

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

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

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

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

30 ***The Need for a Uniform Act.*** Unfortunately, very few states have comprehensive
31 statutory guidance regarding the appointment and powers of receivers for commercial real estate.
32 In the vast majority of states, receivers are appointed pursuant to a court’s general equitable
33 power to appoint a receiver, with minimal statutory guidance either expressly confirming or
34 limiting the power of a receiver. A small handful of states (including California, Indiana,
35 Nebraska, New Mexico, Ohio, Oklahoma, and South Dakota) provide a moderate amount of
36 statutory guidance regarding the appointment and powers of receivers. Only two states —
37 Washington and Minnesota — provide a comprehensive statutory codification of the laws
38 governing the appointment and powers of receivers and receivership procedures.
39

40 Likewise, to date, no uniform law addresses the appointment and powers of real estate
41 receivers in a comprehensive fashion. Although the Uniform Assignment of Rents Act (UARA),
42 promulgated in 2005, does address the evidentiary showing necessary to obtain the appointment
43 of a receiver, UARA’s focus is limited to appointment at the request of an assignee of rents, and
44 nothing in UARA explicitly addresses either receivership procedure or the scope of the powers
45 that a receiver of real estate may exercise before foreclosure.
46

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

- 8 • There is substantial variation as to the circumstances that justify the appointment of a
9 receiver, particularly in the case of mortgaged property. Some courts require that the
10 petitioning party establish the existence of waste; other courts do not require the
11 existence of waste if the property's value is insufficient to satisfy the mortgage debt;
12 others simply permit the petitioning mortgagee to obtain a receiver where the mortgage is
13 in default and the mortgagor consented in the mortgage to the appointment of a receiver
14 after default.
15
- 16 • There is substantial variation as to the circumstances, if any, that justify *ex parte*
17 appointment of a receiver and the procedures associated with *ex parte* appointment.
18 Some courts routinely appoint receivers on an *ex parte* basis with no heightened
19 evidentiary showing required, particularly where the mortgagor consented to *ex parte*
20 appointment in the mortgage or deed of trust. Other courts refuse *ex parte* appointment
21 outright, or require the petitioning mortgagee to establish the circumstances justifying
22 appointment without prior notice to the mortgagor.
23
- 24 • There is substantial variation as to the enforceability of provisions in the mortgage or
25 deed of trust by which the mortgagor consents in advance to the appointment of a
26 receiver after default. In some states, such contractual provisions are enforceable as a
27 matter of right. See, e.g., Ind. Code § 32-30-5-1; Minn. Stat. Ann. § 559.17, subd. 2;
28 N.Y. Real Prop. Law § 254(10); N. Mex. Stat. Ann. § 44-8-4(A). By contrast, most
29 existing statutes provide (or have been interpreted to mean) that the decision to appoint a
30 receiver rests in the discretion of the court, without regard to the terms of the mortgage. 4
31 Clark on Receivers § 950, at 1718 (3d ed. 1959).
32

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

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

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

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

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

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

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

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

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

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

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

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

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

1 recommend disallowance of claims. § 20(e). The Act also authorizes the court to forgo
2 the filing of unsecured claims where the receivership property is likely to be insufficient
3 to satisfy secured claims against the property. § 20(f).
4

- 5 • **Receiver’s Reports.** The receiver must file interim and final reports. §§ 19 and 23.
6
- 7 • **Ancillary Receivership.** Where a receiver has been appointed by another state, the Act
8 authorizes the court to appoint that person or its designee as an ancillary receiver for the
9 purpose of obtaining possession, custody and control of receivership property located
10 within this state. § 24(a). The Act also permits the court to enter any order necessary to
11 effectuate an order of a court in another state appointing or directing a receiver. § 24(b).
12
- 13 • **Receivership in Context of Mortgage Enforcement.** The Act makes clear that the
14 appointment of a receiver on request by a mortgagee or assignee of rents, and actions
15 taken by the receiver, do not make the mortgagee or assignee of rents a “mortgagee in
16 possession,” do not constitute an election of remedies or make the secured obligation
17 unenforceable, and do not constitute an “action” within the meaning of a state’s “one-
18 action” rule. § 25(a). In a state with anti-deficiency rules, where a receiver conducts a
19 sale of receivership property free and clear of a lien, the state’s anti-deficiency rules will
20 apply to any person that held a lien extinguished by the sale to the same extent those rules
21 would have applied after a foreclosure sale not governed by the Act. § 25(b).
22

1 **UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT**

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

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

5 (1) “Affiliate” means:

6 (A) with respect to an individual:

7 (i) a companion of the individual;

8 (ii) a lineal ancestor or descendant, whether by blood or adoption, of:

9 (I) the individual; or

10 (II) a companion of the individual;

11 (iii) a companion of an ancestor or descendant described in clause (ii);

12 (iv) a sibling, aunt, uncle, great aunt, great uncle, first cousin, niece,
13 nephew, grandniece, or grandnephew of the individual, whether related by the whole or the half
14 blood or adoption, or a companion of any of them; or

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

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

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

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

21 (iii) a companion of, or an individual occupying the residence of, an
22 individual described in clause (i) or (ii).

23 (2) “Companion” means:

- 1 (A) the spouse of an individual;
- 2 (B) the [registered] domestic partner of an individual; or
- 3 (C) another individual in a civil union with an individual.
- 4 (3) “Court” means [identify court of general equity jurisdiction in this state].
- 5 (4) “Executory contract” means a contract, including a lease, under which the obligations
- 6 of all parties are not fully performed and the failure of a party to complete performance of its
- 7 obligations would constitute a material breach.
- 8 (5) “Governmental unit” means an office, department, division, bureau, board,
- 9 commission, or other agency of this state or a subdivision of this state.
- 10 (6) “Lien” means an interest in property which secures payment or performance of an
- 11 obligation.
- 12 (7) “Mortgage” means a record, however denominated, that creates or provides for a
- 13 consensual lien on real property or rents, even if it also creates or provides for a lien on personal
- 14 property.
- 15 (8) “Mortgagee” means a person entitled to enforce an obligation secured by a mortgage.
- 16 (9) “Mortgagor” means a person that grants a mortgage or a successor in ownership of
- 17 the real property described in the mortgage.
- 18 (10) “Owner” means the person for whose property a receiver is appointed.
- 19 (11) “Person” means an individual, estate, business or nonprofit entity, public
- 20 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
- 21 entity.
- 22 (12) “Proceeds” means the following property:
- 23 (A) whatever is acquired on the sale, lease, license, exchange, or other disposition

1 of receivership property;

2 (B) whatever is collected on, or distributed on account of, receivership property;

3 (C) rights arising out of receivership property;

4 (D) to the extent of the value of receivership property, claims arising out of the
5 loss, nonconformity, or interference with the use of, defects or infringement of rights in, or
6 damage to the property; or

7 (E) to the extent of the value of receivership property and to the extent payable to
8 the owner or mortgagee, insurance payable by reason of the loss or nonconformity of, defects or
9 infringement of rights in, or damage to the property.

10 (13) "Property" means all of a person's right, title, and interest, both legal and equitable,
11 in real and personal property, tangible and intangible, wherever located and however acquired.
12 The term includes proceeds, products, offspring, rents, or profits of or from the property.

13 (14) "Receiver" means a person appointed by the court as the court's agent, and subject
14 to the court's direction, to take possession of, manage, and, if authorized by this [act] or court
15 order, transfer, sell, lease, license, exchange, collect, or otherwise dispose of receivership
16 property.

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

18 (16) "Receivership property" means the property of an owner which is described in the
19 order appointing a receiver or a subsequent order. The term includes any proceeds of the
20 property.

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

23 (18) "Rents" means:

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

3 (B) sums payable to a mortgagor under a policy of rental-interruption insurance
4 covering real property;

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

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

9 (E) sums payable to a mortgagor for payment or reimbursement of expenses
10 incurred in owning, operating, and maintaining real property, or constructing or installing
11 improvements on real property; or

12 (F) other sums payable under an agreement relating to the real property of another
13 person which constitute rents under law of this state other than this [act].

14 (19) “Secured obligation” means an obligation the payment or performance of which is
15 secured by a security agreement.

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

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

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

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

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

1 **Reporter’s Notes**

2 1. “Affiliate.” The Act uses the term to describe a person who is presumptively disqualified
3 from serving as a receiver under Section 7 based on the person’s relationship with a party to the
4 proceeding. The term is also used in conjunction with the Act’s scope exclusion for residential
5 real property in Section 4(b). The definition is adapted from the one used in the Uniform Debt-
6 Management Services Act (2011).

7
8 References: § 4(b) (scope exclusion for residential real property; § 7(b) (disqualification
9 of person to serve as receiver).

10
11 2. “Companion.” The term means the spouse or [registered] domestic partner of an
12 individual as well as another individual in a civil union with the individual. This definition
13 works in conjunction with the definition of “affiliate” to simplify that definition.

14
15 3. “Court.” The Act defines the term to refer to the court of general equity jurisdiction
16 within the state.

17
18 4. “Executory contract.” The Act defines the term to include an unexpired lease. The
19 definition is similar to the one contained in the Minnesota receivership statute, Minn. Stat. Ann.
20 § 576.21(d), but with a slight modification to track the traditional “Countryman” formulation of
21 the term more precisely. See, e.g., Countryman, Executory Contracts in Bankruptcy: Part I, 57
22 Minn. L. Rev. 439, 460 (1973) (executory contract is one under which the obligation of both
23 parties “are so far unperformed that the failure of either to complete performance would
24 constitute a material breach excusing the performance of the other”).

25
26 References: § 12(b) (power of receiver includes right to adopt/reject executory contract);
27 § 17(b) through (h) (adoption/rejection/assignment of executory contract or unexpired lease).

28
29 5. “Governmental unit.” In this Act, the term “governmental unit” is used to describe state
30 or municipal entities capable of exercising regulatory and police powers. See Minn. Stat. Ann. §
31 576.21(t).

32
33 References: § 4(c) (scope of Act); § 14(d) (exceptions to automatic stay).

34
35 6. “Lien.” The Act defines “lien” to include any voluntary and involuntary interest in
36 property securing an obligation, and includes a security interest.

37
38 References: § 9 (receiver’s status as lien creditor); § 11(b) (adequate protection as
39 precondition to turnover of receivership property subject to lien); § 14(a) (enforcement of lien
40 stayed by appointment); § 16(c) (sale, lease, license, or other transfer by receiver other than in
41 ordinary course); § 16(d) (transfer of lien to proceeds); § 16(e) (right of lienholder to credit bid);
42 § 17(g) (receiver’s rejection of executory contract for purchase of real property or real estate
43 timeshare interest); § 20(g) (distribution on claim of lienholder); § 25(a), (b) (effects of
44 receivership/one-action and anti-deficiency rules).

1 7. “Mortgage.” The Act defines “mortgage” to mean any record, however denominated,
2 that creates a security interest in real property. The term includes a deed of trust or deed to
3 secure debt, and includes an installment land contract in a state that treats an installment land
4 contract as creating a security interest. The term also includes an assignment of rents and leases.
5

6 References: § 6(a), 6(b) (appointment of receiver at request of mortgagee; effect of
7 consent expressed in mortgage); § 14(d) (stay does not prevent foreclosure by creditor who
8 obtained appointment of receiver); § 17(h) (receiver’s power to reject unexpired lease).
9

10 8. “Mortgagee.” The Act defines the term to include any person holding a mortgage. The
11 term includes an assignee of rents.
12

13 References: § 6(b) (appointment where consent expressed in mortgage); § 17(h)
14 (receiver’s power to reject unexpired lease); § 25(a) (effects of receivership/one-action and anti-
15 deficiency rules).
16

17 9. “Mortgagor.” The Act defines “mortgagor” to mean the person granting a mortgage and
18 any successor owner of the mortgaged real property. The term includes an assignor of rents.
19

20 References: § 6(b) (appointment where consent expressed in mortgage); § 25(a) (effects
21 of receivership/one-action and anti-deficiency rules).
22

23 10. “Owner.” The Act defines “owner” to mean the person over whose property the receiver
24 is appointed.
25

26 References: § 4(b) (scope exclusion for owner-occupied residential property); § 6(a)
27 (grounds for appointment); § 6(b) (appointment where consent expressed in mortgage); § 10
28 (receivership property subject to pre-petition security agreement); § 12(a), (b) (power of receiver
29 to assert rights of owner and adopt/reject executory contract of owner); § 13(a), (b) (duties of
30 owner); § 14(a), (d) (effect and scope of stay); § 17(b) (adoption/rejection of executory contract
31 of owner); § 17(d) (assignment of executory contract); § 17(f) (enforceability of contractual limit
32 on assignment of executory contract); § 17(g) (rejection of executory contract to purchase real
33 estate); § 17(h) (rejection of unexpired lease).
34

35 11. “Person.” The Act uses the ULC-required definition for the term.
36

37 References: § 6(a) (grounds for appointment of receiver); § 6(c) (ex parte appointment of
38 receiver); § 7(a) through (d) (identity/eligibility of receiver); § 8(a) (receiver’s bond); § 11(a), (c)
39 (turnover requirement); § 12(a) (powers of receiver); § 13(b) (duties of owner); § 14(a)
40 (automatic stay); § 14(c) (relief from stay); § 14(d) (exceptions to automatic stay); § 14(f)
41 (sanctions for stay violation); § 15(a), (b) (appointment of professionals); § 16(c) (sale, lease,
42 license or other transfer other than in ordinary course); § 16(f) (finality of sale, lease, license or
43 other transfer other than in ordinary course); § 22(d) (sanctions for improvident appointment of
44 receiver); § 24(a) (appointment of ancillary receiver).
45

46 12. “Proceeds.” The Act defines proceeds in a fashion consistent with its definition under

1 Uniform Commercial Code § 9-102(a)(64).

2
3 13. “Property.” The Act defines the term broadly to include all legally-recognized interests.
4 “Personal property” includes both tangible and intangible property.

