

DRAFT
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MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS

NATIONAL CONFERENCE OF COMMISSIONERS
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February 12, 2014

MODEL ACT ON APPOINTMENT AND POWERS OF REAL ESTATE RECEIVERS

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1 **Prefatory Note**

2 **[Reporter’s Note: *No changes have been made to the preliminary Prefatory Note in***
3 ***conjunction with the preparation of this meeting draft. The Reporter expects to prepare a new***
4 ***and more comprehensive Prefatory Note in preparation for the Act’s first reading at the 2014***
5 ***Annual Meeting in July.***
6

7 Receivership is a fundamental equitable remedy sometimes used by one or more creditors
8 of an insolvent or financially distressed debtor. Receivership is also sought as a useful remedy in
9 a variety of other situations, such as collection of judgments, entity dissolutions, and shareholder
10 disputes. If a receiver is appointed, that receiver takes possession of the property described in
11 the court’s order of appointment and preserves and manages that property pending the
12 administration of the receivership.
13

14 Receivership is often sought by a mortgage lender which is seeking to enforce a mortgage
15 that is in default. Typically, a commercial real estate mortgage or deed of trust explicitly
16 provides that upon default, the mortgagee may seek the appointment of a receiver from a court
17 with jurisdiction over the mortgaged premises; frequently, the mortgage or deed of trust purports
18 to provide mortgagor consent for such appointment. Traditionally, mortgage lenders have sought
19 the appointment of a receiver pending foreclosure for one or more of several basic reasons:
20

21 • The mortgaged property is located in a state where the foreclosure process takes a
22 substantial period of time (e.g., six months or longer) and during such period, the mortgaged
23 premises will generate rents that have been assigned to the mortgagee as security for the loan and
24 could be applied to reduce the mortgage debt. Obtaining the appointment of a receiver allows the
25 mortgagee to prevent the mortgagor from diverting rents to other creditors or insiders of the
26 mortgagor pending a foreclosure sale.
27

28 • The property is subject to waste, deterioration, or some other immediate physical
29 harm that threatens to reduce the value of the mortgaged property and thus threatens the
30 mortgagee’s security.
31

32 • The property may have environmental contamination, and the mortgagee does not
33 want to be in the chain of title or rely solely on statutory “secured creditor exemptions” from
34 environmental laws.
35

36 • The project includes personal property (movables and/or intangible property), and
37 the mortgagee wants to foreclose judicially to avoid claims that it failed to liquidate its collateral
38 in a commercially reasonable manner.
39

40 Unfortunately, few states have comprehensive statutory guidance regarding the
41 appointment and powers of receivers for real estate. In most states, receivers are appointed
42 pursuant to a court’s general equitable power to appoint a receiver; only a few states provide
43 statutes that address the appointment and powers of real estate receivers in any detail. Although
44 the Uniform Assignment of Rents Act (promulgated in 2005) explicitly addresses the evidentiary
45 showing necessary to obtain the appointment of a receiver, UARA’s focus is limited to

1 appointment at the request of an assignee of rents. Further, UARA has obtained relatively
2 narrow enactment; thus, there remains significant state to state variation regarding the standards
3 for appointment of a receiver. Further, nothing in UARA explicitly addresses the scope of the
4 powers that a receiver of real estate may exercise prior to foreclosure. This Act seeks to provide
5 a more comprehensive set of statutory guidelines with respect to the standards for the
6 appointment of a receiver and the powers that a receiver may (or may not) exercise without prior
7 approval of the appointing court.
8

9 One source of uncertainty in recent case law concerns whether a receiver has the power
10 to sell real estate. Customarily, a receiver's ability to sell receivership property varied depending
11 upon the circumstances of the receivership. When a court appointed a general receiver for all of
12 the assets of an insolvent debtor, the court would commonly authorize the receiver to gather and
13 sell the assets of the debtor (in the same manner that a bankruptcy trustee might gather and
14 liquidate the debtor's nonexempt assets in a Chapter 7 bankruptcy case). By contrast, when a
15 court appointed a limited receiver to take possession of a specific asset — such as a receiver for
16 mortgaged property pending foreclosure sale — the receiver's role was typically viewed as
17 custodial. For this reason, receivers appointed in conjunction with foreclosure proceedings were
18 often viewed as having the power to operate, maintain, and preserve the property pending the
19 foreclosure sale, but not to sell the property in lieu of foreclosure.
20

21 Recently, some commentators have advocated that receivership can be an effective way
22 to dispose of real estate, and mortgaged real property in particular. There are at least two
23 specific contexts in which a sale by the receiver may be perceived as advantageous:
24

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

1 that might be obtained in an arms-length, non-distress sale. By contrast to a traditional
2 foreclosure, a receiver could theoretically market the mortgaged property to potential
3 buyers in the context of its operation of the property. Marketing of the property in an
4 arms-length context could permit potential buyers to perform more meaningful and
5 complete due diligence; further, a sale subject to judicial review and confirmation could
6 produce greater finality regarding the title acquired by the buyer by virtue of the sale. In
7 theory, providing potential foreclosure buyers with better information regarding the
8 mortgaged property and greater certainty of title might be expected to produce sale prices
9 higher than those that would be produced by distress foreclosure sales.

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

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

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

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

5 (1) “After notice and a hearing” means after 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) “Lien” means an interest in property that secures payment or performance of an
19 obligation.

20 (9) “Mortgage” means a record, however denominated, that creates or provides for a
21 security interest in real property, whether or not it also creates or provides for a security interest
22 in personal property.

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

1 (11) “Mortgagor” means a person that grants a mortgage or a successor in ownership of
2 the real property described in the mortgage.

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

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

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

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

13 (16) “Receivership” means a proceeding in which a receiver is appointed.

14 (17) “Receivership property” means the property of an owner described in the order
15 appointing a receiver, or any subsequent order.

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

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

20 (20) “Security agreement” means an agreement that creates or provides for a security
21 interest.

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

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

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

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

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

8 (24) “State agency” means an office, department, division, bureau, board, commission,
9 or other agency of this state or a subdivision thereof.

