

D R A F T

FOR DISCUSSION ONLY

MODEL COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

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MODEL COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 5, 2014

MODEL COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT

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Prefatory Note

Introduction. A receiver is a person appointed by a court to take possession of the property of another and to “receive, collect, care for, and dispose of the property or the fruits of the property.” 1 Clark on Receivers § 11(a), at 15 (2d ed. 1929). Courts exercising general equity jurisdiction have traditionally appointed receivers in a variety of different contexts:

- Courts have appointed pendente lite receivers to preserve property that is the subject matter of pending litigation, thereby preventing its waste, deterioration, or removal prior to judgment.
- Courts have appointed receivers after entry of a judgment to preserve the property pending appeal, to carry the judgment into effect, or to enforce the judgment.
- Courts have appointed receivers to preserve the property of a corporation, partnership, or other legal entity in the context of the dissolution or winding up of the entity.
- Courts have appointed receivers, at the behest of one or more creditors, to collect, preserve, administer, liquidate and distribute the property of insolvent debtors.

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

One of the most common situations in which courts appoint receivers is at the request of a mortgage lender which is seeking to enforce a mortgage that is in default. A typical commercial real estate mortgage or deed of trust explicitly provides that upon default, the mortgagee may seek the appointment of a receiver from a court with jurisdiction over the mortgaged premises; frequently, the terms of the mortgage or deed of trust purport to provide mortgagor consent for the appointment of a receiver following default. Traditionally, mortgage lenders have sought the appointment of a receiver pending foreclosure for one or more of several reasons:

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

1 pending a foreclosure sale.

- 2
- 3 • The mortgaged property is subject to waste, deterioration, or some other immediate
- 4 physical harm that threatens to reduce the value of the mortgaged property and thus
- 5 threatens the mortgagee's security.
- 6
- 7 • The mortgaged property may be subject to a high vacancy rate or underperforming due to
- 8 poor property management. In such a case, the mortgagee might wish to provide better
- 9 and more active property management and to enter into new tenant leases. In this
- 10 situation, the mortgagee may prefer to secure the appointment of a receiver to provide
- 11 this day-to-day management, both because (1) the appointment of a receiver would
- 12 insulate the mortgagee from the liability that the mortgagee would assume if the
- 13 mortgagee provided this property management directly and thereby became a "mortgagee
- 14 in possession," and (2) the receiver may be a person with specialized expertise in turning
- 15 around a property of that type.
- 16
- 17 • The mortgaged collateral may include not only real estate but substantial personal
- 18 property as well, as would be the case (for example) where the collateral was a hotel or
- 19 resort property. In this situation, the mortgagee may wish to proceed with foreclosure in
- 20 a judicial proceeding so as to minimize or avoid any claim that might arise if it disposed
- 21 of the personal property under Article 9 of the Uniform Commercial Code and the
- 22 disposition was subsequently attacked as being commercially unreasonable.
- 23
- 24 • The property may be subject to environmental contamination, and the mortgagee does not
- 25 want to be in the chain of title or to rely solely on statutory exemptions from federal or
- 26 state environmental laws that may depend upon the mortgagee's status as a secured
- 27 creditor. See, e.g., 42 U.S.C.A. § 9601(20)(A) (excluding from federal CERCLA "owner
- 28 and operator" liability any person who "without participating in the management of a ...
- 29 facility, holds indicia of ownership primarily to protect his security interest in the ...
- 30 facility").
- 31

32 ***The Need for a Model Act.*** Unfortunately, very few states have comprehensive statutory
33 guidance regarding the appointment and powers of receivers for commercial real estate. In the
34 vast majority of states, receivers are appointed pursuant to a court's general equitable power to
35 appoint a receiver, with minimal statutory guidance either expressly confirming or limiting the
36 power of a receiver. A small handful of states (including California, Indiana, Nebraska, New
37 Mexico, Oklahoma, and South Dakota) provide a moderate amount of statutory guidance
38 regarding the appointment and powers of receivers. Only two states — Washington and
39 Minnesota — provide a comprehensive statutory codification of the laws governing the
40 appointment and powers of receivers and receivership procedures. Likewise, to date, no model
41 or uniform law addresses the appointment and powers of real estate receivers in a comprehensive
42 fashion. Although the Uniform Assignment of Rents Act (UARA), promulgated in 2005, does
43 address the evidentiary showing necessary to obtain the appointment of a receiver, UARA's
44 focus is limited to appointment at the request of an assignee of rents, and nothing in UARA
45 explicitly addresses either receivership procedure or the scope of the powers that a receiver of
46 real estate may exercise prior to foreclosure.

1 As a result, there can be a great deal of variation from state to state with regard to the
2 laws governing appointment and powers of receivers. Furthermore, because most states have
3 such minimal statutory guidance, there is even variation from one county, district, parish, or
4 municipal subdivision to the next within a state, as individual judges may have disparate
5 perspectives on the circumstances in which a receivership constitutes an appropriate remedy.
6 The following provides a non-exhaustive list of some of these inter-state and intra-state
7 variations:
8

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

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 upon the circumstances of the receivership. When a court appointed a general
4 receiver for all of the assets of an insolvent debtor, the court would commonly authorize the
5 receiver to gather and sell the assets of the debtor (in the same manner that a bankruptcy trustee
6 might gather and liquidate the debtor's nonexempt assets in a Chapter 7 bankruptcy case). The
7 court would frequently empower such a receiver, in the receivership order, to sell assets both in
8 the ordinary course of business (such as sales of inventory) and even outside of the ordinary
9 course with court approval.

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

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

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

1 arms-length context could permit potential buyers to perform more meaningful and
2 complete due diligence; further, a sale that is both free and clear of liens and rights of
3 redemption and subject to judicial review and confirmation could produce greater finality
4 regarding the title acquired by the buyer. In theory, providing potential foreclosure
5 buyers with better information regarding the mortgaged property and greater certainty of
6 title might be expected to produce sale prices higher than those that would be produced
7 by distress foreclosure sales.
8

9 In this respect, federal law has evolved further than state statutory law, as federal law
10 authorizes receivers appointed by a federal court to sell mortgaged property free and clear of
11 liens. 28 U.S.C.A. §§ 2001 to 2004. The federal statutes are vague with respect to the procedures
12 for marketing and selling the property, “thereby allowing for flexibility and creativity.” Kay
13 Kress, *Federal Receiverships* (2005 ABA Business Law Section Meeting). Furthermore, federal
14 courts have concluded that “the power of sale is within the scope of a receiver’s ‘complete
15 control’ over receivership assets ..., a conclusion firmly rooted in the common law of equity
16 receiverships.” *Securities Exch. Comm’n v. American Capital Investments, Inc.*, 98 F.3d 1133,
17 1144 (9th Cir. 1996). The federal statute specifically authorizes receivers appointed by a federal
18 court to conduct a private sale after notice to all interested parties and a hearing. 28 U.S.C. §
19 2001(b). Further, federal courts have concluded that there is no right of post-sale redemption
20 from judicial sales conducted under 28 U.S.C.A. § 2001(b), notwithstanding any state statutory
21 redemption rights the mortgagor might otherwise claim. See, e.g., *United States v. Heasley*, 283
22 F.2d 422 (8th Cir. 1960).
23

24 For the reasons described above, substantial benefits could flow to the resolution of
25 distressed commercial mortgage loans if state law explicitly granted a receiver the power of sale
26 as recognized under federal law. Unfortunately, most existing state statutes do not specifically
27 authorize a receiver to conduct a sale of real property, and some courts have held that in the
28 absence of express statutory authority, receivers lack the authority to conduct such sales. See,
29 e.g., *Kirven v. Lawrence*, 137 S.E.2d 764 (S.C. 1964) (receiver does not have inherent power of
30 sale, as receivership is “custodial” in nature and designed to preserve the status quo); *Andrick*
31 *Dev. Corp. v. Maccaro*, 311 S.E.2d 95 (S.C. Ct. App. 1984) (same); *Eppes v. Dade Developers,*
32 *Inc.*, 170 So. 875 (Fla. 1936); *Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. Dist. Ct.
33 App. 2010) (receiver lacked power to sell hotel even though appointing court had authorized the
34 sale; no Florida statute authorizes a court-appointed receiver in a foreclosure case to sell the
35 mortgaged property in contravention of mortgagor’s right of redemption). To provide the needed
36 clarity, the Act seeks to provide more explicit rules addressing the extent to which a receiver can
37 sell receivership property, either subject to or free and clear of existing liens and rights of
38 redemption.
39

40 **Summary of the Act.** The following paragraphs provide a brief summary of the
41 provisions of the Act.
42

- 43 • **Scope.** The Act applies to receiverships for real property as well as personal property
44 that is related to the real property or used in its operation. § 3(a). It does not govern a
45 receivership for residential real property from which the owner does not collect rent or
46 other income from an unrelated tenant or other occupier. § 3(b). The Act does not

1 provide the exclusive method for the appointment of a receiver. § 3(d).

- 2
- 3 • **Court.** The state’s court of general equity jurisdiction has exclusive jurisdiction of the
- 4 receivership proceeding. § 4.
- 5
- 6 • **Appointment.** The Act establishes standards under which a court may appoint a receiver
- 7 in the exercise of its equitable discretion, § 5(a), standards under which a petitioning
- 8 mortgage lienholder is entitled to appointment of a receiver as a matter of right, § 5(b),
- 9 and the standards governing *ex parte* appointment of a receiver, § 5(c).
- 10
- 11 • **Identity and Independence of Receiver.** Because a receiver holds receivership property
- 12 for the benefit of all interested parties, the Act requires that the receiver provide sworn
- 13 evidence of the receiver’s independence, but would permit the appointment of an
- 14 interested party with the consent of all parties in a signed record. § 6(a), (b). While a
- 15 party seeking the appointment of a receiver may nominate a person to serve as a receiver,
- 16 the nomination is not binding on the court. § 6(c).
- 17
- 18 • **Effect of Appointment.** Upon appointment, a receiver has the status and priority of a lien
- 19 creditor with respect to receivership property. § 8. Appointment of a receiver does not
- 20 affect the validity of a pre-receivership security interest in receivership property, and
- 21 property acquired after appointment is subject to any pre-receivership security agreement
- 22 to the same extent as if no receiver had been appointed. § 9. Upon appointment, persons
- 23 having possession, custody or control of receivership property must turn the property
- 24 over to the receiver, and persons owing debts that constitute receivership property must
- 25 pay those debts to the receiver. § 10. Entry of the order of appointment effects a stay,
- 26 applicable to all persons, of an act to obtain possession of, exercise control over, or
- 27 enforce a judgment against receivership property, as well as an act to create, perfect, or
- 28 enforce a lien against receivership property. § 13(a). In appropriate situations, the court
- 29 can expand the scope of the stay, § 13(b), and grant relief from the stay, § 13(c).
- 30 However, for policy reasons, certain actions are outside the scope of the stay. § 13(d).
- 31 The Act also addresses the consequences of a violation of the stay. §§ 13(e) and 13(f).
- 32
- 33 • **Powers and Duties of Receiver; Duties of Owner.** The Act sets forth the receiver’s
- 34 presumptive powers, § 11(a), as well as those that the receiver may exercise only with
- 35 court approval following notice and a hearing, § 11(b). The Act also sets forth the duties
- 36 of the owner of receivership property. § 12.
- 37
- 38 • **Employment and Compensation of Professionals.** The Act authorizes the receiver to
- 39 employ and pay professionals to assist in the administration of the receivership following
- 40 court approval after notice and a hearing. § 14.
- 41
- 42 • **Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in**
- 43 **Ordinary Course.** With court approval after notice and a hearing, the Act permits the
- 44 receiver to use, sell, lease, license, or otherwise transfer receivership property other than
- 45 in the ordinary course of business. § 15. The Act provides three alternatives with regard
- 46 to the effect of such a sale. Under the first, the sale would be free and clear of liens and

1 rights of redemption unless the agreement of sale provides otherwise. Under the second,
2 the sale would be free and clear of rights of redemption and liens other than liens that are
3 senior to the lien of the person who obtained the receiver's appointment. Under the third
4 (and least preferred), a sale could occur only with the consent of the owner and all
5 lienholders. § 15(b). Liens extinguished by the receiver's sale attach to proceeds with
6 the same validity, perfection, and priority as they had with respect to the property sold. §
7 15(c). The sale may occur in a private sale. § 15(d). Creditors with valid secured claims
8 may credit bid. § 15(d). The Act also provides a safe harbor for purchasers, in case a
9 party objects to the sale but fails to get a stay of the order approving the sale. § 15(e).
10 Secured creditors are entitled to the proceeds of their collateral according to the priority
11 rules established by law other than this Act, although the court may award the receiver
12 the reasonable and necessary fees and expenses for preserving and transferring
13 receivership property. § 16.
14