5
6 14. “Receiver.” The definition derives from the one contained in Minn. Stat. Ann. §
7 576.21(p).

8
9 15. “Receivership.” The definition derives from the one contained in Minn. Stat. Ann. §
10 576.21(q).

11
12 16. “Receivership property.” The definition is adapted from Minn. Stat. Ann. § 576.21(r).

13
14 References: § 5 (power of court); § 8(a), 8(b) (receiver’s bond); § 9 (receiver’s status as
15 lien creditor); § 11(a), (b), (c) (turnover of receivership property); § 12(a), (b) (powers of
16 receiver); § 12(c) (duties of receiver); § 13(a) (duties of owner); § 14(a), (b) (nature and scope of
17 automatic stay); § 14(d) (exceptions to automatic stay); § 16(b) (use of receivership property
18 other than in ordinary course); § 16(c) (sale, lease, license, or other transfer by receiver other
19 than in ordinary course); § 17(b) (receiver’s power to adopt/reject executory contract relating to
20 receivership property); § 17(e) (effect of rejection of executory contract); § 17(f) (enforceability
21 of contractual limit on assignment of executory contract); § 17(g) (receiver’s power to reject
22 executory contract for sale of land or timeshare interest); § 18(b) (suit against receiver); § 19
23 (interim report of receiver); § 20(g) (distribution of receivership property to secured creditor); §
24 21(a) (fees and expenses of receivership); § 22(c), (d) (removal/termination of receiver); § 23(a)
25 (final report of receiver); § 25(a), (b) (effects of receivership/one-action and anti-deficiency
26 rules).

27
28 17. “Record.” The Act uses the media-neutral term “record” as a noun to include both
29 written and electronic documents. The limitation of the definition to use of “record” as a noun is
30 designed to avoid confusion due to the customary use of the term “record” as a verb in real estate
31 practice.

32
33 References: § 6(b) (appointment where mortgagor consent expressed in a record); §
34 12(a), (c) (powers and duties of receiver); § 13(a) (duties of owner); § 17(h) (receiver’s power to
35 reject unexpired lease); § 20(c), (d) (filing of claims and assignment of claims).

36
37 18. “Rents.” This definition is substantially identical to the definition used in the Uniform
38 Assignment of Rents Act. Because the Act’s scope exclusion for residential property depends on
39 whether the resident is collecting rents from a non-affiliate, a definition of “rents” is needed to
40 delineate the Act’s scope with sufficient clarity. Likewise, the definition is needed because the
41 owner’s failure to turn over rents that a mortgagee is entitled to collect provides grounds for the
42 appointment of a receiver under § 6(b).

43
44 References: § 4(b) (scope exclusion for residential real property); § 6(a), 6(b) (standards
45 for appointment of receiver).

1 19. “Secured obligation.” The Act uses this term, which is commonly used in other real
2 estate-related acts, see, e.g., Uniform Assignment of Rents Act § 2(13); Uniform Residential
3 Mortgage Satisfaction Act § 102(15), rather than the term “mortgage debt.”
4

5 References: § 6(b) (appointment where consent expressed in mortgage); § 25(a) (effects
6 of receivership/one-action and anti-deficiency rules).
7

8 20. “Security agreement.” The Act uses this term to include any agreement that creates or
9 provides for a lien. The term includes a mortgage as defined in Section 2(7).
10

11 Reference: § 10 (receivership property subject to pre-petition security agreement).
12

13 21. “Sign.” The Act uses the media-neutral version of the term commonly used in other
14 recent Uniform Acts.
15

16 References: § 6(b) (appointment where consent expressed in signed record); § 20(c), (d)
17 (signature requirement for submitted claims and assignment of claims).
18

19 22. “State.” The Act uses the boilerplate ULC definition of the term. The definition does not
20 include tribal sovereigns, consistent with the decision of the Drafting Committee in November
21 2014 that such a change is not warranted absent an indication of interest in the Act from one or
22 more tribal organizations.
23

24 **SECTION 3. NOTICE AND OPPORTUNITY FOR HEARING.**

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

27 (b) The court may issue an order under this [act]:

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

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

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

34 **Reporter’s Note**

35 Principles of due process and fairness in judicial administration require that persons

1 affected by a receivership should have notice and an opportunity to be heard before a final
2 determination of their legal rights and responsibilities. However, because receivership is a
3 flexible remedy based in equity, it is not appropriate to implement a rule requiring a uniform
4 type of notice, duration of notice, or hearing for every determination made in the context of a
5 receivership. Consistent with due process requirements, Section 3(a) incorporates the idea that
6 any court order under this Act may be made only “after notice and opportunity for a hearing.”
7 Section 3(a) expresses this concept in a flexible fashion that permits the appointing court to
8 require notice and opportunity for a hearing that is appropriate in the particular circumstances.
9

10 For example, where a receiver proposes to sell property free and clear of liens under
11 Section 16 of this Act, a court should not issue an order approving such a sale without prior
12 notice to interested persons and the actual conduct of a hearing on the proposed merits of the sale
13 terms. In the context of such a sale, there are no plausible circumstances that would require the
14 conduct of such a sale without notice to interested persons and the opportunity for a hearing at
15 which parties objecting to the sale may be heard as to the basis for their objections. By contrast,
16 in many circumstances, such as where the court is approving a routine periodic report by the
17 receiver, the court might require prior notice to interested persons, but might indicate that no
18 hearing would be held before the court’s entry of the order unless an interested party requested a
19 hearing in a timely fashion.
20

21 Section 3 also addresses the possibility that in some circumstances, a court might enter an
22 order appointing or directing a receiver on an *ex parte* basis (without prior notice), where the
23 particular circumstances require that the court issue an order before notice can be given or a
24 hearing held. In such cases, to ensure compliance with due process, principles of due process
25 still require that notice be sent after the order is entered and that prompt opportunity for a post-
26 order hearing be provided. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).
27

28 **SECTION 4. SCOPE; EXCLUSIONS.**

29 (a) Except as otherwise provided in subsection (b) or (c), this [act] applies to a
30 receivership for an interest in real property and any personal property related to the real property
31 or used in operating the real property.

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

34 (1) the interest is used for agricultural, commercial, industrial, or mineral
35 extraction purposes, other than incidental uses by an owner occupying the property as the
36 owner’s primary residence;

37 (2) the interest secures an obligation incurred at a time when the property was

1 used or planned for use for agricultural, commercial, industrial, or mineral extraction purposes;

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

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

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

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

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

13 *Legislative Note: In many states, there are statutes under which a governmental unit or official*
14 *may be appointed as a receiver for an organization such as a hospital, insurance company, or*
15 *other organization affected with a public interest. This [act] generally would not govern the*
16 *receivership, but the bracketed language at the end of subsection (c) would permit a state to*
17 *modify its existing receivership statute to incorporate some or all provisions of this act.*

18

19

Reporter's Notes

20 1. Subsection (a) reflects the Drafting Committee's charge to address the appointment and
21 powers of real estate receivers. Thus, subsection (a) provides that except to the extent Section 4
22 otherwise limits, the Act will govern receivership of real property and personal property that is
23 related to the real property or used in its operation. Thus, for example, if the mortgagee of real
24 estate used by the mortgagor as a hotel sought the appointment of a receiver following the
25 mortgagor's default, the court could appoint a receiver under this Act for both the real estate and
26 any personal property of the owner used in the operation of the hotel (e.g., furnishings,
27 food/beverage inventories, and accounts receivable). In a receivership for an owner engaged in
28 farming operations on land possessed by the owner in fee simple, the court could appoint a
29 receiver for the land, growing crops, and any personal property or fixtures related to or used in
30 the farming operation. Likewise, large natural resource development projects frequently are
31 financed through large credit facilities which include real property collateral (the mineral estate
32 and/or the surface estate), personal property collateral, and fixtures. The court could appoint a
33 receiver under this Act for all of the real and personal property assets of the owner used in

1 operating such a project.
2

3 Where mineral rights have not been severed from the surface estate, appointment of a
4 receiver for the surface estate would include the unsevered mineral rights. Where mineral rights
5 have been severed and a receiver is appointed for the owner of the mineral rights, the
6 receivership property would include the mineral rights, but would include no right in the surface
7 estate other than any easement or other use rights associated with ownership of the mineral
8 estate. In such a case, rather than the exploitation of the mineral rights, the purpose of the
9 receivership would likely be to market and sell the mineral rights using the receiver’s power
10 under Section 16 of this Act.
11

12 2. Subsection (b) provides the Act’s primary scope exclusion — this Act may not be used to
13 appoint a receiver for an interest in real property improved with one to four dwelling units,
14 unless (1) the interest is used for agricultural, commercial, industrial, or mineral extraction
15 purposes, other than incidental uses by an owner occupying the property as the owner’s primary
16 residence; (2) the interest secures an obligation incurred at a time when the property was used or
17 planned for use for agricultural, commercial, industrial, or mineral extraction purposes; (3) the
18 owner planned or is planning to develop the property into one or more dwelling units to be sold
19 or leased in the ordinary course of the owner’s business; or (4) the owner is collecting or has the
20 right to collect rents or other income from the property from a person other than an affiliate of
21 the owner.
22

23 Section 4(b) draws an appropriate line with respect to properties to be included within the
24 Act. The Act includes the following properties within its scope:
25

- 26 • Any commercial building (even if the building was vacant and not currently being
27 “used”) and any undeveloped land, on the theory that such land is not residential in nature
28 and thus should be covered by the Act.
29
- 30 • A failed/failing residential development in which the owner/developer had expected to
31 complete more than four dwelling units for sale or lease in the ordinary course of the
32 owner’s business, but actually completed four or fewer unsold dwelling units. In this
33 situation, the development is clearly commercial in character and should not fall within
34 the general exclusion for property improved by one to four dwelling units.
35
- 36 • A home that a builder built as a “spec” home that remains unsold. In that situation, the
37 owner’s use of the property is commercial and not residential in nature, and the Act
38 should apply.
39
- 40 • A home, duplex, triplex or quadplex—even if the owner occupies a portion of it as the
41 owner’s residence—if the owner is collecting rents or has the right to collect rents from
42 persons other than an affiliate of the owner. In this situation, where the owner is
43 collecting rents from unrelated persons, the owner is effectively making a commercial
44 use of the property, and the Act should apply.
45
- 46 • An interest in property that is improved by one to four dwelling units, if the interest is

1 used for agricultural, commercial, industrial, or mineral extraction purposes. Section 4(b)
2 thus includes within the scope of the Act property that is a farm, ranch, winery, or the
3 like, even if there are one to four dwelling units on the property. This draft reflects the
4 Committee’s understanding that such parcels were “commercial” and should be covered
5 by the Act.
6

- 7 • An interest in property that is improved by one to four dwelling units and is currently
8 used only for residential purposes, if the interest secures an obligation that was incurred
9 at a time when the interest was used or planned for use for agricultural, commercial,
10 industrial, or mineral extraction purposes. Thus, for example, if the owner borrowed
11 money and granted a mortgage on land that it was using (or planned to use) as a farm,
12 Section 4(b) permits a court to appoint a receiver for the land even if the owner was no
13 longer engaged in farming operations and the owner’s current use of the land was
14 exclusively residential in nature.
15

16 By contrast, the Act excludes the following:

- 17
18 • A home occupied only by the owner and used for residential purposes, even if the owner
19 made incidental use of a portion of the home other than for strictly residential purposes.
20 For example, where an owner uses a spare bedroom as a home office for occasional
21 paperwork in the evenings and on weekends, a court may not use this Act as a basis to
22 appoint a receiver for the home.
23
- 24 • A home for which the owner was collecting rents only from one or more children,
25 parents, or other relatives that are “affiliates” under the Act, because rents being
26 collected only from family members are generally more appropriately characterized as
27 intra-family support rather than commercial activity.
28
- 29 • A vacation home that was not the owner’s primary residence if the owner did not rent
30 the home to a person other than an affiliate.
31

32 The exclusion of these residential properties from this Act is not intended to suggest that a court
33 could never appoint a receiver for such a property. Instead, the exclusion means only that this
34 Act may not be used to be appoint a receiver. A court might still appoint a receiver for such
35 residential property under other state law, if other state law would permit appointment of a
36 receiver for residential property under the circumstances.
37

38 3. Subsection (c) is intended to address the relationship of this Act to existing statutory
39 regimes for the appointment of receivers for certain entities. See, e.g., N.H. Rev. Stat. § 401-
40 B:11 (authorizing receivership of insurance company). The provisions of this Act do not apply
41 to appointment of a receiver under an existing statutory regime, except to the extent that the
42 other statutory regime or other law so provides. The bracketed language, by requiring the
43 authorization to come from other law, reflects that the Act does not by itself authorize courts to
44 apply the provisions of the Act by analogy to cases outside the Act’s scope.
45

46 4. Subsection (d) makes clear that this Act is not intended to be the exclusive method by

1 which a court may appoint a receiver. Further, courts are welcome to look to this Act for
2 guidance as to appropriate practices in receiverships that are outside the scope of this Act.