10 **Reporter’s Notes**

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

16
17 References: § 6(a) (cases in which court may appoint receiver); § 6(c) (ex parte
18 appointment; release of security for ex parte appointment); § 12(b) (powers of receiver exercisable
19 after notice and a hearing); § 15(a) (employment of professionals); § 15(b) (payment of
20 professionals); § 16 (foreclosure sale by receiver); § 17(a), Alternatives A-C (sale by receiver other
21 than in ordinary course); § 18(a) (adoption/rejection of executory contract); § 18(e) (assignment of
22 executory contract); § 19(b) (suit against receiver); § 21(c) (resolution of objection to claim); §
23 22(c) (termination of receivership); § 23(b) (approval of receiver’s final report/discharge).

24
25 2. “Assignee of rents.” The Act uses a definition substantially similar to that found in the
26 Uniform Assignment of Rents Act.

27
28 References: § 6(b) (appointment in connection with enforcement of assignment of rents);
29 § 15(b) (payment of professionals with approval of assignee of rents); § 25 (effects of
30 receivership/one-action and anti-deficiency rules).

31
32 3. “Assignment of rents.” The Act uses a definition substantially similar to that found in the
33 Uniform Assignment of Rents Act.

34
35 References: § 6(a), (b) (appointment in connection with enforcement of assignment of
36 rents); § 14(d) (scope of stay); § 15(b) (payment of professionals with approval of assignee of

1 rents); § 17(a), Alt. B (sale by receiver other than in ordinary course); § 18(f) (rejection of
2 unexpired lease).

3
4 4. “Assignor of rents.” The draft currently includes the terms “assignee of rents,”
5 “assignment of rents,” and “assignor of rents” because several of these terms are used in the
6 Uniform Assignment of Rents Act (which has provisions governing the appointment of a
7 receiver) and the Committee should be sensitive to ensure the consistency of this Act with
8 UARA. Nevertheless, because the definition of the term “mortgage” as used in this draft is
9 broad enough to encompass an assignment of rents, the Committee may wish to consider
10 deleting the use of these terms and using only the terms “mortgagor,” “mortgagee,” and
11 “mortgage,” with the inclusion of appropriate comments to reinforce that the breadth of the term
12 would encompass an assignment of rents.

13
14 References: § 6(b) (appointment in connection with enforcement of assignment of rents);
15 § 17(a), Alt. B (sale by receiver other than in ordinary course).

16
17 5. “Court.” The Act defines the term to refer to the court of general equity jurisdiction
18 within the state. The prior draft did not include a definition of the term; this draft includes such a
19 definition, at the suggestion of both the Chair and the Style Committee. The term is used with
20 sufficient frequency in the Act that the notes do not set out each distinct use of the term.

21
22 6. “Executory contract.” The Act defines the term to include an unexpired lease. The
23 definition is similar to the one contained in the Minnesota receivership statute, Minn. Stat. Ann.
24 § 576.21(d), but with a slight modification to track the traditional “Countryman” formulation of
25 the term more precisely.

26
27 References: § 12(b) (power of receiver includes right to adopt/reject executory contract);
28 § 18 (adoption/rejection/assignment of executory contract/unexpired lease).

29
30 7. “Good faith.” The Act uses the Uniform Commercial Code definition of good faith,
31 including both subjective and objective elements.

32
33 Reference: § 17(d) (sale by receiver other than in ordinary course); § 18(h) (rejection of
34 unexpired lease).

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

38
39 References: § 5(1) (lienholders have standing to seek appointment); § 9 (receiver’s status
40 as lien creditor); § 14(a) (perfection of lien stayed by appointment); § 17(a), Alt. A-D (sale by
41 receiver other than in ordinary course); § 17(b) (transfer of lien to proceeds); § 17(c) (right of
42 lienholder to credit bid); § 21(a) (lienholder need not submit claim); § 21(d) (distribution on
43 claim of lienholder); § 25 (effects of receivership/one-action and anti-deficiency rules).

44
45 9. “Mortgage.” The Act defines “mortgage” to mean any document, however denominated,
46 that creates a security interest in real property. The term would include a deed of trust or deed to

1 secure debt, and would include an installment land contract in states that treat installment land
2 contracts as creating a security interest.

3
4 References: § 6(a) (court may appoint receiver at mortgagee’s request); § 6(b)
5 (appointment where consent expressed in mortgage); § 14(d) (stay does not prevent foreclosure
6 by creditor who obtained appointment of receiver); § 17(a), Alt. B (sale by receiver other than in
7 ordinary course); § 18(g) (receiver’s power to reject unexpired lease).

8
9 10. “Mortgagee.” The Act defines the term to include anyone holding a mortgage.

10
11 References: § 6(b) (appointment where consent expressed in mortgage); § 15(b)
12 (payment of professionals where authorized by mortgagee); § 18(g) (receiver’s power to reject
13 unexpired lease); § 25 (effects of receivership/one-action and anti-deficiency rules).

14
15 11. “Mortgagor.” The Act defines “mortgagor” to mean the person granting a mortgage and
16 any successor owner of the mortgaged real property. As discussed above, because the definition
17 of the term “mortgage” as used in this draft is broad enough to encompass an assignment of
18 rents, the Committee may wish to consider deleting the use of these terms and using only the
19 terms “mortgagor,” “mortgagee,” and “mortgage,” with the inclusion of appropriate comments to
20 reinforce that the breadth of the term.

21
22 One member of the Style Committee raised the question whether the phrase “which has
23 assumed the mortgage” should be added to this definition. The Reporter did not add the phrase
24 to the definition, which the Act uses primarily in conjunction with provisions related to a consent
25 by the mortgagor to appointment of a receiver or sale by the receiver. If, for example, the
26 current owner of the mortgaged property is a nonassuming grantee, but has consented to the
27 appointment of a receiver or sale by the receiver, the Reporter understood the intention of the
28 Committee to be that the consent would be binding without regard to whether the then-owner of
29 the mortgaged property had personal liability on the mortgage debt.

30
31 References: § 6(b) (appointment where consent expressed in mortgage); § 17(a), Alt. B
32 (sale by receiver other than in ordinary course); § 25 (effects of receivership/one-action and anti-
33 deficiency rules).

34
35 12. “Owner.” The initial draft of the Act used the term “respondent” to identify the person
36 over whose property the receiver is appointed, in part because the term is commonly used in
37 receivership practice. At the request of the Drafting Committee, the term has been changed from
38 the “procedural” term and replaced with “owner.”