- 15 • ***Executory Contracts and Unexpired Leases.*** With court approval after notice and a
16 hearing, a receiver may adopt or reject an executory contract of the owner relating to
17 receivership property. § 17(b). The Act covers the mechanics for adoption or rejection
18 of executory contracts. § 17(c). The receiver may also assign an adopted executory
19 contract to the extent permitted by the contract and applicable law other than this Act, but
20 free of so-called "ipso facto" clauses. §§ 17(d) and 17(f). The Act specifies the
21 consequences of a receiver's rejection of an executory contract. § 17(e). The Act contains
22 protections for purchasers in possession of real property or real property time share
23 interests that are analogous to those contained in the Bankruptcy Code. § 17(g). The Act
24 also provides that a receiver may reject the unexpired lease of a tenant only if the lease
25 violated the provisions of a mortgage or assignment of rents of which the tenant had
26 actual or constructive notice or if the lease was executed while the owner was in default
27 under a mortgage or assignment of rents and the lease terms were not commercially
28 reasonable. § 17(h). Further, the Act provides that the receiver cannot reject an
29 unexpired lease if the tenant is not in default and the tenant either has an enforceable
30 nondisturbance agreement with the mortgagee or occupies the premises as the tenant's
31 primary residence under a lease made in good faith for a term of one year or less. § 17(i).
32
- 33 • ***Immunity of Receiver.*** Consistent with the receiver's status as an officer of the court, the
34 Act provides the receiver with immunity for acts or omissions within the scope of the
35 receiver's appointment. § 18(a). Further, the Act incorporates the *Barton* doctrine and
36 provides that a receiver cannot be sued for an act, omission or transaction in
37 administering receivership property except with the approval of the appointing court. §
38 18(b).
39
- 40 • ***Claims.*** The Act requires the receiver to notify creditors of the appointment of the
41 receiver, § 20(a), and requires creditors to file claims with the receiver as a precondition
42 to obtaining any distribution from receivership property or the proceeds of such property.
43 § 20(b). The Act permits the receiver to recommend disallowance of claims. § 20(c).
44 The Act also authorizes the court to forgo the filing of unsecured claims where the
45 receivership property is likely to be insufficient to satisfy secured claims against the
46 property. § 20(d).

- 1 • ***Receiver’s Reports.*** The receiver must file interim and final reports. §§ 20 and 22.
2
- 3 • ***Ancillary Receivership.*** Where a receiver has been appointed by another state, the Act
4 authorizes the court to appoint that person or its designee as an ancillary receiver for the
5 purpose of obtaining possession, custody and control of receivership property located
6 within this state. § 23(a). The Act also permits the court to enter any order necessary to
7 effectuate an order of a court in another state appointing or directing a receiver. § 23(b).
8
- 9 • ***Receivership in Context of Mortgage Enforcement.*** The Act makes clear that the
10 appointment of a receiver upon request by a mortgagee or assignee of rents, and actions
11 taken by the receiver, do not make the mortgagee or assignee of rents a “mortgagee in
12 possession,” do not constitute an election of remedies or make the secured obligation
13 unenforceable, and do not constitute an “action” within the meaning of a state’s “one-
14 action” rule. § 24(a). In a state with anti-deficiency rules, where a receiver conducts a
15 sale of receivership property free and clear of a lien, the state’s anti-deficiency rules will
16 apply to any person that held a lien extinguished by the sale. § 24(b).

1 **MODEL COMMERCIAL REAL ESTATE RECEIVERSHIPS ACT**

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

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

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

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

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

10 (4) “Assignor of rents” means a person that executes an assignment of rents or a
11 successor in ownership of the real property described in the assignment.

12 (5) “Court” means [identify court of general equity jurisdiction in this state].

13 (6) “Executory contract” means a contract, including a lease, under which the obligations
14 of all parties are not fully performed and the failure of a party to complete performance of its
15 obligations would constitute a material breach.

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

18 (8) “Governmental unit” means an office, department, division, bureau, board,
19 commission, or other agency of this state or a subdivision of this state.

20 (9) “Lien” means an interest in property that secures payment or performance of an
21 obligation.

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

1 in personal property.

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

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

5 (13) “Owner” means the person for whose property a receiver is appointed.

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

9 (15) “Property” means all of a person’s right, title, and interest, both legal and equitable,
10 in real and personal property, wherever located and however acquired. The term includes
11 proceeds, products, offspring, rents, or profits of or from the original property.

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

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

16 (18) “Receivership property” means the property of an owner which is described in the
17 order appointing a receiver or a subsequent order.

18 (19) “Record,” when used as a noun, means information that is inscribed on a tangible
19 medium or that is stored on an electronic or other medium and is retrievable in perceivable form.

20 (20) “Residential property” means real property improved with not more than four
21 dwelling units. The term includes an attached single-family unit, a single-family manufactured-
22 housing unit if treated as real property under law of this state other than this [act], a time share in
23 residential property if treated as real property under law of this state other than this [act], real

1 property on which construction of not more than four dwelling units has commenced, and a
2 single-family unit in a common-interest community. The term does not include a parcel of real
3 property which is used or configured for use primarily for non-residential purposes such as
4 farming, commercial, or industrial use.

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

7 (22) “Security agreement” means an agreement that creates or provides for a security
8 interest.

9 (23) “Security interest” means an interest in property that arises by agreement and
10 secures payment or performance of an obligation.

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

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

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

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

18 **Reporter’s Notes**

19 1. “After notice and a hearing.” The Act uses a definition similar to that found in the
20 Bankruptcy Code, 11 U.S.C. § 102(1). For actions requiring court approval or judicial
21 determination after notice and a hearing, the Act would not require a specified period of pre-
22 hearing notice, but would give the court discretion to require such notice as the court concludes
23 is necessary under the circumstances in light of the required approval or determination.

24
25 References: § 5(a) (cases in which court may appoint receiver); § 5(c) (ex parte
26 appointment; release of security for ex parte appointment); § 11(b) (powers of receiver exercisable
27 after notice and a hearing); § 14(a) (employment of professionals); § 14(b) (payment of
28 professionals); § 15(a) (use of receivership property other than in ordinary course); § 15(b),

1 Alternatives A-B (sale, lease, license, or other transfer by receiver other than in ordinary course); §
2 17(b) (adoption/rejection of executory contract); § 17(f) (assignment of executory contract); § 18(b)
3 (suit against receiver); § 20(c) (resolution of objection to claim); § 20(d) (waiver of claims
4 procedure where receivership expected to produce no proceeds for distribution to unsecured
5 creditors); § 21(c) (termination of receivership); § 22(b) (approval of receiver's final
6 report/discharge).

7
8 2. "Assignee of rents." The Act uses a definition substantially similar to that found in the
9 Uniform Assignment of Rents Act.

10
11 References: § 5(b) (appointment in connection with enforcement of assignment of rents);
12 § 24(a) (effects of receivership/one-action and anti-deficiency rules).

13
14 3. "Assignment of rents." The Act uses a definition substantially similar to that found in the
15 Uniform Assignment of Rents Act.

16
17 References: § 5(a), (b) (appointment in connection with enforcement of assignment of
18 rents); § 13(d) (scope of stay); § 17(h) (rejection of unexpired lease).

19
20 4. "Assignor of rents." The draft currently includes the terms "assignee of rents,"
21 "assignment of rents," and "assignor of rents" because several of these terms are used in the
22 Uniform Assignment of Rents Act (which has provisions governing the appointment of a
23 receiver) and the Committee should be sensitive to ensure the consistency of this Act with
24 UARA. Nevertheless, because the definition of the term "mortgage" as used in this draft is
25 broad enough to encompass an assignment of rents, the Committee may wish to consider
26 deleting the use of these terms and using only the terms "mortgagor," "mortgagee," and
27 "mortgage," with the inclusion of appropriate comments to reinforce that the breadth of the term
28 would encompass an assignment of rents.

29
30 References: § 5(b) (appointment in connection with enforcement of assignment of rents).

31
32 5. "Court." The Act defines the term to refer to the court of general equity jurisdiction
33 within the state. The term is used with sufficient frequency in the Act that the notes do not set
34 out each distinct use of the term.

35
36 At the March 2014 Drafting Committee meeting, some members of the Drafting
37 Committee raised a question whether any states permitted a receiver to be appointed by a court
38 that lacked jurisdiction to empower the receiver to assert authority over receivership property
39 located in the same state, but outside the geographic jurisdiction of the appointing court (and, if
40 so, whether the Act should address this concern in the definition of "court" or elsewhere in the
41 Act).

42
43 6. "Executory contract." The Act defines the term to include an unexpired lease. The
44 definition is similar to the one contained in the Minnesota receivership statute, Minn. Stat. Ann.
45 § 576.21(d), but with a slight modification to track the traditional "Countryman" formulation of
46 the term more precisely. See, e.g., Countryman, Executory Contracts in Bankruptcy: Part I, 57

1 Minn. L. Rev. 439, 460 (1973) (executory contract is one under which the obligation of both
2 parties “are so far unperformed that the failure of either to complete performance would
3 constitute a material breach excusing the performance of the other”).

4
5 References: § 11(b) (power of receiver includes right to adopt/reject executory contract);
6 § 17(b) through (g) (adoption/rejection/assignment of executory contract/unexpired lease).

7
8 7. “Good faith.” The Act uses the Uniform Commercial Code definition of good faith,
9 including both subjective and objective elements.

10
11 Reference: § 15(e) (sale by receiver other than in ordinary course); § 17(i) (rejection of
12 unexpired lease).

13
14 8. “Governmental unit.” In this Act, the term “governmental unit” is used to describe state
15 or municipal entities capable of exercising regulatory and police powers. See Minn. Stat. Ann. §
16 576.21(t).

17
18 References: § 13(d) (exceptions to automatic stay).

19
20 9. “Lien.” The Act defines “lien” to include any voluntary and involuntary interest in
21 property securing an obligation, and includes a security interest.

22
23 References: § 8 (receiver’s status as lien creditor); § 10(b) (adequate protection as
24 precondition to turnover of receivership property subject to lien); § 13(a) (perfection of lien
25 stayed by appointment); § 15(b), Alt. A-C (sale, lease, license, or other transfer by receiver other
26 than in ordinary course); § 15(c) (transfer of lien to proceeds); § 15(d) (right of lienholder to
27 credit bid); § 16(a) (distribution on claim of lienholder); § 17(g) (receiver’s rejection of
28 executory contract for purchase of real property or real estate timeshare interest); § 24(a), (b)
29 (effects of receivership/one-action and anti-deficiency rules).

30
31 10. “Mortgage.” The Act defines “mortgage” to mean any document, however denominated,
32 that creates a security interest in real property. The term would include a deed of trust or deed to
33 secure debt, and would include an installment land contract in states that treat installment land
34 contracts as creating a security interest.

35
36 References: § 5(a) (court may appoint receiver at mortgagee’s request); § 5(b)
37 (appointment where consent expressed in mortgage); § 13(d) (stay does not prevent foreclosure
38 by creditor who obtained appointment of receiver); § 17(h) (receiver’s power to reject unexpired
39 lease).

40
41 11. “Mortgagee.” The Act defines the term to include anyone holding a mortgage.

42
43 References: § 5(b) (appointment where consent expressed in mortgage); § 17(i)
44 (receiver’s power to reject unexpired lease); § 24(a) (effects of receivership/one-action and anti-
45 deficiency rules).

12. “Mortgagor.” The Act defines “mortgagor” to mean the person granting a mortgage and any successor owner of the mortgaged real property. As discussed above, because the definition of the term “mortgage” as used in this draft is broad enough to encompass an assignment of rents, the Committee may wish to consider deleting the use of these terms and using only the terms “mortgagor,” “mortgagee,” and “mortgage,” with the inclusion of appropriate comments to reinforce that the breadth of the term.

References: § 5(b) (appointment where consent expressed in mortgage); § 24(a) (effects of receivership/one-action and anti-deficiency rules).