3
4 **SECTION 5. POWER OF COURT.** The court that appoints a receiver under this [act]

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

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

13 **Reporter's Notes**

14 1. Section 5 provides a statement of the court's powers in the context of a receivership. It is
15 a substantial adaptation of Minnesota's receivership statute, Minn. Stat. Ann. § 576.23. Under
16 this section, the court has the authority to determine all controversies relating to the collection,
17 preservation, improvement, disposition and distribution of receivership property, as well as all
18 matters arising in or relating to the receivership, the receivership property, the exercise of the
19 receiver's powers, or the performance of the receiver's duties. See also Wash. Rev. Code Ann. §
20 7.60.055(1).

21
22 2. Section 5 focuses only on the appointing court's exclusive judicial authority over the
23 receiver and the receivership property. Section 5 does not displace the exercise of legitimate
24 police powers over the receiver or receivership property.

25
26 3. In some circumstances, a creditor may ask a court to appoint a receiver for an owner with
27 property located in multiple states. For example, suppose Bank holds mortgages on Owner's
28 farm, which is located on contiguous parcels, one located in State A and the other in State B. At
29 Bank's request, State A appoints a receiver under this Act. Section 5 does not authorize the
30 receiver appointed to take possession and control of the portion of the farm located in State B,
31 even if the order appointing the receiver nominally identifies the entire farm as receivership
32 property. If a court appoints a receiver in State A and the receiver wants to take possession and
33 control of property located in State B, the receiver must obtain appointment as an ancillary
34 receiver in State B. Section 12(a)(8) makes clear that the receiver has the power under this Act to
35 seek appointment as an ancillary receiver for property located in another state.

36
37 Likewise, at the time a receiver is appointed in this state, there could be pending litigation
38 in another state involving the owner or the owner's property. Section 5 does not expand the
39 court's subject matter jurisdiction so as permit the appointing court to direct the court of another
40 jurisdiction in the resolution of pending litigation. Section 5 does, however, give the appointing
41 court the exclusive jurisdiction to direct the receiver as to how the receiver can or should respond
42 to pending litigation in another state that might be relevant to the receivership.

1 4. In at least one state (Kentucky), while there is existing ancient case law that does confirm
2 that the appointing court may empower a receiver to act with respect to receivership property
3 located anywhere within the boundaries of the same state, some judges nevertheless hesitate to
4 recognize a receiver's ability to act outside the county in which he or she was appointed without
5 express statutory authority. As reflected in the Legislative Note, in states where certain county,
6 district, or circuit courts may lack the ability to issue orders with statewide effect, Section 5
7 should be revised to permit a court's orders in receiverships covered by this Act to have
8 statewide effect.

9
10 **SECTION 6. APPOINTMENT OF RECEIVER.**

11 (a) The court may appoint a receiver:

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

14 (A) is being subjected to or is in danger of waste, loss, dissipation, or
15 impairment; or

16 (B) has been or could be the subject of a voidable transaction;

17 (2) after judgment:

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

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

22 (3) in an action in which a receiver for real property may be appointed on
23 equitable grounds[; and]

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

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

1 (1) appointment is necessary to protect the property from waste, loss, transfer,
2 dissipation, or impairment;

3 (2) the mortgagor agreed in a signed record to appointment of a receiver on
4 default;

5 (3) the owner agreed, after default and in a signed record, to appointment of a
6 receiver;

7 (4) the property and any other collateral held by the mortgagee are not sufficient
8 to satisfy the secured obligation;

9 (5) the owner fails to turn over to the mortgagee proceeds or rents the mortgagee
10 was entitled to collect; or

11 (6) the holder of a subordinate lien obtains appointment of a receiver for the
12 property.

13 (c) The court may condition appointment of a receiver without prior notice under Section
14 3(b)(1) or without a prior hearing under Section 3(b)(2) on the giving of security by the person
15 seeking the appointment for the payment of damages, reasonable attorney's fees, and costs
16 incurred or suffered by any person if the court concludes that the appointment was not justified.
17 If the court later concludes that the appointment was justified, the court shall release the security.

18 **Legislative Note:** Subsection (a)(4) permits the court to appoint a receiver for the property and
19 its rents during the redemption period. It would be appropriate in a state that provides a post-
20 sale statutory redemption right.

21
22 Subsection (b) includes bracketed alternatives. Under the first, a mortgagee would be entitled to
23 appointment of a receiver in the six circumstances listed in subsection (b). Under the second,
24 these six circumstances would justify appointment of a receiver, but appointment would be
25 subject to the court's discretion rather than an entitlement. Under Section 7 of the Uniform
26 Assignment of Rents Act (UARA), an assignee of rents is entitled to appointment of a receiver
27 under the circumstances expressed in subsection (b). Thus, in a jurisdiction that has enacted
28 UARA, subsection (b) should use the first bracketed alternative to avoid the risk that adoption of
29 this act might create an implied repeal of UARA Section 7.

1 **Reporter’s Notes**

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

4
5 The appointment of a receiver is the means and not the end. . . . Before a court will
6 appoint a receiver the litigant must bring a proper suit before the court and claim a
7 substantive right has been violated, and the court at its discretion appoints a receiver to
8 preserve the res in order that it may respond to the adjudication by the court concerning
9 the substantive right claimed by the party asking for a receiver. The appointment of a
10 receiver in itself determines no substantive right.

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

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

23
24 Subsection (a)(3) authorizes the court to appoint a receiver under this Act in cases in
25 which courts of this state have appointed or may appoint receivers for real property on equitable
26 grounds. This includes the insolvency of the owner of the real property.

27
28 Subsection (a)(4) would be appropriate in states that provide a post-sale statutory
29 redemption right, and would permit the court to appoint a receiver for the property and its rents
30 during the redemption period.

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

1 *Ass'n*, 717 F. Supp. 745 (D. Kan. 1989); *Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd.*,
2 644 A.2d 685 (N.J. Super. 1994) (receivership clause “usurps the judicial function” and thus
3 violates public policy).
4

5 Other courts have treated receivership clauses as presumptively but not conclusively
6 enforceable. *Barclays Bank v. Superior Court*, 137 Cal. Rptr. 743 (Cal. App. 1977); *Riverside*
7 *Properties v. Teachers Ins. & Annuity Ass'n*, 590 S.W.2d 736 (Tex. App. 1979); *Okura & Co. v.*
8 *Careau Group*, 783 F. Supp. 482 (C.D. Cal. 1991); *Wellman Sav. Bank v. Roth*, 432 N.W.2d 697
9 (Iowa App. 1988).
10

11 By contrast, there is significant recent authority supporting the view that a receivership
12 clause provides a sufficient basis to appoint a receiver after the mortgagor’s default. See, e.g.,
13 *Bank of America Nat’l Trust & Sav. Ass’n v. Denver Hotel Ass’n Ltd. Partnership*, 830 P.2d
14 1138 (Colo. App. 1992); *Fleet Bank v. Zimelman*, 575 A.2d 731 (Me. 1990); *Metropolitan Life*
15 *Ins. Co. v. Liberty Center Venture*, 650 A.2d 887 (Pa. Super. 1994); *Federal Home Loan*
16 *Mortgage Corp. v. Nazar*, 100 B.R. 555 (D. Kan. 1989). Finally, federal courts have routinely
17 held receivership clauses in federally insured mortgages sufficient to justify the appointment of a
18 receiver. See, e.g., *United States v. Berk & Berk*, 767 F. Supp. 593 (D. N.J. 1991); *United States*
19 *v. Drexel View II, Ltd.*, 661 F. Supp. 1120 (N.D. Ill. 1987). Consistent with this recent authority,
20 both the Restatement (Third) of Property — Mortgages and the Uniform Assignment of Rents
21 Act take the view that a mortgagee/assignee of rents is “entitled” to the appointment of a receiver
22 where the loan documents contain a clause under which the mortgagor consented to appointment.
23 Restatement (Third) of Property — Mortgages § 4.3(b); Uniform Assignment of Rents Act §
24 7(a).
25

26 Furthermore, some state statutes explicitly make clear that the mortgagee is entitled to a
27 receiver following default as a matter of right. See, e.g., Ind. Code § 32-30-5-1 (court “shall”
28 appoint a receiver if “either the mortgagor or the owner of the property has agreed in the
29 mortgage or in some other writing to the appointment of a receiver”); Minn. Stat. Ann. § 559.17,
30 subd. 2 (where assignment of rents contains receivership clause, “the court shall, without regard
31 to waste, adequacy of the security, or solvency of the mortgagor, appoint a receiver”); N.Y. Real
32 Prop. Law § 254(10) (receivership clause “must be construed as meaning that the mortgagee, his
33 heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without
34 notice and without regard to adequacy of any security of the debt, to the appointment of a
35 receiver of the rents and profits of the premises covered by the mortgage”); N. Mex. Stat. Ann. §
36 44-8-4(A) (court “shall appoint a receiver in an action by a mortgagee or secured party ... where
37 such mortgage, security agreement, contract or other written agreement provides for the
38 appointment of a receiver”).
39

40 Consistent with this recent trend, subsection (b) is based on the comparable provision of
41 § 7 of the Uniform Assignment of Rents Act. One of the bracketed alternatives provides that a
42 person seeking appointment of a receiver is entitled to a receiver as a matter of right in a
43 proceeding to foreclosure a mortgage or enforce an assignment of rents where one of the
44 following conditions exists: (1) appointment is necessary to protect the mortgaged property or
45 rents arising from the property from waste, loss, transfer, or dissipation; (2) the loan documents
46 contain a receivership clause; (3) the owner otherwise consents; (4) the property’s value is not

1 sufficient to satisfy the secured obligation; (5) the owner has failed to turn over rents that the
2 creditor is entitled to collect; or (6) a subordinate creditor has obtained the appointment of a
3 receiver for the property. Under the second bracketed alternative, the presence of one or more of
4 these six factors is grounds for appointment in the court’s discretion. The Legislative Note
5 makes clear that in jurisdictions that have enacted the Uniform Assignment of Rents Act, the
6 state should make certain that Section 6(b) adopts the “matter of right” alternative, so as to avoid
7 any possibility that the enactment of this Act might work an implied repeal of the provisions of
8 UARA Section 7. Likewise, to facilitate enactment in states in which other case law or statutory
9 law makes appointment of a receiver mandatory in certain cases involving mortgage
10 enforcement, the provisions of Section 6 should facilitate the Act’s consistency with those
11 existing state laws.

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

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

30
31 4. Subsection (c) authorizes (but does not require) the court to condition the *ex parte*
32 appointment of a receiver upon the giving of security by the person seeking appointment. This
33 security would protect against damages, fees, and costs incurred or suffered by any person if the
34 court later concludes that the receiver’s appointment was not justified.

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

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

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

1 under penalty of perjury that the person is not disqualified.

2 (b) Except as otherwise provided in subsection (c), a person is disqualified from
3 appointment as receiver if the person:

4 (1) is an affiliate of a party;

5 (2) has an interest materially adverse to an interest of a party;

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

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

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

11 (c) A person is not disqualified from appointment as receiver solely because the person:

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

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

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

18 **Reporter's Notes**

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

25

26 2. Subsection (a) requires the prospective receiver to provide sworn evidence of its
27 independence. Subsection (b) sets forth the circumstances that would disqualify a person from
28 service as a receiver. Earlier drafts of this Section provided that the court could appoint an

1 interested person as receiver with the consent of all parties. The Drafting Committee made a
2 determination to require independence, based significantly on input from Observers within the
3 receiver community who noted that significant abuse resulted from the appointment of interested
4 persons (particularly brokers) as receivers during the most recent real estate downturn.
5

6 Subsection (c) makes clear, however, that a person is not disqualified as a receiver merely
7 because that person has served as a receiver in or is owed compensation relating to a prior
8 unrelated dispute. Subsection (c) also makes clear that an individual receiver is not disqualified
9 merely because the receiver is obligated on a consumer loan that is not in default. For example,
10 an individual would not be disqualified from serving as receiver in a case in which Last National
11 Bank is a creditor merely because the receiver’s home mortgage was originated or is serviced by
12 Last National Bank.
13

14 In most jurisdictions, it is customary for the person seeking the receiver’s appointment to
15 nominate a prospective receiver. Subsection (d) contemplates such a practice, but makes clear
16 that the identity of the receiver is ultimately subject to the court’s discretion. 1 Clark on
17 Receivers, § 48, at 52 (3d ed. 1959) (“the power of determining who the receiver shall be rests
18 with the court”).
19

20 **SECTION 8. RECEIVER’S BOND.**

21 (a) A receiver shall post with the court a bond:

22 (1) conditioned on the faithful discharge of the receiver’s duties;

23 (2) with one or more sureties approved by the court;

24 (3) in an amount the court specifies; and

25 (4) effective as of the date of the receiver’s appointment.