39
40 References: § 3(b) (Act does not apply to owner-occupied single-family residence); §
41 3(d) (scope limitation for powers and trust property); § 5 (persons with standing to seek
42 appointment); § 6(a) (grounds for appointment); § 6(b) (appointment where consent expressed in
43 mortgage); § 10 (receivership property subject to pre-petition security agreement); § 12(a), (b)
44 (power of receiver to assert rights of owner and adopt/reject executory contract of owner); §
45 13(a), (b) (duties of owner); § 14(a), (b), (d) (effect and scope of stay); § 17(a), Alt. D (sale by
46 receiver other than in ordinary course); § 18(a) (adoption/rejection of executory contract of

1 owner; § 18(c) (assignment of executory contract); § 18(f) (rejection of executory contract to
2 purchase real estate); § 18(g) (rejection of unexpired lease).

3
4 13. “Person.” The Act uses the ULC-required definition for the term.

5
6 14. “Property.” The Act defines the term broadly to include all legally-recognized interests.
7 The definition formerly contained an explicit carve-out for any property over which the owner
8 merely holds a power capable of being exercised in favor of third parties or trust property in
9 which the owner holds no beneficial interest. At the request of the Style Committee, this carve-
10 out was removed from the definition and inserted into Section 3 (the Act’s scope provision).
11 “Personal property” is intended to include both tangible and intangible property.

12
13 15. “Receiver.” The definition derives from the one contained in Minn. Stat. Ann. §
14 576.21(p).

15
16 16. “Receivership.” The definition derives from the one contained in Minn. Stat. Ann. §
17 576.21(q).

18
19 17. “Receivership property.” The prior draft provided alternative bracketed formulations of
20 the term. One was to define that term as property “over which a receiver is appointed,” a
21 formulation similar to the Washington statute’s definition of “estate” in Wash. Rev. Code Ann. §
22 7.60.005(3). The other defined the term as property “described in the order appointing the
23 receiver or in any subsequent order,” a formulation adapted from the Minnesota statute, Minn.
24 Stat. Ann. § 576.21(r). The Style Committee suggested that the first formulation of term would
25 not be needed in any event as the language “over which a receiver is appointed” is already part of
26 the definition of “owner” as defined in § 2(12). Thus, the current draft adopted and slightly
27 modified the latter formulation.

28
29 References: § 4 (power of court); § 8(a), 8(b) (receiver’s bond); § 9 (receiver’s status as
30 lien creditor); § 11 (turnover of receivership property); § 12(a), (b) (powers of receiver); § 12(c)
31 (duties of receiver); § 13(a) (duties of owner); § 14(a), (b) (nature and scope of automatic stay); §
32 17(a), Alt. A-D (sale by receiver other than in ordinary course); § 17(d) (reversal of authorization
33 of sale by receiver); § 18(a) (receiver’s power to adopt/reject executory contract relating to
34 receivership property); § 19(b) (suit against receiver); § 20(a) (interim report of receiver); § 21(a)
35 (submission of claim of lienholder unnecessary); § 21(d) (distribution of receivership property);
36 § 22(b), (c) (removal/termination of receiver); § 23(a) (final report of receiver); § 25 (effects of
37 receivership/one-action and anti-deficiency rules).

38
39 18. “Record.” The prior draft used the media-neutral term “document,” to avoid potential
40 confusion due to the customary use of the term “record” in real estate practice. The Style
41 Committee suggested that the Act was using the term “document” to describe what the UCC
42 would describe as a “record,” and documents in a somewhat broader sense (such as in provisions
43 requiring the owner to turn over documents). At the request of the Style Committee, this draft
44 uses the term “record” (making it explicit that the definition is limited to instances where the
45 term is used as a noun, although the act does not use “record” as a verb anywhere).

1 References: § 6(b) (appointment where mortgagor consent expressed in a record); §
2 17(a), Alts. B and D (sale by receiver other than in ordinary course where consent expressed in
3 record).
4

5 19. “Secured obligation.” The Act uses this term (commonly used in other real estate-related
6 acts, see, e.g., Uniform Assignment of Rents Act § 2(13); Uniform Residential Mortgage
7 Satisfaction Act § 102(15)) rather than “mortgage debt.” The current draft of the proposed
8 Home Foreclosure Procedures Act instead merely uses the term “obligation.”
9

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

12 20. “Security agreement.” The Act defines the term using the same definition found in UCC
13 Article 9.
14

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

16 21. “Security interest.” The Act uses the term to include any lien arising by agreement.
17

18 References: § 10 (receivership property subject to pre-petition security agreement); § 25
19 (effects of receivership/one-action and anti-deficiency rules).
20

21 22. “Sign.” The Act uses the media-neutral version of the term commonly used in other
22 recent Model and Uniform Acts.
23

24 References: § 6(b) (appointment where consent expressed in signed record); § 17(a),
25 Alts. B and D (sale by receiver other than in ordinary course where consent expressed in signed
26 record); § 21(b) (signature requirement for submitted claims).
27

28 21. “State.” The Act uses the boilerplate ULC definition of the term.
29

30 22. “State agency.” See Minn. Stat. Ann. § 576.21(t). The Style Committee has suggested
31 that the language “or any subdivision thereof” brings into the definition any county department
32 or board (e.g., a county highway agency), and has questioned whether the Act was intended to be
33 so broad.
34

35 References: § 3(c) (scope exclusion for receivership by state agencies); § 5(5) (standing
36 by state agency to seek appointment).
37

38 **SECTION 3. SCOPE; EXCLUSIONS.**

39 (a) Except as otherwise provided in this section, this [act] governs a receivership for real
40 property and for personal property that is related to the real property or used in its operation.

41 (b) This [act] does not apply to a receivership for real property that is a single-family

1 residence occupied by the owner as the owner’s primary residence and from which the owner
2 does not:

3 (1) collect rent or other income from a tenant or other occupier; or

4 (2) derive income from farming or other business activity carried out on the
5 property.

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

9 (d) This [act] does not apply to a receivership for real property that is:

10 (1) a power that the owner may exercise solely for the benefit of another person,

11 or

12 (2) property impressed with a trust except to the extent that the owner has a
13 residual interest.

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

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

18 **Reporter’s Notes**

19 1. Subsection (a) reflects the current committee charge from the Executive Committee,
20 which is to address the appointment and powers of real estate receivers. Thus, subsection (a)
21 provides that except to the extent Section 3 otherwise limits, the Act will govern receivership of
22 real property and associated personal property.