13. “Owner.” The initial draft of the Act used the term “respondent” to identify the person over whose property the receiver is appointed, in part because the term is commonly used in receivership practice. Consistent with the Conference’s drafting rules, the term has been changed from the “procedural” term and replaced with “owner.”

References: § 3(b), Alternatives A and B (scope exclusion for owner-occupied residential property); § 5(a) (grounds for appointment); § 5(b) (appointment where consent expressed in mortgage); § 9 (receivership property subject to pre-petition security agreement); § 11(a), (b) (power of receiver to assert rights of owner and adopt/reject executory contract of owner); § 12(a), (b) (duties of owner); § 13(a), (d) (effect and scope of stay); § 15(b), Alt. C (sale, lease, license, or other transfer by receiver other than in ordinary course); § 17(b) (adoption/rejection of executory contract of owner); § 17(d) (assignment of executory contract); § 17(f) (enforceability of contractual limit on assignment of executory contract); § 17(g) (rejection of executory contract to purchase real estate); § 17(h) (rejection of unexpired lease).

14. “Person.” The Act uses the ULC-required definition for the term.

References: § 5(a) (grounds for appointment of receiver); § 5(c) (ex parte appointment of receiver); § 6(a) through (d) (identity/eligibility of receiver); § 7(a) (receiver’s bond); § 10(a), (c) (turnover requirement); § 11(a) (powers of receiver); § 12(b) (duties of owner); § 13(a) (automatic stay); § 13(c) (relief from stay); § 13(d) (exceptions to automatic stay); § 13(f) (sanctions for stay violation); § 14(a), (b) (appointment of professionals); § 15(b), Alternatives B-C (sale, lease, license or other transfer other than in ordinary course); § 15(e) (finality of sale, lease, license or other transfer other than in ordinary course); § 21(c) (sanctions for improvident appointment of receiver); § 23(a) (appointment of ancillary receiver).

15. “Property.” The Act defines the term broadly to include all legally-recognized interests. “Personal property” includes both tangible and intangible property. The term is used with sufficient frequency in the Act that the notes do not set out each distinct use of the term.

16. “Receiver.” The definition derives from the one contained in Minn. Stat. Ann. § 576.21(p). The term is used with sufficient frequency in the Act that the notes do not set out each distinct use of the term.

17. “Receivership.” The definition derives from the one contained in Minn. Stat. Ann. § 576.21(q). The term is used with sufficient frequency in the Act that the notes do not set out

1 each distinct use of the term.

2
3 18. “Receivership property.” The definition is adapted from Minn. Stat. Ann. § 576.21(r).

4
5 References: § 4 (power of court); § 7(a), 7(b) (receiver’s bond); § 8 (receiver’s status as
6 lien creditor); § 10(a), (b), (c) (turnover of receivership property); § 11(a), (b) (powers of
7 receiver); § 11(c) (duties of receiver); § 12(a) (duties of owner); § 13(a), (b) (nature and scope of
8 automatic stay); § 13(d) (exceptions to automatic stay); § 15(a) (use of receivership property
9 other than in ordinary course); § 15(b), Alt. A-C (sale, lease, license, or other transfer by receiver
10 other than in ordinary course); § 16(a), (b) (distribution of receivership property to secured
11 creditor); § 17(b) (receiver’s power to adopt/reject executory contract relating to receivership
12 property); § 17(e) (effect of rejection of executory contract); § 17(f) (enforceability of
13 contractual limit on assignment of executory contract); § 17(g) (receiver’s power to reject
14 executory contract for sale of land or timeshare interest); § 18(b) (suit against receiver); § 19
15 (interim report of receiver); § 20(d) (distribution of receivership property); § 21(b), (c)
16 (removal/termination of receiver); § 22(a) (final report of receiver); § 24(a), (b) (effects of
17 receivership/one-action and anti-deficiency rules).

18
19 19. “Record.” The prior draft used the media-neutral term “document,” to avoid potential
20 confusion due to the customary use of the term “record” in real estate practice. The Style
21 Committee suggested that the Act was using the term “document” to describe what the UCC
22 would describe as a “record,” and documents in a somewhat broader sense (such as in provisions
23 requiring the owner to turn over documents). At the request of the Style Committee, this draft
24 uses the term “record” (making it explicit that the definition is limited to instances where the
25 term is used as a noun, although the act does not use “record” as a verb anywhere).

26 References: § 5(b) (appointment where mortgagor consent expressed in a record); § 6(a)
27 (eligibility to serve as receiver); § 11(c) (duties of receiver); § 15(b), Alternatives B-C (sale,
28 lease, license, or other transfer other than in ordinary course); § 20(b) (filing of claims).

29
30 20. “Residential property.” The Act adopts essentially the same definition of the term as in
31 the Uniform Home Foreclosure Procedures Act (UHFPA). Section 3 of the Act provides that the
32 Act does not apply to a receivership for residential property, unless the owner collects rent or
33 other income from a tenant or other occupier of the property.

34
35 At present, the draft provides two alternatives for Section 3(b)’s scope provision:
36 Alternative A, which uses the UHFPA definition, and Alternative B, which uses the
37 same scope provision as contained in the March 2014 meeting draft along with a “predominant
38 purpose” test. The Drafting Committee would welcome input at the Annual Meeting as to which
39 alternative is preferred. If the Act adopts Alternative B, this definition will be unnecessary.

40
41 References: § 3(b) (scope of Act).

42
43 21. “Secured obligation.” The Act uses this term (commonly used in other real estate-related
44 acts, see, e.g., Uniform Assignment of Rents Act § 2(13); Uniform Residential Mortgage
45 Satisfaction Act § 102(15)) rather than “mortgage debt.” The current draft of the proposed

1 Home Foreclosure Procedures Act instead merely uses the term “obligation.”

2
3 References: § 5(b) (appointment where consent expressed in mortgage); § 24(a) (effects
4 of receivership/one-action and anti-deficiency rules).

5
6 22. “Security agreement.” The Act defines the term using the same definition found in UCC
7 Article 9.

8
9 Reference: § 9 (receivership property subject to pre-petition security agreement).

10 23. “Security interest.” The Act uses the term to include any lien arising by agreement.
11 References: § 9 (receivership property subject to pre-petition security agreement).

12
13 24. “Sign.” The Act uses the media-neutral version of the term commonly used in other
14 recent Model and Uniform Acts.

15
16 References: § 5(b) (appointment where consent expressed in signed record); § 6(a)
17 (eligibility to serve as receiver); § 15(b), Alternatives B-C (sale, lease, license or other transfer
18 by receiver other than in ordinary course where consent expressed in signed record); § 20(b)
19 (signature requirement for submitted claims).

20
21 25. “State.” The Act uses the boilerplate ULC definition of the term.

22
23 **SECTION 3. SCOPE; EXCLUSIONS.**

24 (a) Except as otherwise provided in this section, this [act] applies to a receivership for
25 real property and personal property related to the real property or used in its operation.

26 **Alternative A**

27 (b) This [act] does not apply to a receivership for residential property unless the owner
28 collects rent or other income from a tenant or occupier other than an individual related to the
29 owner by affinity or consanguinity within the third degree or in a step or adoptive relationship
30 within the third degree.

31 **Alternative B**

32 (b) This [act] does not apply to a receivership for real property that is a single-family
33 residence used predominantly as the owner’s primary residence unless the owner collects rent or
34 other income from a tenant or occupier other than an individual related to the owner by affinity

1 or consanguinity within the third degree or in a step or adoptive relationship within the third
2 degree.

3 **End of Alternatives**

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

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

9 (e) Unless displaced by a particular provision of this [act], statutes of this state other than
10 this [act] and the principles of law and equity supplement this [act].

11 **Reporter's Notes**

12 1. Subsection (a) reflects the current committee charge from the Executive Committee,
13 which is to address the appointment and powers of real estate receivers. Thus, subsection (a)
14 provides that except to the extent Section 3 otherwise limits, the Act will govern receivership of
15 real property and personal property that is related to the real property or used in the operation of
16 the real property. Thus, for example, if the mortgagee of real estate used by the mortgagor as a
17 hotel sought the appointment of a receiver following the mortgagor's default, the court could
18 appoint a receiver under this Act for both the real estate and any personal property of the owner
19 used in the operation of the hotel (e.g., furnishings, food/beverage inventories, and accounts
20 receivable.

21
22 2. Subsection (b) provides the Act's primary scope exclusion — this Act may not be used to
23 appoint a receiver for residential property from which the owner does not collect rent or other
24 income from unrelated tenants or other occupiers. The term "residential property" is defined in
25 Section 2(19) to exclude property that is used primarily for nonresidential purposes such as
26 farming, commercial, or industrial uses. This carries out the Committee's instructions that the act
27 should apply where the property has a "mixed" use (i.e., the owner occupies it as a residence but
28 also uses the property to generate rental or other business income), but not where the property is
29 used only as the owner's primary residence. Even if the property is used solely for residential
30 purposes, the Act will apply if the owner collects rents or other income from tenants or other
31 occupiers of some or all of the property if such tenants or other occupiers are unrelated to the
32 owner.

33
34 As drafted, the Act provides two alternatives for subsection (b). Alternative A uses the
35 definition "residential property" as that term was defined in the Uniform Home Foreclosure

1 Procedures Act. Alternative B instead uses the undefined term “single-family residence” and
2 would exclude from the scope of the Act a receivership for a single-family residence where the
3 owner’s predominant use of the property is as the owner’s primary residence and where the
4 owner does not collect rent or other income from nonfamily members.

5
6 The Alternatives are not intended to establish alternative scope limitations for the Act;
7 instead, the Alternatives are intended to express (although in different terms) the same basic
8 scope limitation. The Drafting Committee welcomes input from the commissioners, at the
9 Annual Meeting, regarding which expression of the scope limitation is preferable.

10
11 3. Subsection (c) is intended to address the relationship of this Act to existing statutory
12 regimes for the appointment of receivers for certain entities. See, e.g., N.H. Rev. Stat. § 401-
13 B:11 (authorizing receivership of insurance company). The provisions of this Act would not
14 apply to appointment of a receiver under an existing statutory regime, except to the extent that
15 the other statutory regime or other law so provides. The bracketed language, by requiring the
16 authorization to come from other law, is consistent with the Committee’s decision in September
17 2013 that this Act should not itself authorize courts to apply the provisions of the Act by analogy
18 to cases outside the Act’s scope.

19
20 4. Subsection (d) makes clear that this Act is not intended to be the exclusive method by
21 which a court may appoint a receiver.

22
23 **SECTION 4. POWER OF COURT.** The court has exclusive jurisdiction to direct a
24 receiver and determine any controversy related to a receivership under this [act] or receivership
25 property.

26 **Reporter’s Notes**

27 1. Section 4 provides a statement of the court’s powers in the context of a receivership. It is
28 a substantial adaptation of Minnesota’s receivership statute, Minn. Stat. Ann. § 576.23. Under
29 this section, the court has the authority to determine all controversies relating to the collection,
30 preservation, improvement, disposition and distribution of receivership property, as well as all
31 matters arising in or relating to the receivership, the receivership property, the exercise of the
32 receiver’s powers, or the performance of the receiver’s duties. See also Wash. Rev. Code Ann. §
33 7.60.055(1).

34
35 Section 4 focuses only upon the appointing court’s exclusive judicial authority over the
36 receiver and the receivership property. Section 4 does not displace the exercise of legitimate
37 police powers over the receiver or receivership property.

38
39 2. At the March 2014 meeting, there was a suggestion by some members of the Drafting
40 Committee that Section 4 should account for the possibility that a receiver might be appointed by
41 a court that would not have statewide jurisdiction to be able to enter orders with respect to land
42 or property located elsewhere within the state. The Reporter will undertake to discern whether

1 there are any states in which this is a legitimate concern and, if so, to prepare a legislative note to
2 highlight the need in such states for a provision extending the jurisdiction of the appointing court
3 to address receivership property located anywhere in the state.
4

5 **SECTION 5. APPOINTMENT.**

6 (a) After notice and a hearing, the court may appoint a receiver under this [act]:

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

9 (A) being subjected to waste;

10 (B) is in danger of loss or material impairment; or

11 (C) has been or may be the subject of a voidable transfer.

