## **MEMORANDUM**

TO:	Appointment and Powers of Real Estate Receivers Drafting Committee, Advisors and Observers
CC:	Michael Houghton, Harriett Lansing, Richard Cassidy, Pamela Bertani, John Sebert, and Ben Orzeske
FROM:	Thomas S. Hemmendinger and R. Wilson Freyermuth
DATE:	April 25, 2013
RE:	Summary of April 19 – 20, 2013 Meeting of the APRER Drafting Committee

The Drafting Committee on a Model Act on the Appointment and Powers of Real Estate Receivers held its first in-person meeting on April 19 – 20, 2013 in Washington, DC. Those attending were Commissioners Thomas Hemmendinger (Chairperson), Ellen Dyke, Thomas Edmonds, Pat Fry, Donald Mielke, Fred Miller, Mark Sandlin, Gay Taylor-Jones, and Pamela Bertani (Division Chair); Reporter R. Wilson Freyermuth; ABA Section Advisors Jeffrey Allen and Kay Kress; Cheryl Kelly observer, as designee for ABA Advisor John Trott; and Observers Gordon Dunfee (California Receivers Forum) and Kenneth Jannen (ALTA).

ULC President Michael Houghton, Executive Committee Chair Harriett Lansing, and Executive Director John Sebert attended portions of the meeting.

Commissioners John Burton, Steve Cawood, and Rosemary Sackett, ABA Advisor John Trott, ABA Section Advisor James Schwartz, and Staff Liaison Ben Orzeske could not attend.

At this early stage, we were aiming to give the Reporter guidance in preparing a discussion draft of the Act. Therefore, the positions stated in this memo are not final decisions based on formal votes. Instead they reflect the consensus of the Committee on what the Committee wants the Reporter to include in the discussion draft for consideration at the Fall 2013 meeting.

After introductions, the meeting went as follows:

- 1) <u>Committee Charge</u>. The Committee reviewed and discussed the charge from the ULC Executive Committee to the Drafting Committee.
  - a) The charge is: "*RESOLVED*, that . . . a drafting committee on a Model Act on the Appointment and Powers of Real Estate Receivers be formed, and that the act not cover receivers appointed with respect to owner-occupied residences."

b) Some Commissioners expressed concern about designating this as a Model Act early in the process and about the effect that may have on enactability. John Sebert and the Chair conveyed the views of the Scope and Program Committee and the Executive Committee that, although arguments for uniformity may be more limited to this type of Act, the ULC fully supports this project and will energetically support enactment efforts. Further, the Committee can apply to the Executive Committee for redesignation as a Uniform Act. We may revisit this issue after we have considered the discussion draft of the Act.

## 2) General Drafting Approach.

- a) The Reporter described the different approaches the states have taken in drafting their existing statutes. Some, such as Minnesota and Washington, have extensive and detailed statutes. Others follow a moderate approach, and are drafted in more general terms. These statutes may not address all important issues, particularly the receiver's power to sell real estate. Still others provide little statutory guidance, and leave most issues to case law.
- b) After discussion, we directed the Reporter to follow a moderate approach that addresses the important issues, on the understanding that some issues may need more comprehensive treatment, and other issues may be addressed more generally or left to other law.

## 3) <u>Scope</u>.

## a) Owner-Occupied Property.

- The Committee is of the view that rent or other income production provides a useful framework for addressing the carve-out in the Committee's charge. Therefore, a singlefamily primary residence would be outside the scope of the Act. Another suggestion was to exclude one- to four-family dwellings, as in certain other real estate laws. Whichever approach the Committee decides on, we should address forms of ownership, such as living trusts.
- By contrast, an income-producing property, such as a farm, on which the owner lives would be within the scope of the Act, but the Act would need to address the respective rights and duties of the owner and the receiver with respect to the dwelling portion of the property.
- iii) Issues to be addressed in the discussion draft should include: the effect of an assignment of rents clause in the mortgage; second or third homes; circumstances under which the owner would have to pay rent and/or contribute to upkeep expenses.
- iv) The Committee recognized that decisions it takes at its next meeting may require clarification or change to that part of the charge dealing with owner-occupied property.