23
24 We received the following comment from our Style Committee liaison, which is set forth
25 below verbatim:

26
27 [P]roperty includes “all” of the owner’s property, both real and personal property, but the
28 act applies only to a receivership for real property and personal property associated with

1 it, not personal property generally. We also focused on the fact that both “receivership”
2 and “property” are defined terms and then there is another defined term that combines
3 them, “receivership property.” The concern is whether the latter definition is wholly
4 consistent with the former two definitions and whether all these definitions work
5 wherever the terms appear in the act. We decided not to try to sort it out ourselves at this
6 point but simply to raise the concern.
7

8 2. Subsection (b) provides the Act’s primary scope exclusion — this Act may not be used to
9 appoint a receiver for a single-family residence that is occupied by the owner as its primary
10 residence, and from which the owner does not collect rent or derive income from farming or
11 business activity carried out on the property. This phrasing attempts to carry out the
12 Committee’s instructions in the September 2013 meeting that the act should apply where the
13 property has a “mixed” use (i.e., the owner occupies it as a residence but also uses the property
14 to generate rental or other business income), but not where the property is used only as the
15 owner’s primary residence. Subsection (b) does not attempt to define “primary residence,” but
16 would leave definition of this term to judicial development.
17

18 3. Subsection (c) is intended to address the relationship of this Act to existing statutory
19 regimes for the appointment of receivers for certain entities. See, e.g., N.H. Rev. Stat. § 401-
20 B:11 (authorizing receivership of insurance company). The provisions of this Act would not
21 apply to appointment of a receiver under an existing statutory regime, except to the extent that
22 the other statutory regime or other law so provides. The Chair and the Reporter are of the view
23 that the inclusion of the bracketed language, by requiring the authorization to come from other
24 law, is consistent with the Committee’s decision in September 2013 that this Act should not itself
25 authorize courts to apply the provisions of the Act by analogy to cases outside the Act’s scope.
26

27 4. Subsection (d) is a limitation on the Act’s scope that, in the prior draft, was built into the
28 definition of “property.” That definition carved out property over which the owner merely holds
29 a power capable of being exercised in favor of third parties or trust property in which the owner
30 holds no beneficial interest. At the request of the Style Committee, this carve-out was removed
31 from the definition of “property” and inserted here as a separate scope exclusion.
32

33 5. Subsection (e) makes clear that this Act is not intended to be the exclusive method by
34 which a court may appoint a receiver.
35

36 **SECTION 4. POWER OF COURT.** The court has exclusive jurisdiction to direct a
37 receiver and determine all controversies related to the receivership or receivership property.
38

Reporter’s Notes

39 1. Section 4 provides a statement of the court’s powers in the context of a receivership. It is
40 an (extremely) abridged adaptation of Minnesota’s receivership statute, Minn. Stat. Ann. §
41 576.23. Under this section, the court has the authority to determine all controversies relating to
42 the collection, preservation, improvement, disposition and distribution of receivership property,
43 as well as all matters arising in or relating to the receivership, the receivership property, the

1 exercise of the receiver’s powers, or the performance of the receiver’s duties. See also Wash.
2 Rev. Code Ann. § 7.60.055(1).

3
4 Section 4 focuses only upon the appointing court’s exclusive judicial authority over the
5 receiver and the receivership property. Section 4 does not displace the exercise of legitimate
6 police powers over the receiver or receivership property.

7
8 **SECTION 5. STANDING TO SEEK APPOINTMENT OF RECEIVER.** The

9 following may seek the appointment of a receiver under this [act]:

10 (1) a person holding an ownership interest or lien in property for which a receivership is
11 sought;

12 (2) if the owner is not an individual, a person holding an ownership interest in the owner;

13 (3) a creditor of the owner;

14 (4) a person that is a party to a pending action involving the owner or the property for
15 which a receivership is sought; and

16 (5) a state agency or an individual acting in an official capacity on behalf of the agency,
17 to the extent authorized by law of this state other than this [act].

18 **Reporter’s Notes**

19 1. Consistent with the Drafting Committee instruction at the September 2013 meeting, the
20 provisions regarding the identity of parties with standing to seek the appointment of a receiver
21 under this Act have been separated from the provisions on appointment (and the standard for
22 appointment). Those provisions now appear in Section 6.

23
24 **SECTION 6. APPOINTMENT.**

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

26 (1) before judgment, to protect a party to an action that demonstrates an apparent
27 right to property that is the subject of the action, if the property or its revenue-producing
28 potential is being subjected to waste or is in danger of loss or material impairment;

29 (2) after judgment,

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(A) to carry the judgment into effect; or

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

(3) in connection with the foreclosure of a mortgage or enforcement of an assignment of rents, as appropriate to protect the mortgaged property or rents arising from the property;

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

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

(B) the person has been dissolved;

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

(D) the person is in imminent danger of insolvency; [and]

(5) in other cases as provided by law or in which a receiver has been appointed on equitable grounds[; and

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

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

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

(2) the owner otherwise agreed in a signed record to the appointment of a

1 receiver;

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

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

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

7 (c)] The court may appoint a receiver ex parte if the person seeking the appointment
8 establishes that the circumstances justify immediate appointment. If the court appoints a receiver
9 ex parte, the court shall set a hearing to be held as soon as practicable after the appointment. The
10 court may condition the ex parte appointment on the giving of security by the person seeking the
11 appointment, in the amount the court specifies, for the payment of costs and damages incurred or
12 suffered by any person if the court later finds that the appointment was without sufficient cause.
13 If, after notice and a hearing, the court finds that the appointment was justified, the court shall
14 release the security.

15 **Reporter's Notes**

16 1. Section 6 reflects the Committee's instructions in the September 2013 meeting to
17 separate the "who has standing" issue from "when and why may a receiver be appointed" issue.
18 Further, Section 6 now addresses ex parte appointment, which had previously been addressed in
19 a separate section.

20
21 2. Subsection (a) describes the cases in which a court is authorized to appoint a receiver
22 pursuant to this act, and is based on a compilation of numerous existing receivership statutes.
23 Subsection (a)(6) would be appropriate in states that provide a post-sale statutory redemption
24 right, and would permit the court to appoint a receiver for the property and its rents during the
25 redemption period.