12 (2) after judgment:

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

14 (B) to preserve nonexempt property pending appeal or when an execution
15 has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the
16 judgment;

17 (3) in connection with foreclosure of a mortgage or enforcement of an assignment
18 of rents that is in default, as necessary to protect the mortgaged property or rents arising from the
19 property from waste, loss, transfer, or dissipation;

20 (4) in an action against a person that is not an individual if:

21 (A) the object of the action is the dissolution of the person;

22 (B) the person has been dissolved; or

23 (C) the person is insolvent or generally is not paying the person's debts as
24 those debts become due [unless the debts are the subject of bona fide dispute]; [and]

25 (5) in other actions in which receivers have been appointed on equitable grounds

1 or as provided by law[; and

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

4 (b) [In connection with the foreclosure of a mortgage or enforcement of an assignment of
5 rents, a mortgagee or assignee of rents is entitled to appointment of a receiver if there is a default
6 under the mortgage or assignment and:

7 (1) the mortgagor or assignor of rents agreed in a signed record to the
8 appointment of a receiver in the event of default;

9 (2) the owner otherwise agreed in a signed record to the appointment of a
10 receiver;

11 (3) the property for which the receivership is sought is not sufficient, along with
12 other collateral held by the mortgagee or assignee, to satisfy the secured obligation;

13 (4) the owner fails to turn over to the mortgagee or assignee any rents the
14 mortgagee or assignee was entitled to collect; or

15 (5) a subordinate creditor obtains appointment of a receiver for the property.

16 (c)] The court may appoint a receiver ex parte if the person seeking the appointment
17 establishes that the circumstances justify immediate appointment. If the court appoints a receiver
18 ex parte, the court shall set a hearing to be held as soon as practicable after the appointment. The
19 court may condition the ex parte appointment on the giving of security by the person seeking the
20 appointment, in the amount the court specifies, for the payment of costs and damages incurred or
21 suffered by any person if the court finds that the appointment was not justified. If, after notice
22 and a hearing, the court finds that the ex parte appointment was justified, the court shall release
23 the security.

Reporter's Notes

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

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

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

Consistent with this historical approach, section 5(a) describes the types of cases in which a court is authorized to appoint a receiver pursuant to this act, and is based on a compilation of numerous existing receivership statutes. In each of the situations reflected in subsection (a), the determination that circumstances exist to justify the appointment of a receiver for the owner's property would be left to the discretion of the court.

Subsection (a)(6) would be appropriate in states that provide a post-sale statutory redemption right, and would permit the court to appoint a receiver for the property and its rents during the redemption period.

2. As Clark described, courts traditionally held that “[s]ince no litigant can force a judge to do a judicial act . . . no litigant has an absolute right to have the court take another's property into its custody by the appointment of a receiver.” 1 Clark on Receivers, § 48, at 52 (3d ed. 1959). Nevertheless, it is quite common for mortgage loan documents to contain “receivership clauses” under which the mortgagor consents to the appointment of a receiver after default, without regard to whether the mortgaged property is subject to waste or whether it provides adequate security for repayment of the mortgage debt. Because appointment of a receiver traditionally originated from within the court's equitable discretion, some courts have refused to appoint a receiver — despite the presence of a receivership clause — in cases where they would have denied appointment of a receiver otherwise. See, e.g., *Dart v. Western Sav. & Loan Ass'n*, 438 P.2d 407 (Ariz. 1968); *Chromy v. Midwest Fed. Sav. & Loan Ass'n*, 546 So.2d 1172 (Fla. App. 1989); *Sazant v. Foremost Investments, N.V.*, 507 So.2d 653 (Fla. App. 1987) (receivership clause not binding on court where mortgagor had not committed waste and default did not place mortgagee at serious risk of noncollection); *Gage v. First Federal Sav. & Loan Ass'n*, 717 F. Supp. 745 (D. Kan. 1989); *Barclays Bank, P.L.C. v. Davidson Ave. Assocs., Ltd.*, 644 A.2d 685 (N.J. Super. 1994) (receivership clause “usurps the judicial function” and thus violates public policy).

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

6
7 By contrast, there is significant recent authority supporting the view that a receivership
8 clause provides a sufficient basis to appoint a receiver after the mortgagor’s default. See, e.g.,
9 *Bank of America Nat’l Trust & Sav. Ass’n v. Denver Hotel Ass’n Ltd. Partnership*, 830 P.2d
10 1138 (Colo. App. 1992); *Fleet Bank v. Zimelman*, 575 A.2d 731 (Me. 1990); *Metropolitan Life*
11 *Ins. Co. v. Liberty Center Venture*, 650 A.2d 887 (Pa. Super. 1994); *Federal Home Loan*
12 *Mortgage Corp. v. Nazar*, 100 B.R. 555 (D. Kan. 1989). Finally, federal courts have routinely
13 held receivership clauses in federally insured mortgages sufficient to justify the appointment of a
14 receiver. See, e.g., *United States v. Berk & Berk*, 767 F. Supp. 593 (D.N.J. 1991); *United States*
15 *v. Drexel View II, Ltd.*, 661 F. Supp. 1120 (N.D. Ill. 1987). Consistent with this recent
16 authority, both the Restatement (Third) of Property — Mortgages and the Uniform Assignment
17 of Rents Act take the view that a mortgagee/assignee of rents is “entitled” to the appointment of
18 a receiver where the loan documents contain a clause under which the mortgagor consented to
19 appointment. Restatement (Third) of Property — Mortgages § 4.3(b); Uniform Assignment of
20 Rents Act § 7(a).

21
22 Furthermore, some state statutes explicitly make clear that the mortgagee is entitled to a
23 receiver following default as a matter of right. See, e.g., Ind. Code § 32-30-5-1 (court “shall”
24 appoint a receiver if “either the mortgagor or the owner of the property has agreed in the
25 mortgage or in some other writing to the appointment of a receiver”); Minn. Stat. Ann. § 559.17,
26 subd. 2 (where assignment of rents contains receivership clause, “the court shall, without regard
27 to waste, adequacy of the security, or solvency of the mortgagor, appoint a receiver”); N.Y. Real
28 Prop. Law § 254(10) (receivership clause “must be construed as meaning that the mortgagee, his
29 heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without
30 notice and without regard to adequacy of any security of the debt, to the appointment of a
31 receiver of the rents and profits of the premises covered by the mortgage”); N. Mex. Stat. Ann. §
32 44-8-4(A) (court “shall appoint a receiver in an action by a mortgagee or secured party ... where
33 such mortgage, security agreement, contract or other written agreement provides for the
34 appointment of a receiver”).

35
36 Consistent with this recent trend, subsection (b) is based on the comparable provision of
37 § 7 of the Uniform Assignment of Rents Act. It provides that the person seeking appointment of
38 a receiver is entitled to a receiver as a matter of right in a proceeding to foreclose a mortgage
39 or enforce an assignment of rents where one of the following conditions exists: (1) the loan
40 documents contain a receivership clause; (2) the owner otherwise consents; (3) the property’s
41 value is not sufficient to satisfy the secured obligation; (4) the owner has failed to turn over rents
42 that the creditor is entitled to collect; or (5) a subordinate creditor has obtained the appointment
43 of a receiver for the property.

44
45 Some members of the Drafting Committee have expressed some concern with subsection
46 (b), even in bracketed form. The provision remains in the draft, albeit in bracketed form,

1 because in a state that has enacted UARA, this Act should not create a conflict between the rights
2 of an assignee of rents to enforce that assignment by appointment of a receiver under UARA and
3 under this Act. Likewise, to facilitate enactment in a states in which other law makes
4 appointment of a receiver mandatory in certain cases involving mortgage enforcement, the
5 provisions of Section 5 should facilitate the Act's consistency with those existing state laws.
6

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

18 Subsection (a)(3) authorizes the court to appoint a receiver "in connection with
19 foreclosure of a mortgage or enforcement of an assignment of rents that is in default, as
20 necessary to protect the mortgaged property or rents arising from the property from waste, loss,
21 transfer, or dissipation." The section is intended to permit a mortgagee foreclosing nonjudicially
22 to petition to the court directly for the appointment of a receiver without having to institute an
23 entirely separate action for specific performance of an assignment of rents or some other civil
24 action to which the receivership could serve as an ancillary remedy.
25

26 4. Subsection (c) is a modified version of Minnesota's receivership statute, Minn. Stat. Ann.
27 § 576.25, subd. (7), and would permit *ex parte* appointment in cases in which the court concludes
28 that "circumstances justify the immediate appointment." Subsection (c) would authorize (but not
29 require) the court to condition the *ex parte* appointment of a receiver upon the giving of security
30 by the person seeking appointment.
31

32 Consistent with the Committee's instructions in the September 2013 meeting, the current
33 draft does not contain a provision requiring *ex parte* appointment simply because the loan
34 documents contain the mortgagor's consent to *ex parte* appointment. Nevertheless, because the
35 section permits the court to appoint a receiver "if the person seeking the appointment establishes
36 that the circumstances justify immediate appointment," nothing would preclude a court from
37 concluding that a clause in the mortgage consenting to *ex parte* appointment would constitute a
38 "circumstance justifying immediate appointment."
39

40 **SECTION 6. IDENTITY OF RECEIVER; DISCLOSURE OF INTEREST.**

41 (a) [Except by consent of all parties in a signed record, the] [The] court may not appoint
42 a person as receiver unless the person provides evidence under penalty of perjury that the person
43 is independent.

1 (b) A person is not independent under subsection (a) if the person:

2 (1) is related to a party by affinity or consanguinity within the third degree or in a
3 step or adoptive relationship within the third degree;

4 (2) is an officer, director, manager, member, partner, trustee, employee, or
5 controlling shareholder of a party;

6 (3) has an interest materially adverse to the interests of a party;

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

9 (5) has a debtor-creditor relationship with a party; or

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

12 (c) Notwithstanding subsection (b), a person is not disqualified under subsection (a) from
13 appointment as receiver solely because the person was appointed receiver or is owed
14 compensation in an unrelated matter involving a party or was engaged by a party in a matter
15 unrelated to the underlying dispute.

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 6 requires the
23 receiver's "independence." This concept is adapted from Minnesota's receivership statute,
24 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, at least absent consent of all parties in a signed record. Subsection (c)

1 makes clear that a person is not disqualified as a receiver merely because that person has served
2 as a receiver or is owed compensation relating to a prior unrelated dispute.

3
4 In most jurisdictions, it is customary for the person seeking the receiver's appointment to
5 nominate a prospective receiver. Subsection (d) contemplates such a practice, but makes clear
6 that the identity of the receiver is ultimately subject to the court's discretion. 1 Clark on
7 Receivers, § 48, at 52 (3d ed. 1959) ("the power of determining who the receiver shall be rests
8 with the court").
9

10 3. There is some existing authority that permits a mortgagee to serve as a receiver. See,
11 e.g., *First Interstate Bank v. Heritage Square, Ltd.*, 833 P.2d 240 (N.M. 1992). Further, the
12 United States (HUD) has served as an effective receiver in cases where it is the mortgagee.
13 *United States v. Drexel View II, Ltd.*, 661 F. Supp. 1120 (N.D. Ill. 1987). The Restatement of
14 Mortgages does not prohibit the appointment of the mortgagee as a receiver, noting that "the
15 mortgagee-receiver often has a greater incentive than its third-party counterpart to control
16 receivership costs." Restatement (Third) of Property — Mortgages § 4.3, comment e (1997).
17 Consistent with this authority, subsection (a) would permit the mortgagee to serve as a receiver,
18 but only with the consent of the mortgagor (and any other party) in a signed record.
19

20 **SECTION 7. RECEIVER'S BOND.**

21 (a) Except as otherwise provided by law of this state other than this [act], [before a
22 receiver commences the receiver's duties] [not later than [] days after a receiver commences
23 the receiver's duties], the receiver shall execute a bond in the amount the court specifies, with
24 one or more sureties approved by the court, conditioned on the receiver's faithful discharge of
25 the receiver's duties in accordance with the orders of the court and law of this state. Unless the
26 court orders otherwise, the receiver's bond runs in favor of all persons that have an interest in the
27 receivership property.

28 (b) Instead of the bond described in subsection (a), the court may approve the posting
29 with the court of alternative security, such as a letter of credit or deposit of funds. The receiver
30 may not use receivership property as alternative security. Interest that accrues on deposited
31 funds must be paid to the receiver on the receiver's discharge.

32 (c) A claim against a receiver's bond or alternative security must be made not later than
33 [one year] after the date the receiver is discharged.