26 (b) The court may authorize the receiver to act before the receiver posts the bond
27 required by subsection (a).

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

30 **Legislative Note:** *Subsection (c) creates a limitation period for a claim against the bond based*
31 *on an action by the receiver. The period should be consistent with the state’s limitation period*
32 *for obtaining relief from a judgment.*
33

34 **Reporter’s Notes**

35 1. Nearly all of the existing state receivership statutes or rules require that the receiver must

1 post a bond in an amount determined by the court, but provide no specific guidance to the court
2 with respect to the amount of the bond. See, e.g., Alaska Stat. § 09.40.250; Ariz. R. Civ. Proc.
3 66(b)(2); Ark. R. Civ. Proc. 66(a); Cal. Code Civ. Proc. § 567(b); Colo. R. Civ. Proc. 66(b);
4 Idaho Code § 8-604; Ind. Code § 32-30-5-3; Iowa Code Ann. § 680.3; Kan. Stat. Ann. § 60-
5 1302; Mich. Comp. Laws Ann. § 600.2926; Minn. Stat. Ann. § 576.27; Miss. Code Ann. § 11-5-
6 159; Mo. Rev. Stat. § 515.250; Mont. Code Ann. § 27-20-301; N.C. Gen. Stat. § 1-504; N.D.
7 Cent. Code § 32-10-03; Ohio Rev. Code § 2735.03; Okla. Stat. tit. 12, § 1553; R.I. R. Civ. Proc.
8 66(k); S.D. Codif. Laws § 21-21-8; Tex. Civ. Prac. & Rem. Code § 64.023; Wash. Rev. Code
9 Ann. § 7.60.045; W.Va. Code § 53-6-1. By contrast, only a few statutes provide some
10 requirement regarding the size of the bond. See, e.g., Va. Code Ann. § 8.01-587 (bond must be
11 “sufficient at least to cover the probable amount under [the receiver’s] control in any one year);
12 Wis. Stat. Ann. § 813.16(6) (bond must be in an amount “sufficient to cover all property likely to
13 come into the receiver’s hands”).

14
15 Subsection (a) reflects the Drafting Committee’s determination that the amount of the
16 receiver’s bond should be left to the discretion of the judge based on the particular circumstances
17 of the case. Nevertheless, best practices would suggest that a court should require a bond
18 amount based on monthly cash flow through the receivership.

19
20 2. Although subsection (a) requires that the receiver’s bond must be effective as of the date
21 of appointment, subsection (b) makes clear that the court may authorize the receiver to act before
22 the bond has actually been posted with the court.

23
24 3. Section 23(b) provides that the court’s approval of the receiver’s final report following
25 the receiver’s distribution of all receivership property discharges the receiver from further duties
26 as receiver. However, that discharge does not result in the discharge of the surety on the
27 receiver’s bond. As the Clark treatise explains:

28
29 At the time of discharge of the receiver the court will not vacate his recognizance or bond
30 even upon the request of all parties, nor shall sureties on the bond be discharged upon
31 their own request. On the discharge of the receiver the surety is still liable for any default
32 [the receiver] may have made during the administration of his trust, even though this may
33 be afterwards discovered. [3 Clark on Receivers § 696(a), at 1282 (3d ed. 1959).]

34
35 To provide finality to the surety on the receiver’s bond, subsection (c) provides a one-
36 year period for filing claims against the bond, and is modeled on a similar provision in Wash.
37 Rev. Code Ann. § 7.60.045. As the Legislative Note makes clear, this period typically is
38 consistent with the limitations period for obtaining relief from a judgment.

39
40 **SECTION 9. RECEIVER’S STATUS AS LIEN CREDITOR.** On appointment of a
41 receiver, the receiver has the status of a lien creditor:

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

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

3 **Reporter's Note**

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

10
11 The appointment of a receiver does not void contracts between the plaintiff and
12 defendant, neither does it void contracts between the defendant and third parties. It,
13 therefore, follows that under ordinary circumstances, without a governing statute, a third
14 person having an interest in the res or a part of the res by reason of a [security interest] is
15 not deprived of his contractual right by reason of the appointment of a receiver. [*Id.* §
16 274.2, at 425.]

17
18 Nevertheless, Uniform Commercial Code Article 9 requires that a security interest be
19 perfected to ensure its enforceability versus certain third parties. As a result, a receiver “has the
20 power to disregard [an unperfected security interest in] personal property which the receiver
21 finds in his possession.” *Id.* § 274.2, at 426.

22
23 Consistent with the foregoing, Section 9 (which is a simplified version of Minnesota’s
24 receivership statute, Minn. Stat. Ann. § 576.30) provides that the receiver has the status of a lien
25 creditor as to both personal and real property. Under Article 9 of the Uniform Commercial Code,
26 the term “lien creditor” includes “a receiver in equity from the time of appointment.” U.C.C. § 9-
27 102(a)(52)(D). Section 9 makes clear that a receiver appointed under this Act also has the status
28 and priority of a “lien creditor” as to personal property under Article 9.

29
30 Section 9 would enable the receiver to establish priority not only against subsequent
31 creditors, but also a prior unperfected secured party, as that unperfected secured party would be
32 subordinate to a person who acquires the rights of a lien creditor before the conflicting security
33 interest is perfected. U.C.C. § 9-317(a)(2). Section 9 does not create (and is not intended to
34 create) an “avoiding power” in the receiver analogous to the strong-arm power exercisable by a
35 bankruptcy trustee under Bankruptcy Code § 544(a).

36
37 Section 9 also gives the receiver the status and priority of a lien creditor under the state’s
38 recording statute with respect to receivership property that is real property. The application of
39 Section 9 would produce different results in different states with respect to an unrecorded interest
40 in real property (such as an unrecorded mortgage). In the majority of states, an unrecorded
41 mortgage would nevertheless have priority over a subsequent judgment lien. See Stoebuck &
42 Whitman, *The Law of Property* § 11.10, at 880-881 (“Often this conclusion is based on the literal
43 language of the pertinent judgment lien statute, which typically imposes the lien on ‘the

1 defendant’s real property—not the record property, the courts frequently hold, but the actual
2 property as depleted by unrecorded conveyances. An alternative basis for the same result is that
3 the creditor is simply not a ‘purchaser’ in the sense used by the recording statute.”). In a
4 minority of states, an unrecorded mortgage would be subordinate to a subsequent judgment lien,
5 either because the recording statute explicitly so provides or has been so interpreted by the
6 state’s courts. See *Schleuter Co. v. Sevigny*, 564 N.W.2d 309 (S.D. 1997); *Solans v.*
7 *McMenimen*, 951 N.E.2d 999 (Mass. Ct. App. 2011); *McDuff Estate v. Kost*, 158 A. 373 (R.I.
8 1932).

9
10 **SECTION 10. SECURITY AGREEMENT COVERING AFTER-ACQUIRED**

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

15 **Reporter’s Note**

16 Section 10 is derived from Washington’s receivership statute, Wash. Rev. Code Ann. §
17 7.60.240. Section 10 provides that where the owner had entered into a pre-appointment security
18 agreement covering after-acquired property, that agreement is effective against property acquired
19 after the receiver’s appointment to the extent provided under other law. Section 10 ensures that
20 the appointment of a receiver should have no impact on the effectiveness of an after-acquired
21 property clause in a pre-petition security agreement. Thus, for example, if the owner had granted
22 Bank (pre-receivership) a security interest in present and after-acquired equipment and
23 inventory, the appointment of a receiver for all or part of the owner’s property should have no
24 impact on the “after-acquired” clause in that security agreement, either as to similar property
25 acquired by the receiver or by the owner.

26
27 **SECTION 11. COLLECTION AND TURNOVER OF RECEIVERSHIP**

28 **PROPERTY.**

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

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

33 (2) subject to subsection (c), a person that has possession, custody, or control of

1 receivership property shall turn the property over to the receiver.

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

4 (c) If a creditor has possession, custody, or control of receivership property and the
5 validity, perfection, or priority of the creditor's lien on the property depends on the creditor's
6 possession, custody, or control, the creditor may retain possession, custody, or control until the
7 court enters an order providing adequate protection of the creditor's lien.

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

11 **Reporter's Notes**

12 1. Section 11 facilitates the ability of the receiver to gather receivership property and to
13 collect debts that are receivership property. Subsection (a)(1) governs the receiver's ability to
14 collect debts that constitute receivership property. The obligor on a debt that is matured, payable
15 on demand, or payable on order must pay the debt to the receiver on demand, except to the extent
16 that the obligor has a right of setoff or recoupment under other law. Subsection (a)(1) thus
17 provides the receiver with an ability to collect debts that is comparable to that possessed by a
18 trustee or debtor-in-possession under Section 542(b) of the Bankruptcy Code, 11 U.S.C. §
19 542(b).

20
21 Subsection (a)(2) obligates anyone in possession, custody, or control of receivership
22 property to turn that property over to the receiver on demand, unless the court orders otherwise.
23 Subsection (a)(2) provides a receiver with an ability to compel the turnover of receivership
24 property that is comparable to that possessed by a trustee or debtor-in-possession under Section
25 542(a) of the Bankruptcy Code, 11 U.S.C. § 542(a).

26
27 2. Subsection (b) provides that a person who owes money to the owner and has notice of the
28 receiver's appointment may not satisfy that obligation by paying the owner.

29
30 3. Subsection (c) makes clear that if a creditor holds a lien on receivership property in the
31 creditor's possession, custody, or control, and the validity or perfection of its lien depends upon
32 the creditor's retention of that possession, custody, or control, the creditor may retain possession,
33 custody, or control until such time as the court enters an order providing for the adequate
34 protection of the creditor's lien. Thus, for example, a creditor with a statutory artisan's lien on a
35 vehicle could retain possession of the vehicle despite a turnover demand by the receiver until the

1 court entered an order preserving the validity of the creditor's lien on the vehicle (which would
2 otherwise be lost if the creditor released possession of the vehicle). Section 10 thus avoids the
3 result of cases such as *In re WEB2B Payment Solutions, Inc.*, 488 B.R. 387 (Bankr. 8th Cir.
4 2013) (creditor's turnover of funds in deposit account, without order providing for adequate
5 protection of creditor's interest, rendered creditor's security interest unperfected).
6

7 4. Under subsection (d), a person's failure to turnover receivership property on demand by
8 the receiver may be sanctioned by the court as contempt unless there is a bona fide dispute with
9 respect to the receiver's right to possession, custody, or control of the property.
10

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

12 (a) Except as limited by court order or law of this state other than this [act], a receiver
13 may:

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

15 (2) operate a business constituting receivership property, including preservation,
16 use, sale, lease, license, exchange, collection, or disposition of the property in the ordinary
17 course of business;

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

21 (4) assert a right, claim, cause of action, or defense of the owner which relates to
22 receivership property;

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

25 (6) on subpoena, compel a person to submit to examination under oath, or to
26 produce and permit inspection and copying of designated records or tangible things, with respect
27 to receivership property or any other matter that may affect administration of the receivership;

28 (7) engage a professional as provided in Section 15;

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

3 (9) exercise any power conferred by court order, this [act], or law of this state
4 other than this [act].

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

6 (1) incur debt for the use or benefit of receivership property other than in the
7 ordinary course of business;

8 (2) make improvements to receivership property;

9 (3) use or transfer receivership property other than in the ordinary course of
10 business as provided in Section 16;

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

12 (5) pay compensation to the receiver as provided in Section 19 or 23, and to each
13 professional engaged by the receiver as provided in Section 15;

14 (6) recommend allowance or disallowance of a claim of a creditor as provided in
15 Section 20; and

16 (7) make a distribution of receivership property as provided in Section 20.