26
27 3. Subsection (b) is based on the comparable provision of § 7 of the Uniform Assignment of
28 Rents Act. It provides that the person seeking appointment of a receiver is entitled to a receiver
29 as a matter of right in a proceeding to foreclose a mortgage or enforce an assignment of rents
30 where one of the following conditions exists: (1) the loan documents contain a receivership
31 clause; (2) the owner otherwise consents; (3) the property's value is not sufficient to satisfy the

1 secured obligation; (4) the owner has failed to turn over rents that the creditor is entitled to
2 collect; or (5) a subordinate creditor has obtained the appointment of a receiver for the property.
3

4 Some members of the Committee expressed some concern with this subsection appearing
5 in the draft, even in bracketed form. The provision remains in the draft, albeit in bracketed form,
6 because in a state that has enacted UARA, this Act should not create a conflict between the rights
7 of an assignee of rents to enforce that assignment by appointment of a receiver under UARA and
8 under this Act. Likewise, to facilitate enactment in a state (such as New York) in which other
9 law makes appointment of a receiver mandatory in certain cases involving mortgage
10 enforcement, the provisions of Section 6 should facilitate the Act's consistency with those
11 existing state laws.
12

13 4. Subsection (c) is a modified version of Minnesota's receivership statute, Minn. Stat. Ann.
14 § 576.25, subd. (7), and would permit ex parte appointment in cases in which the court concludes
15 that "circumstances justify the immediate appointment." Subsection (c) would authorize (but not
16 require) the court to condition the ex parte appointment of a receiver upon the giving of security
17 by the person seeking appointment.
18

19 Consistent with the Committee's instructions in the September 2013 meeting, the current
20 draft does not contain a provision requiring ex parte appointment simply because the loan
21 documents contain the mortgagor's consent to ex parte appointment. Nevertheless, because the
22 section permits the court to appoint a receiver "if the person seeking the appointment establishes
23 that the circumstances justify immediate appointment," nothing would preclude a court from
24 concluding that a clause in the mortgage consenting to ex parte appointment would constitute a
25 "circumstance justifying immediate appointment."
26

27 **SECTION 7. IDENTITY OF RECEIVER; DISCLOSURE OF INTEREST.**

28 **Alternative A**

29 (a) Before the court appoints a person as receiver, the court shall require the person to
30 disclose under oath whether the person:

31 (1) is an individual related to a party by affinity or consanguinity within the third
32 degree or in a step or adoptive relationship within the third degree;

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

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

36 (4) has a material financial interest in the outcome of the action, other than

1 compensation the court may allow to the receiver;
2 (5) has a debtor-creditor relationship with a party; or
3 (6) holds an equity interest in a party, other than a noncontrolling interest in a
4 publicly-traded company.

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

7 **[Alternative B]**

8 (a) [Except by written consent of all parties, the] [The] court may not appoint a person as
9 receiver unless the person is independent as to the parties and the underlying dispute.

10 (b) A person is not independent as required by subsection (a) if the person:

11 (1) is an individual related to a party by affinity or consanguinity within the third
12 degree or in a step or adoptive relationship within the third degree;

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

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

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

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

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

21 (c) Notwithstanding subsection (b), a person is not disqualified under subsection (a)
22 solely because the person was appointed receiver in an unrelated matter involving a party or was
23 engaged by a party in a matter unrelated to the underlying dispute.

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

3 **End of Alternatives**

4 **Reporter's Notes**

5 1. Alternative A of this draft reflects the Drafting Committee's instruction at the September
6 2013 meeting to address the issue of the receiver's identity/independence by adopting a
7 "disclosure" approach. Under such an approach, the receiver would have to disclose potential
8 conflicts, but the court would retain the discretion to appoint a receiver despite the existence of a
9 disclosed conflict.

10
11 By contrast, Alternative B reflects the approach taken by the original September 2013
12 draft, which required the receiver's "independence." This concept was borrowed from
13 Minnesota's receivership statute, Minn. Stat. Ann. § 576.26, subdivisions 1 and 3.

14
15 The Chair and Reporter have some concern that the Drafting Committee's approach,
16 while sensitive to the broad discretion typically accorded to judges in the receivership context,
17 may be "outside the mainstream" of existing statutory approaches and thus likely to generate
18 enactability concerns. [At present, no existing state statute explicitly takes such a "disclosure"-
19 based approach.]

20
21 If the Drafting Committee decides to retain Alternative A, the Committee may wish to
22 consider whether Alternative A needs to be modified to address the possibility that a court may
23 need to appoint a receiver under truly emergent circumstances in which it may be impossible or
24 impractical for the receiver to make the required disclosures under oath prior to the receiver's
25 commencement of its duties. Such a modification might include a provision authorizing the
26 temporary appointment of the receiver, with the disclosure under oath required before the court
27 can make the appointment permanent.

28 2. Both Alternative A and Alternative B reflect the instructions of the Committee, expressed
29 at the September 2013 meeting, regarding the need for greater precision in the identification of
30 related individuals.

31
32 **SECTION 8. RECEIVER'S BOND.**

33 (a) Except as otherwise provided by law of this state other than this [act], [before a
34 receiver commences the receiver's duties] [not later than [] days after a receiver commences
35 the receiver's duties], the receiver shall execute a bond, with one or more sureties approved by
36 the court, conditioned on the receiver's faithful discharge of the receiver's duties in accordance

1 with the orders of the court and law of this state. The bond must be in the amount the court
2 specifies. Unless the court orders otherwise, the receiver's bond runs in favor of all persons
3 having an interest in the receivership property.

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

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

10 **Receiver's Notes**

11 1. Subsection (a) has been modified from the prior draft to reflect the Committee's
12 instructions, at the September 2013 meeting, that the amount of the receiver's bond should be
13 left to the discretion of the judge. By contrast, the prior draft had specified that the bond must be
14 in the amount of funds that the receiver was expected to administer during the receivership.
15

16 As drafted, subsection (a) contains two possible approaches for the timing of the
17 receiver's obtaining of the bond. One approach would require bonding before the receiver
18 commences any actions; the other would provide a grace period. The Committee should discuss
19 whether variations in local practice merit retaining two approaches. If the latter (grace period)
20 approach is taken, an additional provision may be needed providing for the termination of the
21 receivership or the receiver's authority if the bond/security is not provided during the grace
22 period, or Section 22 (which addresses termination of the receivership) could be adapted to
23 address such a situation.
24

25 2. Subsection (b), which would authorize the posting of a letter of credit or alternative
26 security, derives from Wash. Rev. Code Ann. § 7.60.045. Subsection (b) clarifies that the
27 receiver may not use receivership property as alternative security.
28

29 3. Subsection (c) provides a one-year period for filing claims against the bond, and is
30 modeled upon a similar provision in Wash. Rev. Code Ann. § 7.60.045.
31

32 **SECTION 9. RECEIVER'S STATUS AS LIEN CREDITOR.** On appointment, a
33 receiver has the powers and priority as to all receivership property as if the receiver was a
34 creditor that obtained a judicial lien on the property at the moment of appointment.