Receiver's Notes

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

Subsection (a) reflects the Committee’s instructions, at the September 2013 meeting, that the amount of the receiver’s bond should be left to the discretion of the judge.

2. As drafted, subsection (a) contains two possible approaches for the timing of the receiver’s obtaining of the bond. One approach would require bonding before the receiver commences any actions; the other would provide a grace period. The Committee has yet to discuss whether variations in local practice merit retaining two different approaches. If the latter (grace period) approach is taken, an additional provision may be needed providing for the termination of the receivership or the receiver’s authority if the bond/security is not provided during the grace period, or Section 21 (which addresses termination of the receivership) could be adapted to address such a situation.

3. Subsection (b), which would authorize the posting of a letter of credit or alternative security, derives from Wash. Rev. Code Ann. § 7.60.045. Subsection (b) clarifies that the receiver may not use receivership property as alternative security.

4. Subsection (c) provides a one-year period for filing claims against the bond, and is modeled upon a similar provision in Wash. Rev. Code Ann. § 7.60.045.

SECTION 8. RECEIVER’S STATUS AS LIEN CREDITOR. At the time a receiver is appointed under this [act], the receiver has the status of a lien creditor:

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

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

property.

Reporter's Notes

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

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

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

2. Consistent with the principles noted in Comment 1, Section 8 (which is a simplified version of Minnesota’s receivership statute, Minn. Stat. Ann. § 576.30) provides that the receiver has the status of a lien creditor as to both personal and real property. Under Article 9 of the Uniform Commercial Code, the term “lien creditor” includes “a receiver in equity from the time of appointment.” U.C.C. § 9-102(a)(52)(D). Section 8 is intended to make clear that a receiver appointed under this Act would also have the status and priority of a “lien creditor” as to personal property under Article 9.

Section 8 would enable the receiver to establish priority not only against subsequent creditors, but also a prior unperfected secured party, as that unperfected secured party would be subordinate to a person who acquires the rights of a lien creditor before the conflicting security interest is perfected. U.C.C. § 9-317(a)(2). Section 8 does not create (and is not intended to create) an “avoiding power” in the receiver analogous to the strong-arm power exercisable by a bankruptcy trustee under Bankruptcy Code § 544(a).

Section 8 also gives the receiver the status and priority of a lien creditor under the state’s recording statute with respect to receivership property that is real property. The application of Section 8 would produce different results in different states with respect to an unrecorded interest in real property (such as an unrecorded mortgage). In the majority of states, an unrecorded mortgage would nevertheless have priority over a subsequent judgment lien. See Stoebe & Whitman, *The Law of Property* § 11.10, at 880-881 (“Often this conclusion is based on the literal language of the pertinent judgment lien statute, which typically imposes the lien on ‘the defendant’s real property—not the record property, the courts frequently hold, but the actual

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

SECTION 9. SECURITY INTEREST IN AFTER-ACQUIRED PROPERTY.

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

Reporter’s Notes

1. Section 9 is derived from Washington’s receivership statute, Wash. Rev. Code Ann. § 7.60.240. Section 9 provides that where the owner had entered into a pre-appointment security agreement covering after-acquired property, that agreement is effective against property acquired after the receiver’s appointment to the extent provided under other law. Section 9 ensures that the appointment of a receiver should have no impact on the effectiveness of an after-acquired property clause in a pre-petition security agreement. Thus, for example, if the owner had granted Bank (pre-receivership) a security interest in present and after-acquired equipment and inventory, the appointment of a receiver for all or part of the owner’s property should have no impact on the “after-acquired” clause in that security agreement, either as to similar property acquired by the receiver or by the owner.

SECTION 10. COLLECTION AND TURNOVER OF RECEIVERSHIP PROPERTY.

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

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

(2) subject to subsection (b), a person that has possession, custody, or control of receivership property shall turn the property over to the receiver.

(b) If a creditor has possession, custody, or control of receivership property and the

1 validity or perfection of the creditor's lien on the property depends on the creditor's possession,
2 custody, or control, the creditor may retain possession, custody, or control until the court enters
3 an order providing adequate protection of the creditor's lien.

4 (c) Unless there is a bona fide dispute with respect to a receiver's right to possession,
5 custody, or control of receivership property, a person's failure to turn the property over when
6 required by this section is punishable as a contempt of court.

7 **Reporter's Notes**

8 1. Section 10 facilitates the ability of the receiver to gather receivership property and to
9 collect debts that are receivership property. Subsection (a)(1) governs the receiver's ability to
10 collect debts that constitute receivership property. The obligor on a debt that is matured, payable
11 on demand, or payable on order must pay the debt to the receiver upon demand, except to the
12 extent that the obligor has a right of setoff or recoupment under other law. Subsection (a)(1) thus
13 provides the receiver with an ability to collect debts that is comparable to that possessed by a
14 trustee or debtor-in-possession under Section 542(b) of the Bankruptcy Code, 11 U.S.C. §
15 542(b).

16
17 Subsection (a)(2) obligates anyone in possession, custody, or control of receivership
18 property to turn that property over to the receiver upon demand, unless the court orders
19 otherwise. Subsection (a)(2) provides a receiver with an ability to compel the turnover of
20 receivership property that is comparable to that possessed by a trustee or debtor-in-possession
21 under Section 542(a) of the Bankruptcy Code, 11 U.S.C. § 542(a).

22
23 2. Subsection (b) makes clear that if a creditor holds a lien upon receivership property in the
24 creditor's possession, custody, or control, and the validity or perfection of its lien depends upon
25 the creditor's retention of that possession, custody, or control, the creditor may retain possession,
26 custody, or control until such time as the court enters an order providing for the adequate
27 protection of the creditor's lien. Thus, for example, a creditor with a statutory artisan's lien on a
28 vehicle could retain possession of the vehicle despite a turnover demand by the receiver until the
29 court entered an order preserving the validity of the creditor's lien on the vehicle (which would
30 otherwise be lost if the creditor released possession of the vehicle). Section 10 thus avoids the
31 result of cases such as *In re WEB2B Payment Solutions, Inc.*, 488 B.R. 387 (Bankr. 8th Cir.
32 2013) (creditor's turnover of funds in deposit account, without order providing for adequate
33 protection of creditor's interest, rendered creditor's security interest unperfected).

34
35 3. Under subsection (c), a person's failure to turnover receivership property upon demand
36 by the receiver may be punished by the court as contempt unless there is a bona fide dispute with
37 respect to the receiver's right to possession, custody, or control of the property.

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

2 (a) Except as limited in the order appointing a receiver or by law of this state other than
3 this [act], a receiver may:

4 (1) collect, control, manage, conserve, and protect tangible and intangible
5 receivership property;

6 (2) operate a business constituting receivership property, including the use, sale,
7 lease, collection, license, or other disposition of the property in the ordinary course of business;

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

11 (4) assert a right, claim, cause of action, or defense of the owner that relates to
12 receivership property;

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

15 (6) by subpoena, compel a person to submit to examination under oath, or to
16 produce and permit inspection and copying of designated documents or tangible things, with
17 respect to receivership property or any other matter that may affect administration of the
18 receivership;

19 (7) employ attorneys, accountants, appraisers, auctioneers, brokers, or other
20 professionals as provided in Section 14;

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

23 (9) exercise any power specifically conferred by the order appointing the receiver,

1 this [act], or law of this state other than this [act].

2 (b) If authorized by the court after notice and a hearing, or as otherwise permitted by this
3 [act], a receiver may:

4 (1) incur debt for the use or benefit of the receivership other than in the ordinary
5 course of business;

6 (2) recommend allowance or disallowance of a claim of a creditor as provided in
7 Section 20;

8 (3) make a distribution of receivership property or the proceeds of receivership
9 property as provided in Section 15 or 16;

10 (4) pay compensation to the receiver as provided in Section 19 or 22, or to each
11 attorney, accountant, appraiser, auctioneer, broker, or other professional employed by the
12 receiver as provided in Section 14;

13 (5) make improvements to receivership property;

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

15 and

16 (7) use or transfer receivership property other than in the ordinary course of
17 business as provided in Section 15.

18 (c) A receiver shall:

19 (1) prepare and retain appropriate business records, including records of all
20 receipts, disbursements, and other dispositions of receivership property;

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

23 (3) file with the [appropriate real property recording office] a certified copy of the

1 order appointing the receiver, together with a legal description of the real property if a
2 description is not included in the order; and

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

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

7 **Reporter's Notes**

8 1. The existing receivership laws in most states do not adequately set forth the powers that a
9 receiver may (or may not) exercise, either with or without prior approval of the appointing court.
10 This can result in potential uncertainty regarding the ability of a receiver to borrow money, to
11 approve or reject executory contracts entered into by the owner of the property (including
12 unexpired leases), to sell receivership property either in or outside of the ordinary course of
13 business, or to make improvements to receivership property.

14
15 Sections 11(a) and 11(b) derive from a compilation of various subsections of the
16 Minnesota, Washington, and New Mexico receivership statutes. See, e.g., Minn. Stat. Ann. §
17 576.29, subd. 1(a), (b); Wash. Rev. Code Ann. § 7.60.060(1); N.M. Rev. Stat. Ann. § 44-8-7(H).

18
19 Subsection (a) sets forth the general powers that the receiver may exercise as a matter of
20 the receiver's default powers, except to the extent that the receivership order or other law
21 explicitly restricts the receiver. Subsection (a) addresses the receiver's authority to sell, lease,
22 license, or otherwise transfer receivership property in the ordinary course of business. This
23 provision would allow the receiver to conduct ordinary course sales (such as sales of inventory)
24 in the process of operating a business, and would also permit the receiver of a partially-
25 completed condominium project to sell completed units. The draft does not contain a definition
26 of "ordinary course of business," but leaves the term to judicial development.

27
28 Subsection (b) sets forth specific powers that the receiver can exercise only if specifically
29 authorized by the court following notice and a hearing, or by other provisions of the Model Act.
30 These powers include the power to sell, lease, license or otherwise transfer receivership property
31 other than in the ordinary course of business, the power to make improvements to receivership
32 property, adopt or reject executory contracts of the owner, allow or disallow claims against the
33 receivership, pay compensation to professionals, and to make distributions of receivership
34 property.

35
36 2. Section 11(c), which describes the receiver's duties, is based on Minn. Stat. Ann. §
37 576.29, subd. (2). Subsection (c) includes a duty for the receiver to record a certified copy of the
38 order of appointment in the real estate records in any county in which real property that is
39 receivership property is located.

1 3. Subsection (d), which permits the appointing court to expand, modify, or limit the
2 receiver's powers or duties, is based on Minn. Stat. Ann. § 576.29, subd. (3).
3

4 **SECTION 12. DUTIES OF OWNER.**

5 (a) An owner shall:

6 (1) assist and cooperate fully with the receiver in the administration of the
7 receivership and the discharge of the receiver's duties;

8 (2) turn over to the receiver all tangible and intangible receivership property in the
9 owner's possession, custody, or control;

10 (3) provide the receiver with all documents and information relating to
11 receivership property, including passwords and other information needed to obtain or maintain
12 access to or control of receivership property;

13 (4) submit to examination by the receiver, under oath, concerning the acts,
14 conduct, property, liabilities, and financial condition of the owner or any matter relating to
15 receivership property or the receivership; and

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

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

21 **Reporter's Notes**

22 1. Section 12, which describes the duties of the owner, derives from the provisions of the
23 Washington receivership statute, Wash. Rev. Code Ann. § 7.60.080.

24 **SECTION 13. AUTOMATIC STAY.**

25 (a) Except as otherwise provided in subsection (d) or ordered by the court, an order

1 appointing a receiver operates as a stay, applicable to all persons, of:

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

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

6 (b) In addition to the stay provided in subsection (a), the court may order a stay of an act,
7 action, or proceeding against or relating to receivership property if necessary to protect the
8 property and 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) A stay under subsection (a) or entry of an order staying an act, action, or proceeding
12 under subsection (b) does not operate as a stay of:

13 (1) an act to foreclose a mortgage or enforce an assignment of rents by the person
14 seeking appointment of the receiver;

15 (2) an act to perfect, or maintain or continue the perfection of, an interest in
16 receivership property to the extent the rights of a lien creditor are subject to perfection under law
17 of this state other than this [act];

18 (3) commencement or continuation of a criminal proceeding against the owner;

19 (4) commencement or continuation of an action or proceeding to:

20 (A) establish paternity;

21 (B) establish or modify an order for alimony, maintenance, or support; or

22 (C) collect alimony, maintenance, or support under a judicial order;

23 (5) commencement or continuation of an action or proceeding, or enforcement of

1 a judgment other than a money judgment in an action or proceeding, by a governmental unit to
2 enforce its police or regulatory power; or

3 (6) establishment by a governmental unit of a tax liability and an appeal of the
4 liability.