17 (c) A receiver shall:

18 (1) prepare and retain appropriate business records, including a record of each
19 receipt, disbursement, and disposition of receivership property;

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

22 (3) file with the [appropriate real property recording office] a copy of the order
23 appointing the receiver, together with a legal description of the real property if a legal description

1 is not included in the order;

2 (4) disclose to the court any fact arising during the receivership that would
3 disqualify the receiver under Section 7; and

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

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

8 **Reporter’s Notes**

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

18
19 Sections 12(a) and 12(b) derive from a compilation of various subsections of the
20 Minnesota, Washington, and New Mexico receivership statutes. See, e.g., Minn. Stat. Ann. §
21 576.29. subd. 1(a), (b); Wash. Rev. Code Ann. § 7.60.060(1); N.M. Rev. Stat. Ann. § 44-8-7(H).

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

31
32 Subsection (a)(6) permits a receiver to compel a person to submit to examination under
33 oath after issuance of a subpoena. This Act does not independently create authority in a receiver
34 to issue a subpoena. If the law of the state other than this Act gives the receiver the power to
35 issue a subpoena, subsection (a)(9) would permit the receiver to do so.

36
37 3. Subsection (b) sets forth specific powers that the receiver can exercise only if specifically
38 authorized by the court (following notice and an opportunity for a hearing as prescribed in

1 Section 3). These powers include the power to sell, lease, license or otherwise transfer
2 receivership property other than in the ordinary course of business, the power to make
3 improvements to receivership property, adopt or reject executory contracts of the owner, allow or
4 disallow claims against the receivership, pay compensation to professionals, and to make
5 distributions of receivership property.
6

7 4. Section 12(c), which describes the receiver’s duties, is based on Minn. Stat. Ann. §
8 576.29, subd. (2). Subsection (c)(3) includes a duty for the receiver to record a copy of the order
9 of appointment in the real estate records in any county in which real property that is receivership
10 property is located.
11

12 While Section 12(c)(3) does impose a duty on the receiver to record the order of
13 appointment in the real estate records, the Act does not establish that the receiver’s failure to do
14 so would permit a purchaser of the real property without notice of the receivership to qualify as a
15 bona fide purchaser protected by the state’s recording act. See, e.g., *First Southern Properties,*
16 *Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976) (purported buyer of real estate without notice of
17 receivership did not take title free of receivership under recording statute, as receivership
18 property was held *in custodia legis* and could not be transferred without approval of appointing
19 court). Likewise, Section 12(c)(3) is not intended to effect a change in a state’s law governing *lis*
20 *pendens*. In some states, a *lis pendens* is triggered immediately when litigation over title to the
21 land is docketed in the public litigation records, even if no corresponding notation is made in the
22 real property records. In such a state, the appointment of a receiver constitutes a *lis pendens* even
23 if the receiver did not timely record a copy of the order of appointment.
24

25 5. Subsection (d), which permits the appointing court to expand, modify, or limit the
26 receiver’s powers or duties, is based on Minn. Stat. Ann. § 576.29, subd. (3).
27

28 **SECTION 13. DUTIES OF OWNER.**

29 (a) An owner shall:

30 (1) assist and cooperate with the receiver in the administration of the receivership
31 and the discharge of the receiver’s duties;

32 (2) preserve and turn over to the receiver all receivership property in the owner’s
33 possession, custody, or control;

34 (3) identify all records and other information relating to receivership property,
35 including a password, authorization, or other information needed to obtain or maintain access to
36 or control of receivership property, and make available to the receiver the records and
37 information in the owner’s possession, custody, or control;

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

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

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

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

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

12 (2) sanction the failure as civil contempt.

13 **Reporter's Notes**

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

16
17 2. Subsection (a)(1) requires the owner to cooperate fully with the receiver in the
18 administration of the receivership and the receiver's performance of its duties. This duty of
19 cooperation includes the duty to take reasonable steps to assure that third parties in possession,
20 custody, or control of receivership property (or records or information related to receivership
21 property) comply with the receiver's efforts to obtain possession, custody, or control of that
22 property.

23
24 3. Subsection (a)(2) requires the owner to preserve and turn over to the receiver all
25 receivership property in the owner's possession, custody, or control. Consistent with the
26 definition of property in Section 2(13) of this Act, this turnover obligation includes both tangible
27 and intangible property,

28
29 **SECTION 14. STAY.**

30 (a) Except as otherwise provided in subsection (d) or ordered by the court, an order
31 appointing a receiver operates as a stay, applicable to all persons, of an act, action, or

1 proceeding:

2 (1) to obtain possession of, exercise control over, or enforce a judgment against
3 receivership property; and

4 (2) to enforce a lien against receivership property to the extent the lien secures a
5 claim against the owner which arose before entry of the order.

6 (b) Except as otherwise provided in subsection (d), the court may order a stay of an act,
7 action, or proceeding against or relating to receivership property if the stay is necessary to
8 protect the property or facilitate administration of the receivership.

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

11 (d) An order under subsection (a) or (b) does not operate as a stay of:

12 (1) an act, action, or proceeding to foreclose or otherwise enforce a mortgage by
13 the person seeking appointment of the receiver;

14 (2) an act, action, or proceeding to perfect, or maintain or continue the perfection
15 of, an interest in receivership property;

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

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

20 (5) establishment by a governmental unit of a tax liability against the owner or
21 receivership property or an appeal of the liability.

22 (e) The court may void an act that violates a stay under this section.

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

1 (1) award actual damages caused by the violation, reasonable attorney’s fees, and
2 costs; and

3 (2) sanction the violation as civil contempt.

4 **Reporter’s Notes**

5 1. As the leading treatise explains, it is customary that the order appointing a receiver
6 expresses an injunction against acts, actions, or proceedings that could interfere with the
7 receiver’s possession and management of receivership property or the performance of the
8 receiver’s duties:
9

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

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

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

31 In this regard, Section 14 creates an automatic stay that is much narrower in scope than
32 the automatic stay in a bankruptcy. This stay provided by this Act does not prevent the owner
33 from seeking bankruptcy protection, nor does it prevent creditors of the owner from seeking to
34 place the owner into bankruptcy, even if the bankruptcy filing would result in an interference
35 with the receiver’s possession, custody, or control of receivership property. See, e.g., *Gilchrist v.*
36 *GE Capital Corp.*, 262 F.3d 295 (4th Cir. 2003) (federal court receivership order does not bar
37 creditors from filing involuntary petition against debtor).
38

39 2. Subsection (b) authorizes the court to expand the scope of the stay as necessary to protect
40 receivership property or facilitate the administration of the receivership. Subsection (b) is
41 limited, however, to acts, actions, or proceedings against receivership property, the receiver, or
42 the owner; therefore, subsection (b) would not authorize the court to stay an action against a

1 guarantor or co-obligor.
2

3 3. Subsection (c) permits any person subject to the automatic stay to apply to the appointing
4 court for relief from the automatic stay for cause. The Act does not define “cause,” but leaves to
5 judicial development the circumstances that would justify relief from the stay. An interested
6 person who wishes to seek relief from the automatic stay but is not a party should intervene in
7 the receivership action.
8

9 “Cause” under subsection (c) includes the right of a senior lienholder to obtain the
10 appointment of a receiver under this Act. Under traditional law, rents collected by a receiver
11 appointed at the request of a junior lienholder could be applied to the reduction of the junior
12 lienholder’s debt until the senior lienholder took appropriate steps to enforce its right to collect
13 rents. See, e.g., Restatement (Third) of Property: Mortgages § 4.5(b). The stay occasioned by the
14 appointment of the receiver at the request of the junior lienholder should not prevent a senior
15 lienholder from taking the appropriate steps to enforce its right to collect rents.
16

17 For example, suppose that Owner owns a parcel of commercial real estate subject to two
18 liens: a senior mortgage held by Lender A, and a junior mortgage held by Lender B. Lender B
19 obtains the appointment of a receiver. Owner is in default under Owner’s mortgage with Lender
20 A, Lender A has an assignment of rents, and Lender A is entitled to the appointment of a
21 receiver. While the appointment of the receiver at Lender B’s request triggers a stay under
22 subsection (a), Lender A may request and is entitled to relief from stay. The court must either
23 appoint a different receiver, or order that any sums collected by the existing receiver must first
24 be applied to the debt of Lender A.
25

26 4. Subsection (d) provides a list of exceptions to the automatic stay created by subsection
27 (a). Subsection (d)(1) makes clear that the stay does not prevent the appointing creditor from
28 foreclosing its mortgage or enforcing its assignment of rents. Subsection (d)(2) permits a person
29 with a security interest in receivership property to perfect that interest following appointment.
30 Likewise, subsection (d)(2) permits a creditor to file a continuation statement to maintain its
31 perfection so long as that continuation statement was filed within the applicable period to ensure
32 that the creditor maintained continuous perfection. Further, subsection (d)(2) permits a creditor
33 holding a possessory lien on receivership property to retain possession, as authorized under
34 Section 11(c) of this Act, until such time as the court enters an order providing adequate
35 protection of the creditor’s lien. Subsection (d)(3) permits the commencement or continuation of
36 criminal proceedings against the owner. Subsection (d)(4) permits governmental actors to take
37 actions or enforce nonmonetary judgments pursuant to police and regulatory powers. Subsection
38 (d)(5) permits a governmental unit to establish a tax liability against the owner or receivership
39 property, but does not permit the governmental unit to conduct a tax sale of receivership property
40 without obtaining approval from the court that appointed the receiver.
41

42 5. Subsection (e) permits the court to declare an act void as being in violation of the stay
43 under subsection (a). This means that an act in violation of the automatic stay is merely voidable
44 rather than void.
45

46 6. Subsection (f) permits an injured party to recover actual damages, including costs and

1 attorney fees, from a person that knowingly violated the stay. In addition, subsection (f)
2 authorizes the court to sanction any knowing violation by civil contempt, without regard to
3 whether any person suffered actual damages as a result. If the receiver seeks and obtains a
4 recovery under subsection (f), that recovery is receivership property and not the proceeds of the
5 receiver's personal cause of action.

6
7 **SECTION 15. ENGAGEMENT AND COMPENSATION OF PROFESSIONAL.**

8 (a) With court approval, a receiver may engage an attorney, accountant, appraiser,
9 auctioneer, broker, or other professional to assist the receiver in performing the receiver's duties.

10 The receiver shall disclose to the court:

- 11 (1) the identity and qualifications of the professional;
- 12 (2) the scope and nature of the proposed engagement;
- 13 (3) any potential conflict of interest; and
- 14 (4) the proposed compensation.

15 (b) A person is not disqualified from engagement under this section solely because of the
16 person's engagement by, representation of, or other relationship with the receiver, a creditor, or
17 other party. This [act] does not prevent the receiver from serving in the receivership as an
18 attorney, accountant, auctioneer, or broker when authorized by law.

19 (c) A receiver or professional engaged under subsection (a) shall file with the court an
20 itemized statement of the time spent, work performed, and billing rate of each person that
21 performed the work and an itemized list of expenses. The receiver shall pay the amount
22 approved by the court.

23 **Reporter's Notes**

24 1. Section 15(a) provides that the receiver must obtain the court's approval to engage and
25 retain professionals, but contemplates that this approval may come in the order of appointment
26 itself. If the authorization is not contained in the order of appointment, subsection (a)
27 contemplates notice and an opportunity for a hearing before the receiver engages the
28 professional. See Section 3.

1 While subsection (a) uses the singular (“the receiver may engage an attorney . . .”), the
2 Act contemplates that where the nature of the receivership so demands, the receiver may engage
3 more than one attorney or more than one other type of professional as needed.
4

5 2. Subsection (a) requires the receiver to disclose any potential conflict of interest that exists
6 with respect to a professional for whom appointment is sought. Subsection (b) makes clear that
7 the court has discretion to approve the engagement of a professional despite the presence of
8 existing relationships that might be nominal or de minimis conflicts of interest. For example, the
9 fact that an attorney has previously represented a creditor holding a claim against the owner in an
10 unrelated matter would not preclude the court from approving the receiver’s engagement of that
11 attorney. Nevertheless, while subsection (a) recognizes the court’s discretion, the court should
12 not approve the engagement of a professional under circumstances where a serious or substantial
13 conflict of interest exists.
14

15 The final sentence of subsection (b) makes clear that the receiver may provide certain
16 types of professional services on the receiver’s own behalf (and be compensated for those
17 services) where licensed to do so. See, e.g., Wash. Rev. Code Ann. § 7.60.180(3). Thus, a
18 receiver may serve as an attorney, accountant, auctioneer, or broker, but not as an appraiser. The
19 Act intentionally omits “appraiser” from this list based on input from observers that dual service
20 as both a receiver and appraiser involves an inappropriate conflict of interest.
21

22 3. Subsection (c) provides that the receiver’s payment of the fees and expenses of
23 professionals can occur only after the submission to the court of an itemized statement and court
24 approval.
25

26 **SECTION 16. USE OR TRANSFER OF RECEIVERSHIP PROPERTY NOT IN**
27 **ORDINARY COURSE OF BUSINESS.**

28 (a) In this section, “good faith” means honesty in fact and the observance of reasonable
29 commercial standards of fair dealing.