Reporter's Notes

1
2 1. This section is a simplified version of Minnesota's receivership statute, Minn. Stat. Ann.
3 § 576.30. It provides that the receiver has the status of a lien creditor as to both personal and real
4 property. Under Article 9 of the Uniform Commercial Code, the term "lien creditor" includes "a
5 receiver in equity from the time of appointment." U.C.C. § 9-102(a)(52)(D). Section 9 is
6 intended to make clear that a receiver appointed under this Act would also have the rights and
7 the status of a "lien creditor" as to personal property under Article 9.
8

9 At the September 2013 meeting, the Committee raised a question regarding whether the
10 Minnesota statute was intended to or did create an "avoiding power" analogous to Bankruptcy
11 Code § 544. Consultation with the Chair of the committee that drafted Minnesota's statute, Jim
12 Baillie of Fredrikson & Byron, P.A., produced the following response:
13

14 We didn't discuss and I think didn't intend to create any section 544/ 550 avoiding
15 power. Although the possible model of the well-developed bankruptcy was always in
16 mind, in general we intentionally tried to avoid creating a state bankruptcy analog. We
17 only wanted to give the receiver the position of a lien creditor for priority purposes. So
18 no creditor could act after the commencement of the receivership and establish rights
19 superior to the receiver. That principle would apply to an unperfected security interest,
20 for example. As we discussed the issue the several people on the committee who
21 specialize in real estate practice (which doesn't include me, but does include Sam
22 Sigelman) struggled with how to integrate this concept with title recording issues. I think
23 we all saw that there could be a number of issues we hadn't foreseen but again we
24 consciously steered away from simply adopting bankruptcy law wholesale on most
25 topics, including this one.
26

27 This response would appear to be consistent with what the Reporter believes to be the
28 consensus position expressed by the Committee members that the Act should not create in favor
29 of the receiver an "avoiding power" analogous to the "strong-arm" avoiding power of 11 U.S.C.
30 § 544(a).
31

32 There remains a question, however, about whether the existing language might be
33 interpreted to create such a power. The Minnesota committee's stated intent was to ensure that
34 "no creditor could act after the commencement of the receivership and establish rights superior
35 to the receiver." However, to the extent that the language gives the receiver the status of a lien
36 creditor of personal property as of the receivership date, it would enable the receiver to establish
37 priority not only against subsequent creditors, but also a prior unperfected secured party, as that
38 unperfected secured party would be subordinate to a person who acquires the rights of a lien
39 creditor before the conflicting security interest is perfected. U.C.C. § 9-317(a)(2). Further, one
40 might argue that the stay provision in Section 14 already would prevent another creditor from
41 acting after the commencement of the receivership to establish rights superior to that of the
42 receiver (or at least that it would prevent such a result without the approval of the court), except
43 to the extent that Section 14(d)(2) would permit a purchase-money secured party to perfect after
44 the receivership date within the applicable grace period in which that party could obtain relation-
45 back priority under applicable law (such as U.C.C. § 9-317(e)).

1 Likewise, with respect to real property, the current phrasing of Section 9 creates the
2 possibility that its application would produce different results in different states with respect to
3 an unrecorded interest in real property (such as an unrecorded mortgage). In the majority of
4 states, an unrecorded mortgage would nevertheless have priority over a subsequent judgment
5 lien. See Stoebuck & Whitman, *The Law of Property* § 11.10, at 880-881 (“Often this
6 conclusion is based on the literal language of the pertinent judgment lien statute, which typically
7 imposes the lien on ‘the defendant’s real property—not the record property, the courts frequently
8 hold, but the actual property as depleted by unrecorded conveyances. An alternative basis for the
9 same result is that the creditor is simply not a ‘purchaser’ in the sense used by the recording
10 statute.”). In a minority of states, an unrecorded mortgage would be subordinate to a subsequent
11 judgment lien, either because the recording statute explicitly so provides or has been so
12 interpreted by the state’s courts. See *Schleuter Co. v. Seigny*, 564 N.W.2d 309 (S.D. 1997);
13 *Solans v. McMenimen*, 951 N.E.2d 999 (Mass. Ct. App. 2011); *McDuff Estate v. Kost*, 158 A.
14 373 (R.I. 1932). If the Committee wishes for the receiver to be treated comparably without
15 regard to the state of appointment, it would be more appropriate to give the receiver the status of
16 a bona fide purchaser of receivership real estate as of the date of appointment. In the judgment
17 of the Reporter, that would effectively give the receiver the power to avoid an unrecorded
18 mortgage.

19
20 **SECTION 10. SECURITY INTEREST IN AFTER-ACQUIRED PROPERTY.**

21 Except as otherwise provided in Section 9 or by law of this state other than this [act], property
22 that a receiver or owner acquires after the order appointing the receiver is subject to a security
23 agreement entered into before the order to the same extent as if the court had not appointed a
24 receiver.

25 **Reporter’s Notes**

26 1. This Section is derived from Washington’s receivership statute, Wash. Rev. Code Ann. §
27 7.60.240, and provides that where the respondent had entered into a pre-appointment security
28 agreement covering after-acquired property, that agreement would be effective against property
29 acquired after the receiver’s appointment to the extent provided under other law.

30
31 2. The Style Committee raised a question with respect to this section regarding whether the
32 section was intended to cover only receivership property, receivership real property, or other
33 property. The Reporter drafted Section 10 based upon his understanding of the intent of the
34 Drafting Committee—that Section 10 was meant to ensure that the appointment of a receiver
35 should have no impact on the effectiveness of an after-acquired property clause in a pre-petition
36 security agreement. Thus, for example, if the owner had granted Bank (pre-receivership) a
37 security interest in present and after-acquired equipment and inventory, the appointment of a
38 receiver for all or part of the owner’s property should have no impact on the “after-acquired”
39 clause in that security agreement, either as to similar property acquired by the receiver or by the
40 owner. If that is indeed that intention of the Drafting Committee, the Reporter believes that the

1 current phrasing of Section 10 is appropriate, but the Drafting Committee may wish to give
2 further consideration to the intended purpose and reach of the Section.