5 (e) On motion of a party, the court may declare void an act that violates a stay under this
6 section.

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

8 (1) award the receiver actual damages caused by the violation, including costs and
9 attorney's fees; and

10 (2) punish the violation as a contempt of court.

11 **Reporter's Notes**

12 1. As the leading treatise explains, it is customary that the order appointing a receiver
13 expresses an injunction against acts, actions, or proceedings that could interfere with the
14 receiver's possession and management of receivership property or the performance of the
15 receiver's duties:

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

27
28 The court may protect its possession and control of property within its territorial
29 jurisdiction even without a specific injunction. The order of appointment impliedly
30 enjoins parties to the cause and warns any other person from interfering with the court's
31 control and possession. [2 Clark on Receivers, § 625.1(a), at 1024 (3d ed. 1959).]
32

33 Consistent with this practice, Section 13 provides that the order of appointment operates as a stay
34 against any act to obtain possession or control of receivership property (including any attempt to
35 enforce a judgment against receivership property) and any act to create, perfect, or enforce a lien

1 against receivership property on account of a claim arising prior to the receivership.

2
3 In this regard, Section 13 creates an automatic stay that is much narrower in scope than
4 the automatic stay that would be applicable in bankruptcy. This stay provided by this Act does
5 not prevent the owner from seeking bankruptcy protection, nor does it prevent creditors of the
6 owner from seeking to place the owner into bankruptcy, even if the bankruptcy filing would
7 result in an interference with the receiver's possession, custody, or control of receivership
8 property. See, e.g., *Gilchrist v. GE Capital Corp.*, 262 F.3d 295 (4th Cir. 2003) (federal court
9 receivership order does not bar creditors from filing involuntary petition against debtor).

10
11 2. Subsection (b) authorizes the court to expand the scope of the stay as necessary to protect
12 receivership property or facilitate the administration of the receivership. Subsection (b) is
13 limited, however, to acts, actions, or proceedings against receivership property, the receiver, or
14 the owner; therefore, subsection (b) would not authorize the court to stay an action against a
15 guarantor or co-obligor.

16
17 3. Subsection (c) permits any person subject to the automatic stay to apply to the appointing
18 court for relief from the automatic stay for cause. The Act does not define "cause," but leaves to
19 judicial development the circumstances that would justify relief from the stay.

20
21 4. Subsection (d) provides a list of exceptions to the automatic stay created by subsection
22 (a). Subsection (d)(1) makes clear that the stay does not prevent the appointing creditor from
23 foreclosing its mortgage or enforcing its assignment of rents. Subsection (d)(2) permits a person
24 with a purchase money security interest in receivership property to perfect that interest following
25 appointment as long as perfection occurs within the applicable state law grace period under other
26 law (such as U.C.C. § 9-317(e)). Likewise, subsection (d)(2) would permit a creditor to file a
27 continuation statement to maintain its perfection so long as that continuation statement was filed
28 within the applicable period to ensure that the creditor maintained continuous perfection.
29 Subsection (d)(3) would permit the commencement or continuation of criminal proceedings
30 against the owner. Subsection (d)(4) would permit the commencement or continuation of actions
31 (or the modification of judgments) for alimony, maintenance, or support. Subsection (d)(5)
32 would permit governmental actors to take actions or enforce nonmonetary judgments pursuant to
33 police and regulatory powers. Subsection (d)(6) would permit a governmental unit to establish a
34 tax liability against the owner or receivership property.

35
36 5. Subsection (e) permits the court to declare an act void as being in violation of the stay
37 under subsection (a). Subsection (e) thus currently reflects the judgment of the Drafting
38 Committee, at its March 2014 meeting, to provide that an act in violation of the automatic stay is
39 merely voidable rather than void.

40
41 6. Subsection (f) permits the receiver to recover actual damages, including costs and
42 attorney fees, from a person that willfully violated the stay. In addition, subsection (f) would
43 permit the court to punish any willful violation by contempt, without regard to whether the
44 receiver suffered actual damages as a result.

1 **SECTION 14. EMPLOYMENT AND COMPENSATION OF PROFESSIONAL.**

2 (a) With court approval in the order appointing a receiver, or otherwise after notice and a
3 hearing, the receiver may employ an attorney, accountant, appraiser, auctioneer, broker, or other
4 professional to assist the receiver in performing the receiver's duties. The receiver shall disclose
5 to the court the identity and qualifications of the professional, the scope and nature of the
6 proposed engagement, the proposed compensation, and any potential conflict of interest. A
7 person is not disqualified from employment under this section solely because of the person's
8 employment by, representation of, or other relationship with the receiver, a creditor, or other
9 party if the court finds the employment is appropriate. This [act] does not preclude the receiver
10 from providing services as an attorney, accountant, auctioneer, or broker when licensed to do so.

11 (b) A receiver or a professional employed by the receiver under subsection (a) may file
12 with the court an itemized statement of the time spent, work performed, billing rates of all
13 persons that performed the work and an itemized list of expenses. With court approval after
14 notice and a hearing, the receiver shall pay the amounts itemized in the statement.

15 **Reporter's Notes**

16 1. Section 14(a) provides that the receiver must obtain the court's approval to employ and
17 retain professionals, but contemplates that this approval may come in the order of appointment
18 itself. If the authorization is not contained in the order of appointment, subsection (a) would
19 require notice and a hearing for appointment.
20

21 The final sentence of subsection (a) also makes clear that the receiver may provide
22 professional services to the estate (and be compensated for those services) where licensed to do
23 so. See, e.g., Wash. Rev. Code Ann. § 7.60.180(3). The omission of "appraiser" from this
24 sentence is intentional based on input from observers that dual service as both a receiver and
25 appraiser would be inappropriate.
26

27 While subsection (a) uses the singular ("the receiver may employ an attorney"), the
28 Act contemplates that where the nature of the receivership so demands, the receiver may employ
29 more than one attorney or other professional as needed.
30

31 2. Subsection (b) provides that the receiver's payment of the fees and expenses of

1 professionals can occur only after the submission to the court of an itemized statement and court
2 approval following notice and a hearing.

3
4 **SECTION 15. USE, SALE, LEASE, LICENSE OR OTHER TRANSFER OF**
5 **RECEIVERSHIP PROPERTY OTHER THAN IN ORDINARY COURSE OF BUSINESS.**

6 (a) With court approval after notice and a hearing, a receiver may use receivership
7 property other than in the ordinary course of business.

8 **Alternative A**

9 (b) With court approval after notice and a hearing, a receiver may sell, lease, license, or
10 otherwise transfer receivership property other than in the ordinary course of business. Unless the
11 agreement of sale provides otherwise, a sale under this section is free and clear of all liens and
12 rights of redemption.

13 **Alternative B**

14 (b) With court approval after notice and a hearing, a receiver may sell, lease, license, or
15 otherwise transfer receivership property other than in the ordinary course of business. Unless the
16 agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the
17 person that obtained the appointment of the receiver, any subordinate lien, and any rights of
18 redemption, but is subject to a valid senior lien unless the holder of the lien authorized the
19 transfer free and clear of the lien [in a signed record].

20 **Alternative C**

21 (b) Unless authorized by law of this state other than this [act], a receiver may not sell,
22 lease, license, or otherwise transfer receivership property other than in the ordinary course of
23 business, except with the consent in a signed record of the owner and all persons holding a valid
24 lien on the property. The consent of the owner under this section must be obtained after the
25 appointment of the receiver.

1 **End of Alternatives**

2 (c) Subject to Section 16, on a sale under subsection (b), a lien on the property which is
3 extinguished by the sale attaches to the proceeds of the sale with the same validity, perfection,
4 and priority as the lien had with respect to the property immediately before the sale.

5 (d) A transfer under subsection (b) may occur by means other than a public auction sale.
6 A creditor holding a valid lien on the property to be sold may purchase the property and may
7 offset against the purchase price part or all of the allowed amount secured by the creditor's lien,
8 if the creditor tenders cash sufficient to satisfy in full the reasonable expenses of sale and all
9 liens payable out of the proceeds of sale having priority over the lien of the creditor.

10 (e) A reversal or modification of an order approving a transfer under this section does
11 not affect the validity of the transfer to a person that acquired the property in good faith, whether
12 or not the person knew prior to the transfer of the motion for reversal or modification, unless the
13 court stays the order.

14 **Reporter's Notes**

15 1. Traditionally, a receiver's ability to sell receivership property varied depending upon the
16 circumstances of the receivership. For example, when a court appointed a general receiver for all
17 of the assets of an insolvent debtor, the court would typically empower the receiver to gather and
18 sell the assets of the debtor, in much the same way that a bankruptcy trustee might gather and
19 liquidate the debtor's nonexempt assets in a Chapter 7 bankruptcy case. By contrast, when a
20 court appointed a limited receiver to take possession of a specific asset — such as a receiver for
21 mortgaged property pending foreclosure sale — the receiver's role was more typically viewed as
22 custodial. For this reason, receivers appointed in conjunction with foreclosure proceedings were
23 often viewed as having the power to operate, maintain, and preserve the property pending the
24 foreclosure sale—but not to sell the property, as the sale would instead take place under the
25 applicable foreclosure procedures. See, e.g., *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764
26 (1964); *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). A recent
27 Florida court went further, holding that the court lacks the authority to empower a receiver
28 appointed in a foreclosure case to sell the property free and clear of liens and rights of
29 redemption. *Shubh Hotels Boca, LLC v. Federal Deposit Ins. Corp.*, 46 So.3d 163 (Fla. Dist. Ct.
30 App. 2010). See also *Todd Enters., LLC v. MidCountry Bank*, 2013 WL 4045765 (Minn. Ct.
31 App. 2013) (not reported in N.W.2d) (court order authorizing receiver's sale free and clear of
32 borrower's statutory right of redemption was contrary to state mortgage foreclosure statute).

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

19
20 Another potential advantage to receiver sales arises out of the structure of the
21 securitization of commercial mortgages. Commercial mortgage-backed securities (CMBS) loans
22 are held in real estate mortgage investment conduits (“REMICs”), which are special purpose
23 vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed securities.
24 The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, at the
25 risk of losing their tax status as pass-through entities. Thus, if a REMIC ends up having to
26 purchase the mortgaged property at a foreclosure sale, it cannot make a new loan to a potential
27 buyer on a seller-financing basis. However, the Internal Revenue Code does permit a REMIC to
28 make limited modifications to an existing defaulted loan. Thus, if the property can be sold
29 through a receiver or by the borrower directly, with the buyer assuming the mortgage, the
30 mortgage loan can be modified and restructured without threatening the REMIC’s tax status.
31 Thus, a CMBS lender may have good reason to believe a receiver sale can produce higher price
32 by comparison to a public foreclosure (cash) sale, making such a sale attractive to a CMBS
33 lender that does not wish to foreclose (and possibly take ownership) of a property that is worth
34 less than the outstanding mortgage debt.

35
36 Existing federal statutes explicitly authorize a receiver appointed by a federal court to sell
37 mortgaged property, in either a public or private sale. 28 U.S.C.A. § 2001 et seq. By contrast,
38 under existing state laws, the authority for receiver sales is much less clear. There are a few
39 states with statutory provisions that explicitly grant the power of sale to a receiver. See, e.g.,
40 Ind. Code § 32-30-5-7; N.C. Gen. Stat. § 1-505; Wash. Rev. Code Ann. § 7.60.260. Despite
41 having no clear statutory authority, courts in Ohio and Michigan have upheld court-authorized
42 receiver sales free and clear of liens and statutory redemption rights. See, e.g., *CSB Bank v.*
43 *Christy*, No. 305869 (Mich. Ct. App. Oct. 18, 2012) (unpublished); *Park Nat’l Bank v. Cattani,*
44 *Inc.*, 187 Ohio App.3d 186, 931 N.E.2d 623 (2010); *Huntington Nat’l Bank v. Motel 4 BAPS,*
45 *Inc.*, 191 Ohio App.3d 90, 944 N.E.2d 1210 (2010).