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

32 (c) With court approval, a receiver may transfer receivership property other than in the
33 ordinary course of business by sale, lease, license, exchange, or other disposition. Unless the
34 agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the
35 person that obtained appointment of the receiver, any subordinate lien, and any right of
36 redemption but is subject to a senior lien.

1 (d) A lien on receivership property which is extinguished by a transfer under subsection
2 (c) attaches to the proceeds of the transfer with the same validity, perfection, and priority as the
3 lien had on the property immediately before the transfer, even if the proceeds are not sufficient to
4 satisfy all obligations secured by the lien.

5 (e) A transfer under subsection (c) may occur by means other than a public auction sale.
6 A creditor holding a valid lien on the property to be transferred may purchase the property and
7 offset against the purchase price part or all of the allowed amount secured by the lien, if the
8 creditor tenders funds sufficient to satisfy in full the reasonable expenses of transfer and the
9 obligation secured by any senior lien extinguished by the transfer.

10 (f) A reversal or modification of an order approving a transfer under subsection (c) does
11 not affect the validity of the transfer to a person that acquired the property in good faith or revive
12 against the person any lien extinguished by the transfer, whether the person knew before the
13 transfer of the request for reversal or modification, unless the court stayed the order before the
14 transfer.

15 **Reporter's Notes**

16 1. Traditionally, a receiver's ability to sell receivership property varied depending on the
17 circumstances of the receivership. For example, when a court appointed a general receiver for all
18 of the assets of an insolvent debtor, the court would typically empower the receiver to gather and
19 sell the assets of the debtor. By contrast, when a court appointed a limited receiver to take
20 possession of a specific asset — such as a receiver for mortgaged property pending foreclosure
21 sale — the receiver's role was more typically viewed as custodial. For this reason, receivers
22 appointed in conjunction with foreclosure proceedings were often viewed as having the power to
23 operate, maintain, and preserve the property pending the foreclosure sale—but not to sell the
24 property, as the sale would instead take place under the applicable foreclosure procedures. See,
25 e.g., *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964); *Andrick Dev. Corp. v. Maccaro*,
26 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). A recent Florida court went further, holding that
27 the court lacks the authority to empower a receiver appointed in a foreclosure case to sell the
28 property free and clear of liens and rights of redemption. *Shubh Hotels Boca, LLC v. Federal*
29 *Deposit Ins. Corp.*, 46 So.3d 163 (Fla. Dist. Ct. App. 2010). See also *Todd Enters., LLC v.*
30 *MidCountry Bank*, 2013 WL 4045765 (Minn. Ct. App. 2013) (not reported in N.W.2d) (court
31 order authorizing receiver's sale free and clear of borrower's statutory right of redemption was

1 contrary to state mortgage foreclosure statute).

2
3 In the context of the recent real estate crisis, however, some commentators have
4 advocated that receivership can be an effective way to dispose of real estate—and particularly,
5 that it may in some cases provide a more effective way of disposing of mortgaged real property
6 than the foreclosure process. Under current foreclosure law in all American jurisdictions, a
7 foreclosure sale is a “distress sale,” i.e., a public auction sale on the courthouse steps (or at some
8 other public place). Foreclosure by public sale is traditionally justified as a means to protect the
9 mortgagor’s equity in the mortgaged property, particularly by comparison to the historical
10 approach under which a defaulting borrower simply forfeited its interest in the mortgaged
11 property (and any equity the borrower may have accumulated either through principal reduction
12 or market appreciation). Nevertheless, public foreclosure sales do not consistently produce
13 prices that approximate the market value that might be obtained in an arms-length, non-distress
14 sale. By contrast, a receiver of mortgaged commercial real property could readily market that
15 property to potential buyers in the context of operating the property during the receivership. Such
16 marketing could permit potential buyers to perform more meaningful and complete due
17 diligence. Further, a sale subject to judicial review and confirmation could produce greater
18 finality regarding the title acquired by the buyer at the sale. Thus, there is certainly reason to
19 expect that at least in some contexts, receiver sales of mortgaged real estate might produce
20 higher sale prices than public foreclosure sales.

21
22 Another potential advantage to receiver sales arises out of the structure of the
23 securitization of commercial mortgages. Commercial mortgage-backed securities (CMBS) loans
24 are held in real estate mortgage investment conduits (“REMICs”), which are special purpose
25 vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed securities.
26 The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, at the
27 risk of losing their tax status as pass-through entities. Thus, if a REMIC ends up having to
28 purchase the mortgaged property at a foreclosure sale, it cannot make a new loan to a potential
29 buyer on a seller-financing basis. However, the Internal Revenue Code does permit a REMIC to
30 make limited modifications to an existing defaulted loan. Thus, if the property can be sold
31 through a receiver or by the borrower directly, with the buyer assuming the mortgage, the
32 mortgage loan can be modified and restructured without threatening the REMIC’s tax status.
33 Thus, a CMBS lender may have good reason to believe a receiver sale can produce higher price
34 by comparison to a public foreclosure (cash) sale, making such a sale attractive to a CMBS
35 lender that does not wish to foreclose (and possibly take ownership) of a property that is worth
36 less than the outstanding mortgage debt.

37
38 Existing federal statutes explicitly authorize a receiver appointed by a federal court to sell
39 mortgaged property, in either a public or private sale. 28 U.S.C.A. § 2001 et seq. By contrast,
40 under existing state laws, the authority for receiver sales is much less clear. There are a few
41 states with statutory provisions that explicitly grant the power of sale to a receiver. See, e.g.,
42 Ind. Code § 32-30-5-7; N.C. Gen. Stat. § 1-505; Wash. Rev. Code Ann. § 7.60.260. Despite
43 having no clear statutory authority, courts in Ohio and Michigan have upheld court-authorized
44 receiver sales free and clear of liens and statutory redemption rights. See, e.g., *CSB Bank v.*
45 *Christy*, No. 305869 (Mich. Ct. App. Oct. 18, 2012) (unpublished); *Park Nat’l Bank v. Cattani,*
46 *Inc.*, 187 Ohio App.3d 186, 931 N.E.2d 623 (2010); *Huntington Nat’l Bank v. Motel 4 BAPS,*

1 *Inc.*, 191 Ohio App.3d 90, 944 N.E.2d 1210 (2010).

2
3 Section 16 provides much-needed clarity to this issue. Section 16(c) authorizes the
4 receiver (with court approval after notice and opportunity for a hearing as required by Section 3)
5 to sell, lease, license, exchange or otherwise transfer receivership property free and clear of liens
6 and rights of redemption, other than a lien that is senior in priority to the lien of the creditor that
7 obtained the receiver's appointment. The intent of the provision is to preserve to the receiver the
8 ability to seek authority to sell either free and clear or subject to liens, depending upon the
9 situation. For example, this permits the senior mortgagee of a securitized mortgage loan to seek a
10 receiver to facilitate a sale of the property subject to the existing CMBS loan, with that loan
11 being modified in the context of the receiver's sale.

12
13 Section 16(c) makes clear that if a creditor holding a junior lien on receivership property
14 obtains the appointment of a receiver, the receiver may not sell the property free and clear of the
15 senior creditor's lien without the senior creditor's consent. Thus, in a case where a second
16 mortgagee obtained the appointment of a receiver and the court approved a sale by the receiver,
17 the buyer at the sale acquires title subject to the first mortgage (unless the first mortgagee
18 consented to the sale free and clear of its lien). As a practical matter, if the first mortgagee does
19 not want the buyer as its new borrower, it can effectively deter the sale by stating that it declines
20 to accept the buyer. Section 16(c), however, does not preclude the buyer at that sale from paying
21 off the outstanding balance due under the first mortgage (including any enforceable prepayment
22 fee) and obtaining a release of that mortgage, if the first mortgagee was obligated to accept
23 prepayment. Likewise, if the senior creditor is a nonconsensual creditor such as the holder of a
24 judgment lien, the senior creditor must release its lien if the buyer tendered payment of the
25 obligation secured by that lien.

26
27 2. Some have argued that a receiver ought not have the power to sell receivership real
28 property unless the sale price was sufficient to satisfy all liens on the property, or the senior lien
29 on the property. Because the Act views a receiver sale as an alternative approach to a traditional
30 foreclosure sale (at which the collateral might fail to bring a price sufficient to satisfy the first
31 mortgage debt), Section 16(c) rejects this argument. If the first mortgagee wishes to obtain the
32 appointment of a receiver but does not want the possibility of a receiver sale for less than the
33 outstanding balance of the first mortgage debt, the first mortgagee can ask the court to appoint
34 the receiver without giving the receiver the power to sell under Section 16(c). Likewise, if the
35 court has authorized the receiver to market the property for sale, the first mortgagee (or any other
36 lienholder) has the right to be heard in opposition to a proposed sale.

37
38 3. With respect to intellectual property, the rights of an owner may be limited to the rights
39 of a nonexclusive licensee who has no ability to transfer the owner's rights as licensee without
40 the consent of the licensor. In such a situation, the receiver could assume no greater rights than
41 the owner had, and those rights would remain subject to the provisions of Section 9-408 of the
42 Uniform Commercial Code.

43
44 4. In some cases, there may be a bona fide dispute between lienholders over the priority of
45 their respective liens. For example, real property under construction may be subject to the lien of
46 a construction mortgage and one or more mechanics' liens, which could (depending on disputed

1 facts) be prior to or subordinate to the construction mortgage. In such a case, if the construction
2 mortgagee obtains the appointment of a receiver for the real estate and there is a bona fide
3 dispute over the priority of the competing liens, subsection (c) would permit the court to sell the
4 property free and clear of the competing liens, while later resolving the priority dispute before
5 making a distribution of the proceeds of the sale.
6

7 5. Subsection (d) provides for the transfer of any liens extinguished by the sale to sale
8 proceeds. The extinguished liens are transferred to the sale proceeds, with the same order of
9 priority as the liens had with respect to the real property, even if the proceeds are not sufficient to
10 satisfy all liens.
11

12 6. Subsection (e) permits the receiver to sell receivership property in a private sale rather
13 than a public auction sale. Giving the receiver the power to market the property in a private sale
14 (with the increased opportunity for due diligence investigation that a private sale may provide)
15 makes sense. This gives the receiver the flexibility to market the property in a fashion calculated
16 to bring the highest possible price. Cf. U.C.C. § 9-610, comment 2 (noting that Article 9
17 “encourages private dispositions on the assumption that they frequently will result in higher
18 realization on collateral for the benefit of all concerned”).
19

20 Nevertheless, under subsection (c), the receiver may not sell receivership property other
21 than in the ordinary course of business without court approval. Because the court may not enter
22 an order approving the sale without notice and opportunity for a hearing under Section 3, a court
23 may not approve a private sale without notice of the actual terms of the sale and an opportunity
24 for interested persons to be heard on whether those terms justify court approval.
25

26 7. Subsection (e) permits a lienholder to purchase the property at a receiver’s sale and to
27 credit bid at that sale, as long as the purchasing lienholder tenders funds sufficient to satisfy the
28 costs of the sale and the balance due on any obligation secured by senior lien that was being
29 extinguished by the transfer. The application of subsection (e) is demonstrated by the following
30 example:
31

32 *Example.* Owner owns a parcel of commercial real estate that is subject to two mortgage
33 liens: a senior lien held by Lender A (securing an unpaid balance of \$3 million) and a
34 junior lien held by Lender B (securing an unpaid balance of \$1.5 million). There is also a
35 tax lien for unpaid real estate taxes in the amount of \$100,000. Lender B obtains the
36 appointment of a receiver and the receiver proposes to conduct an auction sale of the real
37 estate under Section 16. Suppose that Lender A does not consent to the sale and under
38 law other than this Act is entitled to refuse prepayment. Therefore, the sale would be
39 subject to Lender A’s mortgage lien. Lender B may credit bid against its \$1.5 million
40 debt at the auction sale. If it is the high bidder, it may acquire title to the real estate
41 subject to Lender A’s senior mortgage, but free of the tax lien, as long as it tenders funds
42 equal to the costs of the sale and the \$100,000 unpaid tax bill.
43

44 8. A receiver sale under Section 16(c) could be set aside because of fraud or other reasons
45 sufficient to justify relief from a judgment or order. Cf. Fed. R. Civ. Proc. 60(b). However,
46 subsection (f) provides that the title of a good faith purchaser from the receiver is not affected by

1 modification of the order approving the transfer or its reversal on appeal, unless the authorization
2 and transfer were stayed before the transfer takes place.

3
4 Subsection (f) also provides that the modification of an order approving a transfer or its
5 reversal on appeal does not revive any lien extinguished by the sale unless the authorization and
6 transfer were stayed before the transfer took place. Subsection (f) thus rejects the reasoning
7 expressed in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (9th Cir.
8 B.A.P. 2008). In that case, the bankruptcy court approved an auction sale of land free and clear
9 of liens, and the senior lienholder purchased the land at the sale by a credit bid. Following a post-
10 sale appeal by the junior lienholder, the appellate court reversed and held that while equitable
11 mootness prevented the reversal of the sale, it did not prevent the court from reinstating a junior
12 lien.