- b) <u>General, Special, and Custodial Receiverships</u>. The discussion draft should require a real estate nexus, but the draft should not specifically exclude non-real estate assets, such as the property owner's business operations on the property.
- c) <u>Property Subject to Which the Receivership May Apply</u>. The consensus was to include tangible and intangible personal property related to the real estate, whether or not that property is encumbered.
- 4) Grounds for Appointment.
  - a) The group had an extensive discussion of the effect of a mortgage provision in which the property owner consents to the appointment of a receiver. Such receivership clauses are increasingly common in commercial transactions. The Uniform Assignment of Rents Act ("UARA") provides that such receivership clauses entitle the mortgagee to the appointment of a receiver upon default. The discussion draft will follow that approach, but will include an alternative under which the underlying default has to be a payment default.
  - b) As to other grounds should entitle the mortgagee to appointment of a receiver, the sense of the group was that, whichever way the Committee goes on receivership clauses, the court should still retain discretion whether to appoint a receiver on other grounds. However, the Committee wants to consider an alternative under which appointment of a receiver mandatory except for good cause shown.
  - c) Waste should be a ground for appointment of a receiver. Fraud should also be a ground, at least where the fraud relates to the real property or other property that can be subject to the receivership proceeding.
  - d) The group did not decide whether insolvency or inadequacy of collateral should be requirements for the appointment of a receiver. The discussion draft will present language for the Committee's consideration, and we will revisit these questions at the Fall meeting.

# 5) Standing.

- a) The parties who should have standing to seek appointment of a receiver should include:
  - i) A person with an interest in the property, including someone with a disputed interest. This would include mortgagees, co-tenants, tenants, and common interest ownership.
  - ii) A person with a contractual right to the appointment of a receiver.
  - iii) Public officials, as authorized by other law.

- iv) Other persons who would be entitled to appointment of a receiver under other law. This would permit courts to address unusual situations and would preserve the flexibility of receivership as a remedial device.
- 6) <u>Power to Sell</u>.
  - a) The group was unanimous that any power to sell must provide for passage of insurable, marketable title. Among the questions still to resolve are:
    - i) In which situations can a receiver sell real property?
    - ii) Can the sale be free of all liens? Can it be free of only junior liens? Can it be free of the petitioner's mortgage? Can it be free of senior liens?
    - iii) Can the sale be free of statutory redemption and cure rights?
  - b) After discussion, the consensus was that the Reporter should draft the following alternatives for the Committee to consider:
    - i) No authority to sell within the Act, leaving the question to other law.
    - ii) A power to sell if the court orders a sale, setting ground rules that provide for passage of good title.
    - iii) A power to sell if the property owner consented in a pre-petition contract.
    - iv) A power to sell if the property owner consents in the receivership proceeding.
    - v) A power to sell that affords the property owner the type of protections it would have in a foreclosure proceeding. This might take the form of a requirement that a sale not take place for a certain number of days after appointment of the receiver, with the number of days tied to any statutory redemption period.
- 7) Other Powers.
  - a) <u>Operation and Maintenance</u>. The discussion draft will include a list of routine powers and a provision that the court can authorize additional acts as appropriate.
  - b) <u>Improvements</u>. The Committee felt that the receiver should obtain specific authorization from the court before making improvements to the property. The appropriate standard might be whether the task is within ordinary course of business of the property owner.
  - c) <u>Obtaining Credit</u>. The receiver's ability to obtain unsecured credit in the ordinary course should be a routine power under the Act. To obtain credit outside the ordinary course or to

obtain secured credit, the receiver should need specific court permission, on appropriate notice.

- d) Executory Contracts and Unexpired Leases.
  - i) <u>Rejection</u>. The discussion draft should give the receiver the power to deal with executory contracts and unexpired leases as the court may direct in the appointment order or in a subsequent order. An ordinary course of business standard may be appropriate in setting the receiver's routine powers. In other cases, specific court permission would be required. The Committee considered a number of issues that the discussion draft should address regarding unexpired leases, including the grounds for rejection, the effect of subordination, non-disturbance and attornment agreements, and other questions regarding the relative priorities of the lease and the mortgage.
  - ii) <u>Assumption and Assignment</u>. The consensus was that the receiver should not have the right to do an end run around other state law on assigning contacts.
  - iii) <u>Other Issues</u>. The draft may distinguish between unexpired leases and other agreements. The draft will include language for the Committee to consider regarding *ipso facto* clauses.