1 Section 15(b) seeks to provide much-needed clarity to this issue, providing a range of
2 alternatives that a state could adopt. Under the broadest and most preferred approach,
3 Alternative A, section 15(b) would authorize the receiver, with court approval after notice and a
4 hearing, to sell, lease, license, or otherwise transfer receivership property outside the ordinary
5 course of business free and clear of liens and redemption rights. Under Alternative B, section
6 15(b) would authorize the receiver (again with court approval after notice and a hearing) to sell,
7 lease, license or otherwise transfer receivership property free and clear of liens and rights of
8 redemption, other than a lien that is senior in priority to the lien of the creditor that obtained the
9 receiver's appointment. Alternative C would be the most restrictive, and might be enacted in a
10 state that wanted to forbid any nonordinary course transfer except with the consent of all persons
11 holding an interest in the property.

12
13 Under each alternative A through C, the intent of the provision is to preserve to the
14 receiver the ability to seek authority to sell either free and clear or subject to liens, depending
15 upon the situation. This would facilitate the ability, for example, for the senior mortgagee of a
16 securitized mortgage loan to seek a receiver to facilitate a sale of the property subject to the
17 existing CMBS loan, with that loan being modified in the context of the receiver's sale.

18
19 2. Subsection (c) provides for the transfer of any liens extinguished by the sale to sale
20 proceeds. Subsection (d) recognizes that the receiver may sell other than by a public auction
21 sale, and provides for the right of a lienholder to credit bid.

22
23 3. Subsection (e) provides that the title of a good faith purchaser from the receiver is not
24 affected by reversal of the transfer order on appeal unless the authorization and transfer were
25 stayed pending appeal.

26
27 4. Subsection (a) would permit the receiver, with court approval after notice and a hearing,
28 to use receivership property other than in the ordinary course of business.

29 30 **SECTION 16. DISTRIBUTION TO SECURED CREDITOR.**

31 (a) Subject to subsection (b), a creditor with a perfected lien on receivership property is
32 entitled to receive the property or proceeds from a transfer of the property in accordance with the
33 creditor's priority under law of this state other than this [act].

34 (b) The court may award the receiver from receivership property or proceeds the
35 reasonable and necessary fees and expenses of preserving, protecting, and transferring the
36 property.

37 **Reporter's Notes**

38 1. Section 16 provides that in the event of a disposition of receivership property by the

1 receiver (whether in the ordinary course under Section 11 or outside the ordinary course under
2 Section 15), creditors with perfected liens on the property are entitled to the proceeds of the
3 disposition according to the state's applicable priority rules as determined by law other than this
4 Act.

5
6 2. Under subsection (b), the court may allow the receiver to recover the reasonable and
7 necessary fees of preserving, protecting, and disposing of the property prior to distribution to
8 secured creditors. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) ("A sale by
9 the receiver free from liens is for most practical purposes equivalent to a foreclosure sale and if
10 and when the property is realized under such circumstances and if and when the mortgagees or
11 lienholders avail themselves of the advantage of the receivership to effect the sale of the
12 mortgaged premises, this means they have saved themselves similar expenses in a foreclosure
13 suit or otherwise and, therefore, should pay for the advantage they have received.").

14 15 **SECTION 17. EXECUTORY CONTRACT.**

16 (a) In this section, "timeshare interest" means an interest granting its holder the right to
17 use and occupy an accommodation, facility, or recreational site, whether improved or not, for a
18 specific period less than a full year during any given year, and having a duration of more than
19 three years.

20 (b) Except as otherwise provided in subsection (h), with court approval after notice and a
21 hearing, a receiver may adopt or reject an executory contract of the owner relating to
22 receivership property. The court may condition the receiver's adoption and continued
23 performance of the contract on terms appropriate under the circumstances.

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

27 (d) A provision in an executory contract which effects or permits a forfeiture,
28 modification, or termination of the contract on account of the appointment of a receiver or the
29 financial condition of the owner does not affect a receiver's power under subsection (b) to adopt
30 the contract.

1 (e) A receiver's right to possess or use receivership property pursuant to an executory
2 contract terminates on rejection of the contract. Rejection is a breach of the contract effective
3 immediately before the appointment of the receiver. A claim for damages for rejection of the
4 contract must be filed by the later of:

5 (1) the time set for filing a claim in the receivership; or

6 (2) [30] days after the court approves the rejection.

7 (f) If an owner had the right to assign an executory contract relating to receivership
8 property under the contract and law of this state other than this [act] at the time a receiver was
9 appointed, the receiver may assign the contract with court approval after notice and a hearing.

10 (g) If a receiver rejects an executory contract for the sale of receivership property that is
11 real property of which the purchaser is in possession or a real property timeshare interest, the
12 purchaser may:

13 (1) treat the rejection as a termination of the contract, in which case the purchaser
14 has a lien on the property for the recovery of any part of the purchase price the purchaser paid; or

15 (2) retain the purchaser's right to possession under the contract, in which case the
16 purchaser shall continue to perform all obligations arising under the contract and may offset any
17 damages caused by nonperformance of an obligation of the owner after the date of the rejection,
18 but the purchaser has no right or claim against other receivership property or the receiver on
19 account of the damages.

20 (h) A receiver may reject an unexpired lease to a tenant only if:

21 (1) the lease violated a provision of a mortgage or assignment of rents, or a loan
22 document related to the mortgage or assignment, of which the tenant had actual or constructive
23 notice at the time the lease was executed; or

(2) the lease was made or amended while the owner was in default under a mortgage or assignment of rents and the lease was not commercially reasonable when it was executed.

(i) A receiver may not reject an unexpired lease to a tenant if the tenant is not in default and the tenant:

- (1) has an enforceable nondisturbance agreement with a mortgagee; or
- (2) occupies the leased premises as the tenant's primary residence under a lease [for a term of one year or less] made by the tenant in good faith.

Reporter's Notes

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

2. Traditionally, a receiver does not automatically or inherently become bound to the owner's existing executory contracts upon appointment. See 2 Clark on Receivers, § 423, at 710 (3d ed. 1959) ("A receiver is not strictly speaking the successor of the defendant, individual or corporation and an executory contract of the defendant is not binding on the receiver but may be broken by the receivership and give rise to damages resulting in a claim against the assets in the hands of the receiver.").

Consistent with this traditional rule, subsection (b) permits the receiver to evaluate whether an executory contract relating to receivership property is beneficial or burdensome, and to either adopt or reject (with court approval) the contract accordingly based upon the receiver's evaluation. In this regard, the Act differs from the Minnesota receivership statute, Minn. Stat. Ann. § 576.45, under which the receiver succeeds to the duties of the owner under any executory contract unless the receiver can demonstrate "good cause" to terminate that contract.

Subsection (b) permits the court to condition the receiver's adoption of a contract upon appropriate terms regarding assurance of the receiver's ability to perform. Subsection (c) provides that the receiver's temporary performance of the contract does not prevent the receiver from later seeking court approval to reject it. Subsection (d) makes clear that the receiver's ability to adopt an executory contract is not affected by contractual provisions that would otherwise permit the counterparty to terminate the contract based upon the appointment of a receiver or the owner's financial condition.

3. Under subsection (f), the receiver can assign an executory contract, but only to the extent permitted by the contract and applicable law. See, e.g., 2 Clark on Receivers, § 441.1, at 733 (3d

1 ed. 1959) (“If a contract is ordinarily assignable between A & B there seems no reason why the
2 receiver under proper orders of court cannot assign the contract.”). The receiver thus cannot
3 assign an executory contract if the contract and applicable law would excuse the counterparty
4 from accepting performance or rendering performance to an entity other than the owner.
5

6 4. Subsection (g) addresses situations in which the receiver attempts to reject an executory
7 contract for the sale of receivership real property of which the purchaser is in possession (i.e., an
8 executory installment land contract or “contract for deed”) or an executory contract for a
9 timeshare interest. It gives the purchaser the choice to (a) treat the rejection as a termination of
10 the contract (in which case the purchaser has a lien against the property for the recovery of
11 purchase money already paid) any portion of the purchase price that the purchaser had paid; or
12 (b) retain its rights under the contract. If the purchaser takes the latter option, it must continue to
13 perform its obligations, and may offset against its liability thereon any damages caused by the
14 owner’s nonperformance of the contract following rejection, but has no claim or right against
15 other receivership property or the receiver.
16

17 Subsection (f) would provide these purchasers with protection comparable to that which
18 such purchasers would have under Section 365(i) of the Bankruptcy Code, 11 U.S.C.A. § 365(i),
19 and its inclusion responds to concerns that the Act should be sensitive to “forum shopping”
20 concerns (i.e., that it not provide a contracting party with the incentive to seek appointment of a
21 receiver to permit termination of contracts that could not be terminated under bankruptcy law).
22 The definition of “timeshare interest” in this section is a simplified version of the definition
23 contained in the Bankruptcy Code, 11 U.S.C.A. § 101(53D).
24

25 5. Subsection (h) (which permits rejection only if the lease violates a prior recorded
26 mortgage/assignment of rents or if the lease is a “sweetheart lease” that took effect while the
27 mortgagor was in default) is based on Restatement (Third) of Property — Mortgages § 4.4(b),
28 (c). It would not permit the receiver to reject an otherwise valid lease simply because the lease
29 currently bore a below-market rent.
30

31 6. It is customary for many commercial lenders to enter into subordination, nondisturbance
32 and attornment (SNDA) agreements with tenants under commercial leases. Subsection (i)
33 provides that a receiver cannot reject a lease if the rejection would violate the terms of an
34 enforceable SNDA agreement.
35

36 Consistent with the Committee’s instructions at the September 2013 meeting, subsection
37 (i) also provides that a receiver may not reject a lease for one year or less entered into in good
38 faith by a residential tenant so long as the tenant is not in default. The “one year or less”
39 language is bracketed, to flag for the Committee’s discussion whether to remove good-faith
40 residential leases from the receiver’s rejection authority regardless of their duration.
41

42 **SECTION 18. IMMUNITY OF RECEIVER.**

43 (a) A receiver is entitled to all defenses and immunities provided at common law, in
44 equity, or by law of this state other than this [act] for an act or omission within the scope of the

1 receiver's appointment.

2 (b) A receiver may be sued for an act, omission, or transaction in administering
3 receivership property only with approval, after notice and a hearing, of the court that appointed
4 the receiver.

5 **Reporter's Notes**

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

9
10 On the highest grounds of necessity and public policy judges cannot be held liable
11 for acts done by them in their judicial capacity.... It follows that courts managing
12 property through a receiver cannot be held liable as courts for imperfect management.
13 Officers of the courts, such as sheriffs, constables, receivers and other officers, who act in
14 obedience to the lawful mandate of the court or in obedience to lawful process of any
15 sort, are protected or privileged in respect to acts done under such lawful authority. [2
16 Clark on Receivers, § 388, at 648 (3d ed. 1959).]
17

18 Consistent with this approach, the Act provides the receiver with immunity for acts or omissions
19 within the scope of the order appointing the receiver. Subsection (a) is based on the Minnesota
20 receivership statute, Minn. Stat. Ann., as contrasted with Washington's statute, Wash. Rev. Code
21 Ann. § 7.60.170, which provides more detailed and specific provisions regarding the scope of a
22 receiver's liability.
23

24 2. Determining the breadth of a receiver's immunity could create a conceptual problem in a
25 case in which a receiver has been appointed as a primary receiver by a court in one state and an
26 ancillary receiver by a court in another state. If the primary state's law provides the receiver
27 with broader immunity than does the ancillary state's law, a question might arise as to whether
28 the receiver would be entitled to the broader immunity available under the law of the primary
29 state (or only the narrower immunity available under the law of the ancillary state). In these
30 cases, courts should resolve these issues by reference to conflicts-of-laws principles.
31

32 3. Subsection (b) is an adaptation of Wash. Rev. Code Ann. § 7.60.160(1), and is meant to
33 incorporate into the Act the *Barton* doctrine, which derives from the decision of the United
34 States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881). In *Barton*,
35 the Supreme Court held that to sue a court-appointed receiver, the would-be plaintiff must first
36 seek approval of the appointing court. The doctrine rests upon the notion that the appointing
37 court has *in rem* jurisdiction over the receivership property; thus, a forum other than the
38 appointing court would lack subject-matter jurisdiction over the action. See also 2 Clark on
39 Receivers, § 549, at 890 (3d ed. 1959) ("The custody of property by the court through its receiver
40 is the custody of the sovereign power or government acting through the courts. Possession by the
41 court of the res gives jurisdiction over the res to the court appointing the receiver and gives such

1 court power to determine all questions concerning the ownership and disposition of this property.
2 No other court can interfere with the possession of the res. The general rule of law, therefore,
3 naturally follows that a receiver as an officer of court cannot in the absence of an enabling statute
4 be sued without leave of the court appointing him.”).