3
4 **SECTION 11. TURNOVER OF RECEIVERSHIP PROPERTY.** On demand by a
5 receiver, a person that has possession, custody, or control of receivership property shall turn the
6 property over to the receiver, unless the court orders otherwise. Unless there is a bona fide
7 dispute with respect to the receiver's right to possession, custody, or control of receivership
8 property, the person's failure to turn over the property is punishable as a contempt of court.

9 **Reporter's Notes**

10 1. Section 11 derives from Wash. Rev. Code Ann. § 7.60.070, and requires the turnover of
11 any receivership property to the receiver. The Style Committee raised the question of whether
12 the Act should use the terms "deliver" and "delivery" rather than "turn over" or "turnover."
13 After consultation, the Chair and Reporter have left the language "turn over" and "turnover" in
14 the current draft, based upon the familiarity of that language in the context of bankruptcy
15 practice. The Drafting Committee may wish to discuss further whether that justification (or any
16 other potential justification) provides a sufficiently meaningful reason to prefer one term rather
17 than the other.

18
19 **SECTION 12. POWERS AND DUTIES OF RECEIVER.**

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

22 (1) collect, control, manage, conserve, and protect tangible and intangible
23 receivership property;

24 (2) operate a business constituting receivership property, including the use, sale,
25 or lease of the property in the ordinary course of business;

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

29 (4) assert rights, claims, causes of action, or defenses of the owner that relate to

1 receivership property;

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

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

8 (7) employ attorneys, accountants, appraisers, auctioneers, brokers or other
9 professionals;

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

12 (9) exercise any power specifically conferred by the order appointing the receiver,
13 this [act], or law of this state other than this [act].

14 (b) If authorized by an order of the court after notice and a hearing, or as otherwise
15 permitted by this [act], a receiver may:

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

18 (2) recommend allowance or disallowance of a claim of a creditor against the
19 receivership;

20 (3) make a distribution of the proceeds of receivership property;

21 (4) pay compensation to the receiver or to the receiver's attorneys, accountants,
22 appraisers, auctioneers, brokers or other professionals;

23 (5) make improvements to receivership property; [and]

1 (6) adopt or reject an executory contract of the owner as provided in Section 18[;

2 and

3 (7) use or transfer receivership property other than in the ordinary course of

4 business].

5 (c) A receiver shall:

6 (1) prepare and retain appropriate business records, including records of all

7 receipts, disbursements, and other dispositions of receivership property;

8 (2) account for receivership property, including the proceeds of a sale, lease,

9 collection, or other disposition of the property;

10 (3) file with the [appropriate governmental office] a certified copy of the order

11 appointing the receiver, together with a legal description of the real property if a description is

12 not included in the order; and

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

14 than this [act].

15 (d) The powers and duties of a receiver may be expanded, modified, or limited by court

16 order.

17 **Reporter's Notes**

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

21
22 Subsection (a) sets forth the general powers that the receiver may exercise as a matter of
23 the receiver's default powers, except to the extent that the receivership order or other law
24 explicitly restricts the receiver.

25
26 Subsection (a) addresses the receiver's authority to sell receivership property in the
27 ordinary course of business. This provision is intended not only to allow the receiver to conduct
28 ordinary course sales (such as sales of inventory) in the process of operating a business, but also
29 would (for example) permit the receiver of a partially-completed condominium project to sell

1 completed units. The draft currently does not contain a definition of “ordinary course of
2 business.” The Committee should discuss whether definition of the term is necessary or whether
3 the term should be left to judicial development.
4

5 In the prior draft, subsection (a) authorized the receiver to “engage and retain” attorneys.
6 The present draft uses the more simple “employ” based upon the suggestion of the Style
7 Committee.
8

9 Subsection (b) sets forth specific powers that the receiver can exercise only if specifically
10 authorized by the court following notice and a hearing, or by other provisions of the Model Act.
11

12 Subsection (c), which describes the receiver’s duties, is based on Minn. Stat. Ann. §
13 576.29, subd. (2).
14

15 Subsection (d) is based on Minn. Stat. Ann. § 576.29, subd. (3). The prior draft reflected
16 that the court could expand, modify, or limit the powers or duties of the receiver “for good cause
17 shown.” The current draft removes all instances of “cause,” with the exception of the stay
18 provision in Section 14.
19

20 **SECTION 13. DUTIES OF OWNER.**

21 (a) An owner shall:

22 (1) assist and cooperate fully with the receiver in the administration of the
23 receivership and the discharge of the receiver’s duties;

24 (2) turn over to the receiver all tangible and intangible receivership property in the
25 owner’s possession, custody, or control, including all accounts, documents, and passwords;

26 (3) submit to examination by the receiver, under oath, concerning the acts,
27 conduct, property, liabilities, and financial condition of the owner or any matter relating to
28 receivership property or the receivership; and

29 (4) comply with any duty imposed by this [act], law of the state other than this
30 [act], or court order.

31 (b) If an owner is not an individual, this section applies to each officer, director,
32 manager, member, partner, trustee, or other individual exercising or having the power to exercise
33 control over the affairs of the owner.

1 **Reporter’s Notes**

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

4
5 2. Section (a)(2) obligates the owner to deliver all “tangible and intangible” receivership
6 property, including passwords. The current draft included these additions from the prior draft,
7 based upon concerns raised by Drafting Committee members and observers at the September
8 2013 meeting with respect to the need for the Act to give the receiver the maximum amount of
9 legal authority for compelling the turnover of assets held in intangible/digital form. While the
10 Style Committee has suggested removing the words “tangible and intangible” from Section
11 13(a)(2) as superfluous, the Chair and the Reporter have chosen to leave them in the current
12 draft, for the time being, to facilitate the Committee’s further consideration of how such assets
13 should be handled.

14
15 The Chair has been in communication with the Chair and Reporters of the Drafting
16 Committee of the Uniform Fiduciary Access to Digital Assets Act. The Chair’s initial
17 suggestion to that drafting committee was that the Fiduciary Access to Digital Assets Act might
18 incorporate a receiver within the concept of “fiduciary” as used within that act. Based upon the
19 existing status of that act (which is nearing a final read), and potential concerns with certain
20 stakeholders, the Chair of that committee is reluctant at this stage to expand the scope of that act.
21 The Chair will provide a further report on these discussions at the March Drafting Committee
22 meeting.