13
14 9. Subsection (b) permits the receiver, with court approval, to use receivership property
15 other than in the ordinary course of business. This permits the receiver to use receivership
16 property in a manner different from its normal use where such use may produce income for the
17 benefit of the receivership. For example, the receiver of a vineyard and winery operation might
18 decide to permit the occasional use/rental of the property for weddings or receptions.

19
20 **SECTION 17. EXECUTORY CONTRACT.**

21 (a) In this section, “timeshare interest” means [an interest having a duration of more than
22 three years which grants its holder the right to use and occupy an accommodation, facility, or
23 recreational site, whether improved or not, for a specific period less than a full year during any
24 given year].

25 (b) Except as otherwise provided in subsection (h), with court approval, a receiver may
26 adopt or reject an executory contract of the owner relating to receivership property. If the
27 receiver does not request court approval to adopt or reject the contract within a reasonable time
28 after the receiver’s appointment, the receiver is deemed to have rejected the contract. The court
29 may condition the receiver’s adoption and continued performance of the contract on terms
30 appropriate under the circumstances.

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

1 (d) A provision in an executory contract which requires or permits a forfeiture,
2 modification, or termination of the contract because of the appointment of a receiver or the
3 financial condition of the owner does not affect a receiver's power under subsection (b) to adopt
4 the contract.

5 (e) A receiver's right to possess or use receivership property pursuant to an executory
6 contract terminates on rejection of the contract under subsection (b). Rejection is a breach of the
7 contract effective immediately before appointment of the receiver. A claim for damages for
8 rejection of the contract must be submitted by the later of:

9 (1) the time set for submitting a claim in the receivership; or

10 (2) [30] days after the court approves the rejection.

11 (f) If at the time a receiver is appointed, the owner has the right to assign an executory
12 contract relating to receivership property under law of this state other than this [act], the receiver
13 may assign the contract with court approval.

14 (g) If a receiver rejects under subsection (b) an executory contract for the sale of
15 receivership property that is real property in possession of the purchaser or a real-property
16 timeshare interest, the purchaser may:

17 (1) treat the rejection as a termination of the contract, and in that case the
18 purchaser has a lien on the property for the recovery of any part of the purchase price the
19 purchaser paid; or

20 (2) retain the purchaser's right to possession under the contract, and in that case
21 the purchaser shall continue to perform all obligations arising under the contract and may offset
22 any damages caused by nonperformance of an obligation of the owner after the date of the
23 rejection, but the purchaser has no right or claim against other receivership property or the

1 receiver on account of the damages.

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

3 (1) the tenant occupies the leased premises as the tenant’s primary residence;

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

5 or

6 (3) the receiver was appointed at the request of a mortgagee and:

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

8 (B) the tenant has an enforceable agreement with the mortgagee or the

9 holder of a senior lien under which the tenant’s occupancy will not be disturbed as long as the

10 tenant performs its obligations under the lease;

11 (C) the mortgagee has consented to the lease, either in a signed record or

12 by its failure timely to object that the lease violated a provision of the mortgage; or

13 (D) the terms of the lease were commercially reasonable at the time the

14 lease was agreed to and the tenant did not know or have reason to know that the lease violated a

15 provision of the mortgage.

16 **Legislative Note:** *If a state statute defines the term “timeshare interest,” the state should*
17 *incorporate that definition into subsection (a).*

18

19

Reporter’s Notes

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

23

24 2. Traditionally, a receiver does not automatically or inherently become bound to the
25 owner’s existing executory contracts on appointment. See 2 Clark on Receivers, § 423, at 710
26 (3d ed. 1959) (“A receiver is not strictly speaking the successor of the defendant, individual or
27 corporation and an executory contract of the defendant is not binding on the receiver but may be
28 broken by the receivership and give rise to damages resulting in a claim against the assets in the
29 hands of the receiver.”). Consistent with this traditional rule, subsection (b) permits the receiver
30 to evaluate whether an executory contract relating to receivership property is beneficial or

1 burdensome, and with court approval to either adopt or reject the contract accordingly. In this
2 regard, the Act differs from the Minnesota receivership statute, Minn. Stat. Ann. § 576.45, under
3 which the receiver succeeds to the duties of the owner under any executory contract unless the
4 receiver can demonstrate “good cause” to terminate that contract.
5

6 Because the Act provides that rejection gives rise to a claim against the receivership, the
7 status of the contract must be resolved within some reasonable period of time before the claims
8 deadline. Under subsection (b), if the receiver does not request approval to accept or reject the
9 contract within a reasonable time following appointment, the contract is deemed to be rejected.
10

11 Subsection (b) permits the court to condition the receiver’s adoption of a contract on
12 appropriate terms regarding assurance of the receiver’s ability to perform.
13

14 3. Subsection (c) provides that the receiver’s temporary performance of the contract does
15 not prevent the receiver from later seeking court approval to reject it.
16

17 4. Subsection (d) provides that a counterparty may not exercise an “ipso facto” clause and
18 thereby use the receiver’s appointment as a basis to terminate or modify an executory contract
19 and thereby prevent its adoption by the receiver. The prohibition on modification would likewise
20 prevent the counterparty from using the receiver’s appointment as a basis for imposing a
21 contractual penalty to thereby increase the effective cost of the receiver’s adoption of the
22 contract. Thus, if the contract in question was a service contract that purported to permit the
23 counterparty to increase the agreed price by 100% in the event a receiver was appointed, the
24 receiver could adopt the contract at the original contract price.
25

26 5. Under subsection (e), the receiver’s rejection of the contract constitutes a breach of the
27 contract and allows the counterparty to file a claim against the receivership. In this regard,
28 subsection (e) addresses only the potential liability of the receivership estate and not the
29 underlying liability of the owner. The Act does not (1) discharge the liability of the owner to the
30 counterparty, (2) preclude the counterparty from proceeding against nonreceivership property of
31 the owner, or (3) preclude the counterparty from proceeding against guarantors or third-party
32 assets securing the owner’s obligation to the counterparty.
33

34 6. Under subsection (f), the receiver can assign an executory contract, but only to the extent
35 permitted by the contract and applicable law. See, e.g., 2 Clark on Receivers, § 441.1, at 733 (3d
36 ed. 1959) (“If a contract is ordinarily assignable between A & B there seems no reason why the
37 receiver under proper orders of court cannot assign the contract.”). The receiver thus cannot
38 assign an executory contract if the contract and applicable law would excuse the counterparty
39 from accepting performance or rendering performance to an entity other than the owner.
40

41 7. Subsection (g) addresses situations in which the receiver attempts to reject an executory
42 contract for the sale of receivership real property of which the purchaser is in possession (i.e., an
43 executory installment land contract or “contract for deed”) or an executory contract for a
44 timeshare interest. It gives the purchaser the choice to (a) treat the rejection as a termination of
45 the contract (in which case the purchaser has a lien against the property for the recovery of
46 purchase money already paid) any portion of the purchase price that the purchaser had paid; or

1 (b) retain its rights under the contract. If the purchaser takes the latter option, it must continue to
2 perform its obligations, and may offset against its liability thereon any damages caused by the
3 owner’s nonperformance of the contract following rejection, but has no claim or right against
4 other receivership property or the receiver.
5

6 Subsection (g) gives these purchasers protection comparable to the protection under
7 Section 365(i) of the Bankruptcy Code, 11 U.S.C.A. § 365(i), and its inclusion responds to
8 concerns that the Act should be sensitive to “forum shopping” concerns (i.e., that it not provide a
9 contracting party with the incentive to seek appointment of a receiver to permit termination of
10 contracts that could not be terminated under bankruptcy law). The definition of “timeshare
11 interest” in this section is a simplified version of the definition contained in the Bankruptcy
12 Code, 11 U.S.C.A. § 101(53D).
13

14 8. Subsection (h) protects most tenants holding unexpired leases of real property from
15 having their leases rejected by the receiver. Under no circumstances can the receiver reject the
16 lease of a tenant that is occupying the property as its primary residence. Where the receiver is
17 appointed at the behest of an involuntary lienholder (such as a judgment creditor or mechanics’
18 lienor), the receiver likewise cannot reject the tenant’s lease. Where the receiver is appointed at
19 the behest of a mortgagee, the receiver cannot reject the lease under any of the following
20 circumstances: (a) the lease is senior to the mortgage; (b) the tenant has a nondisturbance
21 agreement with the mortgagee or the holder of a senior lien; (c) the mortgagee has consented,
22 either in a signed record or by its failure to timely object that the lease violates the terms of the
23 mortgage; or (d) the lease was commercially reasonable at the time of the agreement and the
24 tenant did not know or have reason to know that the lease violated the terms of the mortgage.
25

26 In this regard, subsection (h) is consistent with Section 4.4(b) and 4.4(c) of the
27 Restatement (Third) of Property: Mortgages.
28

29 **SECTION 18. DEFENSES AND IMMUNITIES OF RECEIVER.**

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

32 (b) A receiver may be sued for an act or omission in administering receivership property
33 only with approval of the court that appointed the receiver.
34

34 **Reporter’s Notes**

35 1. As an officer of the appointing court, a receiver is shielded by judicial immunity for
36 actions performed under the lawful authority of the appointment order. As explained in the
37 leading treatise:
38

39 On the highest grounds of necessity and public policy judges cannot be held liable
40 for acts done by them in their judicial capacity.... It follows that courts managing

1 property through a receiver cannot be held liable as courts for imperfect management.
2 Officers of the courts, such as sheriffs, constables, receivers and other officers, who act in
3 obedience to the lawful mandate of the court or in obedience to lawful process of any
4 sort, are protected or privileged in respect to acts done under such lawful authority. [2
5 Clark on Receivers, § 388, at 648 (3d ed. 1959).]
6

7 Consistent with this approach, the Act provides the receiver with immunity for acts or omissions
8 within the scope of the order appointing the receiver. Subsection (a) is based on the Minnesota
9 receivership statute, Minn. Stat. Ann., as contrasted with Washington’s statute, Wash. Rev. Code
10 Ann. § 7.60.170, which provides more detailed and specific provisions regarding the scope of a
11 receiver’s liability.
12

13 2. Determining the breadth of a receiver’s immunity could create a conceptual problem in a
14 case in which a receiver has been appointed as a primary receiver by a court in one state and an
15 ancillary receiver by a court in another state. If the primary state’s law provides the receiver
16 with broader immunity than does the ancillary state’s law, a question might arise as to whether
17 the receiver is entitled to the broader immunity available under the law of the primary state (or
18 only the narrower immunity available under the law of the ancillary state). In these cases, courts
19 should resolve these issues by reference to conflicts-of-laws principles.
20

21 3. Subsection (b) is an adaptation of Wash. Rev. Code Ann. § 7.60.160(1), and is meant to
22 incorporate into the Act the *Barton* doctrine, which derives from the decision of the United
23 States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881). In *Barton*,
24 the Supreme Court held that to sue a court-appointed receiver, the would-be plaintiff must first
25 seek approval of the appointing court. The doctrine rests on the notion that the appointing court
26 has *in rem* jurisdiction over the receivership property; thus, a forum other than the appointing
27 court would lack subject-matter jurisdiction over the action. See also 2 Clark on Receivers, §
28 549, at 890 (3d ed. 1959) (“The custody of property by the court through its receiver is the
29 custody of the sovereign power or government acting through the courts. Possession by the court
30 of the res gives jurisdiction over the res to the court appointing the receiver and gives such court
31 power to determine all questions concerning the ownership and disposition of this property. No
32 other court can interfere with the possession of the res. The general rule of law, therefore,
33 naturally follows that a receiver as an officer of court cannot in the absence of an enabling statute
34 be sued without leave of the court appointing him.”).
35

36 The appointing court may grant leave to sue the receiver without regard to the merits of
37 the would-be plaintiff’s claims. The would-be plaintiff need not demonstrate a substantial
38 likelihood of prevailing on the merits to obtain permission to sue the receiver. Correspondingly,
39 a decision by the appointing court to give permission to sue the receiver is not a conclusion that
40 the would-be plaintiff’s claim is meritorious.
41

42 **SECTION 19. INTERIM REPORT OF RECEIVER.** A receiver may file, or if
43 ordered by the court shall file, an interim report that includes:

44 (1) the activities of the receiver since appointment or a previous report;

- 1 (2) receipts and disbursements, including a payment made or proposed to be made to a
2 professional engaged by the receiver;
- 3 (3) receipts and dispositions of receivership property;
- 4 (4) fees and expenses of the receiver and, if not filed separately, a request for approval of
5 payment of the fees and expenses; and
- 6 (5) any other information required by the court.

7 **Reporter's Notes**

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

14
15 **SECTION 20. CLAIM AGAINST RECEIVERSHIP; DISTRIBUTION TO**
16 **CREDITORS.**

17 (a) Except as otherwise provided in subsection (f), a receiver shall give notice of
18 appointment of the receiver to creditors of the owner by:

19 (1) deposit for delivery through first-class mail or other commercially reasonable
20 delivery method to the last-known address of each creditor; and

21 (2) publication as directed by the court.