5
6 **SECTION 19. INTERIM REPORT OF RECEIVER.** The court may order a receiver
7 to file an interim report of:

- 8 (1) the activities of the receiver since a previous report;
- 9 (2) cash receipts and disbursements, including a payment made to or proposed to be
10 made to a professional employed by the receiver;
- 11 (3) receipts and dispositions of receivership property;
- 12 (4) fees and expenses of the receiver and, if not filed separately, a motion for approval of
13 payment of the fees and expenses; and
- 14 (5) other matters specified in the order.

15 **Reporter’s Notes**

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

22
23 **SECTION 20. CLAIM AGAINST RECEIVERSHIP.**

24 (a) A receiver shall give notice of appointment of the receiver to creditors of the owner
25 by:

26 (1) mailing notice of the appointment by first class mail to the last known address
27 of each creditor; and

28 (2) publishing notice of the appointment, at least once a week for three
29 consecutive weeks, in a newspaper having general circulation in the county where the appointing

1 court is located.

2 (b) Except as otherwise provided in subsection (d), a creditor with a claim against the
3 owner which arose before a receiver's appointment must submit the claim to the receiver on or
4 before the date specified in the notice required by subsection (a). The date specified must be at
5 least [90] days after the later of the mailing or last publication of the notice under subsection (a),
6 unless the court reduces or extends the period. The claim must set forth the name and address of
7 the creditor and the nature and amount of the claim, be signed by the creditor under penalty of
8 perjury, and include a copy of any record on which the claim is based. [A claim submitted in
9 accordance with this subsection is prima facie evidence of the validity and amount of the claim.]

10 (c) At any time before entry of an order approving a receiver's final report, the receiver
11 may file with the court an objection to a claim of a creditor, setting forth the basis for the
12 objection. After notice and a hearing, the court shall allow or disallow the claim according to
13 law of this state other than this [act]. A claim that is timely submitted under subsection (b) and
14 not disallowed is entitled to share in any distribution from the receivership as the court directs
15 according to law of this state other than this [act.] Unless the court orders otherwise, a claim that
16 is not timely submitted is not entitled to a distribution from the receivership.

17 (d) After notice and a hearing, if the court concludes that receivership property is likely
18 to be insufficient to satisfy the claims of creditors holding secured claims against the receivership
19 property, the court may order that unsecured creditors need not submit claims under this section.

20 **Reporter's Notes**

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

1 2. Subsection (a) requires the receiver to give notice of appointment to creditors by first
2 class mailing to the last known address of each creditor and by publication. Subsection (b) then
3 directs any creditors holding claims that arose prior to appointment to file a proof of that claim
4 with the receiver within 90 days of the notice, except as provided in subsection (d) (which
5 permits the appointing court to obviate the entire claims process in cases where the receivership
6 will not generate sufficient funds to result in a distribution to unsecured creditors).

7
8 Subsection (b) provides minimal requirements for the creditor's proof of claim. Under
9 the bracketed language in subsection (b), a claim would be valid unless objected to by the
10 receiver and ultimately disallowed by the court. This prima facie validity of the claim derives
11 from the Washington statute, Wash. Rev. Code Ann. § 7.60.210(4).

12 3. Subsection (c) provides that allowed claims shall receive distribution from the residue of
13 the receivership estate as the court directs in accordance with law other than this Act. The draft
14 took this approach to avoid including the extensive priority provisions included in the Minnesota
15 and Washington statutes, see Minn. Stat. Ann. § 576.51; Wash. Rev. Code Ann. § 7.60.230.
16 This decision was based on a perceived consensus at the April 2013 Drafting Committee meeting
17 that the Act should seek to avoid the "exhaustive" comprehensiveness reflected in the Minnesota
18 and Washington statutes. At the same time, subsection (c) indicates that the court should respect
19 any rules of administrative priority for certain unsecured claims that might exist under other
20 applicable law of the state.

21
22 4. Subsection (d) permits the receiver to forgo the entire claims process if the court
23 concludes that the expected net proceeds from the receivership will be insufficient to satisfy the
24 claims of creditors holding secured claims against receivership property. In such a case, the
25 court may order that the receiver need not comply with the process for the filing and
26 determination of claims and that unsecured creditors need not submit claims. A creditor holding
27 a secured claim against receivership property must file a proof of claim with the receiver, so that
28 the receiver can have the necessary information to facilitate the receiver's ability to make
29 recommendations to the court regarding the appropriate distribution of receivership property or
30 the proceeds of such property.

31
32 **SECTION 21. REPLACEMENT OF RECEIVER; TERMINATION OF**
33 **RECEIVERSHIP.**

34 (a) The court shall replace a receiver if the receiver dies, resigns, or refuses or fails to
35 fulfill the receiver's duties under this [act].

36 (b) If the court finds that a receiver replaced under subsection (a) has accounted fully for
37 and turned over to the successor receiver all receivership property and has filed a report of all
38 receipts and disbursements during the replaced receiver's tenure, the court shall enter an order

1 discharging the replaced receiver from all further duties as receiver.

2 (c) After notice and a hearing, the court may discharge a receiver and terminate the
3 court's administration of the receivership property if the court finds that appointment of the
4 receiver was improvident or that the circumstances no longer warrant continuation of the
5 receivership. [If the court finds that the appointment was procured wrongfully or in bad faith, the
6 court may assess against the person that procured the appointment all of the receiver's fees, costs
7 of the receivership, and any appropriate sanction.]

8 **Reporter's Notes**

9 1. Section 21 section is adapted with some minor changes from the Washington receivership
10 statute, Wash. Rev. Code Ann. § 7.60.280.

11
12 2. Subsection (a) provides for the replacement of a receiver upon the receiver's death or
13 resignation or the receiver's removal by the court for failure to carry out its duties as receiver. 3
14 Clark on Receivers, § 692, at 1272 (3d ed. 1959). Once a removed receiver has provided a full
15 accounting for all receivership property and a full report of all receipts and disbursements during
16 its tenure, 3 Clark on Receivers, § 699.1, at 1285 (3d ed. 1959), subsection (b) provides that the
17 court shall discharge the receiver from further duties as receiver.

18
19 3. Subsection (c) permits the court to discharge a receiver and terminate the receivership if
20 the court finds that the receiver's appointment was improvident or that the receivership is no
21 longer warranted. See, e.g., 3 Clark on Receivers, § 692.1, at 1274-1277 (3d ed. 1959).

22
23 Under the bracketed language in subsection (c), where the court terminates a receivership
24 as having been improvidently granted and the court further finds that the person who procured
25 the receiver's appointment acted wrongfully or in bad faith, the court may impose on such person
26 the costs of the receivership and any other appropriate sanction.

27 28 **SECTION 22. FINAL REPORT OF RECEIVER; DISCHARGE.**

29 (a) On completion of a receiver's duties, the receiver shall file a final report setting forth
30 all receipts and disbursements of the receivership. The final report must include:

- 31 (1) a description of the activities of the receiver in the conduct of the receivership;
32 (2) a list of all receivership property at the commencement of the receivership and
33 any receivership property added thereafter;

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

(4) if not filed separately, a request for approval of the payment of fees and expenses of the receiver.

(b) After notice and a hearing, the court may approve a final report filed under subsection (a). The approval discharges the receiver and the surety on the receiver's bond for all matters in the report.

Reporter's Notes

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

SECTION 23. ANCILLARY RECEIVERSHIP.

(a) The court may appoint a person appointed as a receiver in another state, or that person's nominee, as an ancillary receiver with respect to property located in this state or subject to the jurisdiction of the court if:

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

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

(b) A court may enter any order necessary to effectuate a judicial order entered in another state appointing or directing a receiver.

(c) Unless the court orders otherwise, an ancillary receiver appointed under subsection (a) has the rights, powers, and duties of a receiver appointed under this [act].

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 23 is based in significant part upon 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 **SECTION 24. EFFECT OF ENFORCEMENT BY MORTGAGEE OR ASSIGNEE
OF RENTS.**

35 [(a)] A motion by a mortgagee or assignee of rents for appointment of a receiver under
36 this [act], appointment of a receiver under this [act], or application of receivership property or
37 proceeds to the secured obligation by the mortgagee or assignee does not:

38 (1) make the mortgagee or assignee a mortgagee in possession of the real

1 property;

2 (2) make the mortgagee or assignee an agent of the mortgagor or assignor;

3 (3) constitute an election of remedies that precludes a later action to enforce the

4 secured obligation;

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

6 (5) limit any right available to the mortgagee or assignee with respect to the

7 secured obligation[;][; or]

8 [(6) constitute an action within the meaning of [cite the “one-action” statute of

9 this state][; or]]

10 [(7) except as provided in subsection (b), bar a deficiency judgment pursuant to

11 law of this state other than this [act] governing or relating to deficiency judgments following the

12 enforcement of a lien].

13 [(b) If a receiver sells receivership property free and clear of a lien pursuant to Section

14 15(a), law of this state other than this [act] governing or relating to a deficiency judgment after

15 the enforcement of a lien applies to the holder of the extinguished lien.]

16 **Legislative Note:** *A state whose law does not prohibit or otherwise limit the ability of a*

17 *lienholder to obtain a deficiency judgment following the enforcement of a lien should enact*

18 *Section 23 without subsection (b) and without subsection (a)(7). A state that does not have a*

19 *“one action” statute should omit subsection (a)(6).*

21 **Reporter’s Note**

22 1. Section 24 is an adaptation of Section 11 of the Uniform Assignment of Rents Act

23 (UARA), which provides that certain actions taken by an assignee of rents to enforce its security

24 interest in rents (such as direct collection of rents after notification to tenants or through

25 appointment of a receiver) does not itself make the assignee a “mortgagee in possession,”

26 constitute an election of remedies, waive other security held by the assignee, violate a state’s

27 “one-action” rule, or constitute a foreclosure sale for purposes of triggering a state’s anti-

28 deficiency rule. Section 24 assures that this Act does not conflict with UARA by making clear

29 that the decision of a mortgagee or an assignee of rents to pursue its right to a receiver under the

30 Act should not trigger a state’s one-action rule or bar the mortgagee or assignee of rents from an

1 action to enforce the debt. Section 23 is consistent with Cal. Code Civ. Proc. § 564(d), which
2 provides that “Any action by a secured lender to appoint a receiver pursuant to this section shall
3 not constitute an action within the meaning of subdivision (a) of section 726.”
4

5 2. Subsection (b) is appropriate in states that have enacted legislation prohibiting an action
6 for a deficiency judgment following the foreclosure of some or all liens. Under Section 15(b), a
7 sale of receivership property by the receiver could, in some circumstances, have the effect of
8 extinguishing one or more liens on the property. Such a receivership sale is not a foreclosure
9 sale under this Act, but could have an effect similar to the title-clearing effect of a foreclosure
10 sale. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) (“A sale by the receiver
11 free from liens is for most practical purposes equivalent to a foreclosure sale”). In those
12 situations, the obligor should be protected by a state’s prohibition on deficiency judgments to the
13 same extent as would have been the case following a foreclosure sale, and subsection (b)
14 accomplishes this result.
15

16 Subsection (b) would also be appropriate in states that place a “fair value” limit on the
17 ability of a foreclosing creditor to obtain a deficiency judgment following a foreclosure sale. In
18 such states, the foreclosing creditor’s deficiency judgment is calculated by reference to the
19 difference between the outstanding balance of the debt and the appraised “fair market value” of
20 the property (rather than the difference between the outstanding balance of the debt and the
21 foreclosure sale price). If a receiver sells receivership property free and clear of a lien under
22 Section 15(a), subsection (b) would provide the obligor with the benefit of the state’s “fair value”
23 rule in a subsequent action on the debt by the holder of the extinguished lien.
24

25 **SECTION 25. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
26 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
27 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
28 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
29 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
30 Section 7003(b).
31

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