# 8) Multi-Jurisdiction Cases.

- a) Few state receivership acts address this issue, and those that do follow different models. The Committee felt that the Act should facilitate multi-state receiverships and discourage forum-shopping. The Committee examined a number of state statutes, including the Minnesota, New Mexico, and Washington receivership laws. The Reporter might also derive an approach from how other Uniform and Model Acts deal with interstate issues.
- b) The Committee recommends that the Act address the ability of the receiver to serve in the ancillary proceeding, both in terms of the receiver being eligible under the other state's law, and in terms of whether the receiver should be preferred as the ancillary receiver.
- c) The Committee recommends that courts deal with petitions by receivers in foreign countries under principles of comity, rather than by the terms of the Act.

# 9) <u>Relation to Other Law</u>.

a) The Committee identified a number of other laws to deal with, including: equity; UARA; the Bankruptcy Code; foreclosure statutes; redemption statutes; cure statutes; entity dissolution statutes; and the Uniform Commercial Code.

#### 10) Survey Questionnaire.

- a) The subcommittee gave an excellent report to the full Committee on its deliberations and recommendations, and the report was accepted by consensus.
- b) The subcommittee will add several questions to the document, including: the respondent's personal opinion on issues in his/her jurisdiction; whether the respondent's state would be receptive to a Uniform or Model Act; whether the respondent would like to be an observer; and whether the Reporter can follow up with the respondent for further information.
- c) The subcommittee will work with the Chicago office to arrange for people to complete the survey online, with a system for automatically compiling the responses in a usable format, and to identify Commissioners in each state who can complete it. With subcommittee member and observer Cheryl Kelly's help, the subcommittee will also identify other practitioners in each state.

### 11) Other Issues.

- a) <u>Stay or Injunction against Creditor Actions</u>. The doctrine of *in custodia legis* may not be sufficient on its own, so the Committee directed the Reporter to include in the discussion draft an automatic stay, with appropriate exceptions. The draft should also address the ability of creditors such as mechanics lien claimants to perfect, but not enforce their liens without permission of the receivership court. The draft will also authorize the receiver to seek an expanded stay or other appropriate relief.
- b) <u>Avoidance Powers</u>. The Committee felt that receivers should not have greatly expanded powers beyond the rights held by actual creditors. However, receivers should have the rights of lien creditors under UCC Article 9 and perhaps under local real estate law. Any rights as a lien creditor under real estate law will vary from jurisdiction to jurisdiction.
- c) <u>Effect on Security Interests in After-Acquired Property</u>. The Committee felt that the appointment of a receiver should not cut off after-acquired property clauses in security instruments. No decision was made on whether the Act should address this specifically, or leave it to other law.
- d) <u>Legal Status and Immunity</u>. The consensus was that the *Barton* doctrine makes sense, but that any immunity should be a qualified immunity.
- e) <u>Eligibility to Serve as Receiver</u>. The discussion draft should include some type of disinterestedness requirement, but not necessarily to the same degree as under the Bankruptcy Code. In cases where the property owner's consent should be obtained, the consent should be obtained in the proceeding, rather than through a mortgage clause.

- f) <u>Bonding</u>. The receiver should post a bond. The court should have discretion as to the amount, with an appropriate minimum. The court should also have discretion to require a bond from the petitioner on an *ex parte* request for appointment of a receiver.
- g) <u>Power to Prosecute and Defend</u>. The Act should have a general power to defend. As to the power to prosecute, the discussion draft will offer an alternative that distinguishes between prosecuting claims in the ordinary course and prosecuting other claims.

## 12) Enactability; Additional Observers.

- a) Everyone was mindful of enactability concerns, as evidenced by the high quality of the discourse throughout the meeting.
- b) The group identified several other organizations that we should approach about appointing observers to this project.

## 13) Wrap-up and Next Steps.

- a) By the end of the meeting, the consensus was that the Reporter has sufficient guidance from the Committee to prepare the discussion draft.
- b) The questionnaire subcommittee will work to obtain and compile responses for use at our next meeting.
- c) Our next meeting will be in the Fall of 2013, at which time we will consider a discussion draft of the Act. After that, the plan is to meet again in the Spring of 2014, in preparation for an anticipated first reading at the 2014 ULC annual meeting.