22 (b) Except as otherwise provided in subsection (f), the notice required by subsection (a)
23 must specify the date by which each creditor holding a claim against the owner which arose
24 before appointment of the receiver must submit the claim to the receiver. The date specified
25 must be at least [90] days after the later of notice under subsection (a)(1) or last publication
26 under subsection (a)(2), unless the court extends the period for submitting the claim. Unless the
27 court orders otherwise, a claim that is not submitted timely is not entitled to a distribution from

1 the receivership.

2 (c) A claim submitted by a creditor under this section must:

3 (1) state the name and address of the creditor;

4 (2) state the amount and basis of the claim;

5 (3) identify any property securing the claim;

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

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

8 (d) An assignment by a creditor of a claim against the owner is effective against the
9 receiver only if the assignee gives timely notice of the assignment to the receiver in a signed
10 record.

11 (e) At any time before entry of an order approving a receiver's final report, the receiver
12 may file with the court an objection to a claim of a creditor, stating the basis for the objection.
13 The court shall allow or disallow the claim according to law of this state other than this [act].

14 (f) If the court concludes that receivership property is likely to be insufficient to satisfy
15 claims of each creditor holding a perfected lien on the property, the court may order that:

16 (1) the receiver need not give notice under subsection (a) of the appointment to all
17 creditors of the owner, but only such creditors as the court directs; and

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

19 (g) Subject to Section 21, a distribution of receivership property to a creditor holding a
20 perfected lien on the property must be made in accordance with the creditor's priority under law
21 of this state other than this [act]. A distribution of receivership property to a creditor with an
22 allowed unsecured claim must be made as the court directs according to law of this state other
23 than this [act].

1 **Reporter's Notes**

2 1. This draft includes a claims provision that is substantially simplified relative to the more
3 comprehensive provisions found in the Minnesota and Washington statutes. Section 12(b)(6)
4 provides that if the court so orders, the receiver has the power to recommend the allowance and
5 disallowance of claims. Combined with this section, the receiver thus has the flexibility to seek
6 allowance or disallowance of claims in a fashion suitable to the circumstances of the
7 receivership.

8
9 2. Subsection (a) provides that unless the court orders otherwise, the receiver will give
10 notice of appointment to creditors by first class mailing to the last known address of each
11 creditor and by publication as directed by the court. Subsection (b) then directs any creditors
12 holding claims that arose before appointment to file a proof of that claim with the receiver within
13 90 days of the notice, except as provided in subsection (f) (which permits the appointing court to
14 obviate the entire claims process in cases where the receivership will not generate sufficient
15 funds to result in a distribution to unsecured creditors).

16
17 By requiring “publication as directed by the court,” the Act’s intention is to require
18 “publication” as a court may interpret that term in light of technological evolution and changing
19 economics in the publishing industry. Ten years following the enactment of this Act, it may well
20 be that the only “newspapers” of circulation in a county are ones that publish only in electronic
21 form. Subsection (a) is intended to permit a court to treat electronic publication in that context as
22 sufficient.

23
24 3. Subsection (c) provides minimal requirements for the creditor’s proof of claim.

25
26 4. Subsection (d) makes clear that while the Act does not prohibit the assignment of claims
27 against the receivership, an assignment is effective against the receiver only if the assignee gives
28 the receiver timely notice of the assignment. The amount of notice that is “timely” may differ
29 depending upon the circumstances. For example, for notice of an assignment to be effective to
30 protect the assignee’s right to a distribution from the receivership, timely notice requires the
31 assignee to give notice before distributions were made. By contrast, suppose that the receiver
32 proposes to sell receivership property, and seeks to give notice of a proposed sale and a hearing
33 to approve the sale terms. In this context, an assignment of a claim would be effective against
34 the receiver so as to obligate the receiver to give notice of the proposed sale and hearing if the
35 assignee gave notice of the claim assignment before the receiver gave notice of the proposed
36 sale. Thus, for example, suppose that on April 1, the receiver gives Creditor X notice of a
37 proposed sale of receivership property. On April 8, Creditor X assigns its claim to Creditor Y.
38 In this situation, even though the sale may not have occurred yet, the validity of a subsequent
39 receiver sale should not be called into question because Creditor Y did not get notice of the
40 proposed sale.

41
42 5. Subsection (f) permits the receiver to forgo the claims process if the court concludes that
43 the expected net proceeds from the receivership will be insufficient to satisfy the claims of
44 creditors holding secured claims against receivership property. In such a case, the court may
45 order that the receiver need not comply with the process for the filing and determination of

1 claims and that unsecured creditors need not submit claims. A creditor holding a secured claim
2 against receivership property must file a proof of claim with the receiver, so that the receiver can
3 have the necessary information to facilitate the receiver’s ability to make recommendations to
4 the court regarding the appropriate distribution of receivership property or the proceeds of such
5 property.
6

7 6. Subsection (g) provides that any distribution of receivership property to a creditor with a
8 perfected lien on that property shall be made according to the state’s applicable priority rules as
9 determined by law other than this Act. This applies both to the distribution of proceeds from the
10 sale of receivership property under Section 16 and to the distribution of collected rents that are
11 the subject of an assignment of rents.
12

13 Subsection (g) also provides that allowed unsecured claims shall receive distribution
14 from the residue of the receivership property as the court directs in accordance with law of this
15 state other than this Act (including the state’s choice of law rules). The draft took this approach
16 to avoid including the extensive priority provisions included in the Minnesota and Washington
17 statutes, see Minn. Stat. Ann. § 576.51; Wash. Rev. Code Ann. § 7.60.230. At the same time,
18 subsection (g) makes clear that the court should respect any rules of administrative priority for
19 certain unsecured claims that might exist under other applicable law of the state.
20

21 **SECTION 21. FEES AND EXPENSES.**

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

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

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

28 (2) a person whose conduct would have justified the appointment of the receiver
29 under Section 6(a)(1).
30

30 **Reporter’s Note**

31 1. Under section 21(a), the court may allow the receiver to recover the reasonable and
32 necessary fees of preserving, protecting, or transferring the property before distribution to
33 secured creditors. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) (“A sale by
34 the receiver free from liens is for most practical purposes equivalent to a foreclosure sale and if
35 and when the property is realized under such circumstances and if and when the mortgagees or
36 lienholders avail themselves of the advantage of the receivership to effect the sale of the

1 mortgaged premises, this means they have saved themselves similar expenses in a foreclosure
2 suit or otherwise and, therefore, should pay for the advantage they have received.”).

3
4 2. Section 21(b)(1) provides that if a person sought appointment of a receiver and the
5 resulting receivership receipts were insufficient to pay the costs of the receivership, the shortfall
6 should be assessed to the petitioner.

7
8 Section 21(b)(2) provides that if the receiver could have been appointed under Section
9 6(a)(1) of this Act—i.e., if the property or its revenue-producing potential was being subjected to
10 waste, loss, dissipation, or impairment—then the court may impose the costs of the receivership
11 on the party responsible for that waste, loss, dissipation, or impairment.

12
13 In subsection (b), the “reasonable and necessary fees and expenses of the receivership”
14 would include expenses incurred by any professional engaged by the receiver under Section 15.

15
16 **SECTION 22. REMOVAL OF RECEIVER; REPLACEMENT; TERMINATION**
17 **OF RECEIVERSHIP.**

18 (a) The court may remove a receiver for cause.

19 (b) The court shall replace a receiver that dies, resigns, or is removed.

20 (c) If the court finds that a receiver that resigns or is removed or the representative of a
21 deceased receiver has accounted fully for and turned over to the successor receiver all
22 receivership property and has filed a report of all receipts and disbursements during the service
23 of the replaced receiver, the replaced receiver is discharged.

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

29 (1) the fees and expenses of the receivership, including reasonable attorney’s fees
30 and costs; and

31 (2) actual damages caused by the appointment, including reasonable attorney’s

1 fees and costs.

2 **Reporter's Notes**

3 1. Section 22 section is adapted with some minor changes from the Washington receivership
4 statute, Wash. Rev. Code Ann. § 7.60.280.

5
6 2. Subsection (a) permits the removal of the receiver for cause. Subsection (b) provides for
7 the replacement of a receiver on the receiver's death or resignation or the receiver's removal by
8 the court for failure to carry out its duties as receiver. 3 Clark on Receivers, § 692, at 1272 (3d
9 ed. 1959). Under subsection (c), once a removed receiver (or a representative, in the case of a
10 deceased receiver) has provided a full accounting for all receivership property and a full report of
11 all receipts and disbursements during its tenure, 3 Clark on Receivers, § 699.1, at 1285 (3d ed.
12 1959), the replaced receiver is discharged.

13
14 3. Subsection (d) permits the court to discharge a receiver and terminate the receivership if
15 the court finds that the receiver's appointment was improvident or that the receivership is no
16 longer warranted. See, e.g., 3 Clark on Receivers, § 692.1, at 1274-1277 (3d ed. 1959). If the
17 court terminates a receivership as having been improvidently granted and the court further finds
18 that the person who procured the receiver's appointment acted wrongfully or in bad faith, the
19 court may impose on such person the costs of the receivership and may assess against the person
20 damages in favor of the owner, including attorney fees.

21
22 **SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.**

- 23 (a) On completion of a receiver's duties, the receiver shall file a final report including:
- 24 (1) a description of the activities of the receiver in the conduct of the receivership;
- 25 (2) a list of receivership property at the commencement of the receivership and
26 any receivership property received during the receivership;
- 27 (3) a list of disbursements, including payments to professionals engaged by the
28 receiver;
- 29 (4) a list of dispositions of receivership property;
- 30 (5) a list of distributions made or proposed to be made from the receivership for
31 creditor claims;
- 32 (6) if not filed separately, a request for approval of the payment of fees and
33 expenses of the receiver; and

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

2 (b) If the court approves a final report filed under subsection (a) and the receiver
3 distributes all receivership property, the receiver is discharged.

4 **Reporter's Notes**

5 1. Subsection (a) provides for the termination of the receivership and discharge of the
6 receiver on notice and hearing. The receiver's final report is based on the same general template
7 as any interim reports filed by the receiver. Subsection (b) provides that the court's approval of
8 the report discharges the receiver from further duties as receiver once the receiver makes all
9 distributions.

10
11 The discharge of the receiver is a discharge from further duties as receiver; it is not a
12 discharge of liability for acts taken by the receiver during the receivership and for which the
13 receiver would not be entitled to immunity under Section 18.

14
15 **SECTION 24. RECEIVERSHIP IN ANOTHER STATE; ANCILLARY**

16 **PROCEEDINGS.**

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

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

21 and

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

24 (b) The court may issue an order that gives effect to an order entered in another state
25 appointing or directing a receiver.

26 (c) Unless the court orders otherwise, an ancillary receiver appointed under subsection

27 (a) has the rights, powers, and duties of a receiver appointed under this [act].

28

1 **Reporter's Notes**

2 1. State boundary lines provide an inherent jurisdictional limitation to the ability of a
3 receiver to exercise control over receivership property located outside the boundaries of the state
4 in which the receiver was appointed. As the Clark treatise explains:

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

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

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

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

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

34
35 **SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE.**

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

39 (1) make the mortgagee a mortgagee in possession of the real property;

40 (2) make the mortgagee an agent of the owner;

1 (3) constitute an election of remedies that precludes a later action to enforce the
2 secured obligation;

3 (4) make the secured obligation unenforceable; [or]

4 (5) limit any right available to the mortgagee with respect to the secured
5 obligation[;]; or]

6 [(6) constitute an action within the meaning of [cite the “one-action” statute of
7 this state] [; or]]

8 [(7) except as otherwise provided in subsection (b), bar a deficiency judgment
9 pursuant to law of this state other than this [act] governing or relating to a deficiency judgment].

10 [(b) If a receiver transfers receivership property free and clear of a lien pursuant to
11 Section 16(c), the ability of a creditor to enforce an obligation that had been secured by the lien
12 is subject to law of this state other than this [act] relating to a deficiency judgment.]

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

17
18

Reporter’s Note

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

31
32
33

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

1 sale of receivership property by the receiver could, in some circumstances, have the effect of
2 extinguishing one or more liens on the property. Such a receivership sale is not a foreclosure
3 sale under this Act, but could have an effect similar to the title-clearing effect of a foreclosure
4 sale. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) (“A sale by the receiver
5 free from liens is for most practical purposes equivalent to a foreclosure sale . . .”). In those
6 situations, the obligor should be protected by a state’s prohibition on deficiency judgments to the
7 same extent as the obligor would have been protected following a foreclosure sale, and
8 subsection (b) accomplishes this result.
9

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

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

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

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

31 **SECTION 29. REPEALS; CONFORMING AMENDMENTS.**

32 (a)

1 (b)

2 (c)

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