23
24 **SECTION 14. AUTOMATIC STAY.**

25 (a) Except as otherwise provided in subsection (d) or ordered by the court, an order
26 appointing a receiver operates as a stay, applicable to all persons, of:

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

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

31 (b) In addition to the stay provided in subsection (a), the court may order a stay of an act,
32 action, or proceeding against receivership property, the receiver, or the owner as necessary to
33 protect the property and facilitate administration of the receivership.

34 (c) A person whose action or proceeding is stayed under this section may apply to the

1 court for relief from the stay for cause.

2 (d) The entry of an order appointing a receiver does not operate as a stay of:

3 (1) an act to foreclose a mortgage or enforce an assignment of rents by the person
4 seeking the receiver's appointment;

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

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

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

10 (A) establish paternity;

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

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

13 (5) commencement or continuation of an action or proceeding by a governmental
14 unit to enforce its police or regulatory power;

15 (6) enforcement of a judgment, other than a money judgment, obtained in an
16 action or proceeding by a governmental unit to enforce its police or regulatory power; or

17 (7) establishment by a governmental unit of a tax liability and any appeal of the
18 liability.

19 (e) At the request of the receiver, the court may declare void an act that violates a stay
20 under this section.

21 **Alternative A**

22 (f) If a person willfully violates a stay under this section, the receiver may recover
23 damages from the person for actual harm caused by the violation, including costs and attorney's

1 fees.

2 **Alternative B**

3 (f) A willful violation of a stay under this section is punishable as a contempt of court.

4 **End of Alternatives**

5 **Reporter's Notes**

6 1. The draft reflects the instructions of the Committee at its September 2013 meeting that
7 subsection (a) should provide only a narrow stay, focused particularly on actions to obtain
8 control over receivership property or to perfect a lien against receivership property. Subsection
9 (b) now authorizes the court to expand the scope of the stay as necessary to protect receivership
10 property or facilitation the administration of the receivership. Subsection (d)(2) adds an
11 exception to the stay that would permit a person with a purchase money security interest in
12 receivership property to perfect that interest following appointment as long as perfection occurs
13 within the applicable state law grace period under other law such as U.C.C. § 9-317(e).

14
15 2. Subsections (e) and (f) reflect an attempt to address the Committee's discussions at the
16 September 2013 meeting with respect to the consequences of a stay violation. Subsection (e)
17 would permit the court to declare void any action taken in violation of the stay.

18
19 Subsection (f) reflects two possible alternatives where actions are taken in willful
20 violation of the stay, in recognition that preliminary discussions at the September 2013 meeting
21 did not produce clear consensus. Under Alternative A, the receiver could recover damages,
22 including costs and attorney fees. Under Alternative B, any willful violation would be
23 punishable by contempt. If the Committee elects for Alternative B, the comments presumably
24 should be expanded to reflect the extent to which sanctions for contempt may include actual
25 damages, including counsel fees and costs, and the extent to which payment could be directed to
26 the receiver.

27
28 3. Even with the narrower focus of Section 14, several members of the Joint Editorial Board
29 for Uniform Real Property Acts expressed concerns at their November 2013 meeting about the
30 breadth of the stay created by Section 14 and whether a stay of such breadth truly necessary to
31 protect the integrity of a receivership and the receiver's ability to manage receivership property.
32 The Reporter has invited these members of the JEBURPA to express their concerns in more
33 detail to the Drafting Committee in writing, and will share any such written comments with the
34 Drafting Committee members and Observers at the March meeting.

35
36 **SECTION 15. EMPLOYMENT AND COMPENSATION OF PROFESSIONALS.**

37 (a) With court approval in the order appointing a receiver, or otherwise after notice and a
38 hearing, the receiver may employ attorneys, accountants, appraisers, auctioneers, brokers or

1 other professionals that do not have or represent an interest adverse to the receivership to assist
2 the receiver in carrying out the receiver’s duties. The receiver shall disclose to the court the
3 identity and qualifications of the professionals, the proposed compensation, and any potential
4 conflict of interest. A person is not disqualified from employment under this section solely
5 because of the person’s employment by, representation of, or other relationship with the receiver,
6 a creditor, or other party if the court finds the employment is appropriate. This [act] does not
7 preclude the receiver from providing services as an attorney, accountant, appraiser, auctioneer, or
8 broker when licensed to do so.

9 (b) A receiver and a professional employed by the receiver may file with the court an
10 itemized statement of the time spent, the billing rates of all persons that performed work to be
11 compensated, and a detailed list of expenses. With court approval after notice and a hearing, the
12 receiver may pay the amounts specified in the statement. If the receiver is appointed in a
13 proceeding to foreclose a mortgage or enforce an assignment of rents, the receiver may pay the
14 amounts specified in the statement on written consent of the mortgagee or assignee of rents.

15 (c) Except to the extent fees and expenses have been approved by the court under
16 subsection (b), an interim payment of fees and expenses to the receiver is subject to court
17 approval in connection with the receiver’s final report.

18 **Reporter’s Notes**

19 1. Subsection (a) provides that the receiver must obtain the court’s approval to employ and
20 retain professionals, but contemplates that this approval may come in the order of appointment
21 itself. If the authorization is not contained in the order of appointment, subsection (a) would
22 require notice and a hearing for appointment. Subsection (a) also makes clear that the receiver
23 may provide professional services to the estate (and be compensated for those services) where
24 licensed to do so. See, e.g., Wash. Rev. Code Ann. § 7.60.180(3).
25

26 The Style Committee suggested that the Act should use the singular term “professional”
27 rather than the plural term “professionals.” After consultation, the Chair and the Reporter have
28 retained the plural term “professionals” in the current draft because (a) the plural term more aptly

1 reflects that a particular receivership might be sufficiently complex to warrant the appointment
2 of multiple professionals of a particular type, and (b) the plural term is familiar within the
3 bankruptcy vernacular. Nevertheless, the Style Committee’s suggestion is noted here for the
4 Drafting Committee’s further consideration.

5
6 In addition, subsection (a) has been modified here to use the phrase “if the court finds”
7 rather than “if the court determines” (as in the prior draft). This is in response to a Style
8 Committee observation that the prior draft used “finds,” “concludes,” and “determines” in
9 different places and a suggestion that the Act should use consistent terminology. After
10 consultation, it was the Chair’s judgment (with the Reporter’s concurrence) that in nearly every
11 instance in the Act, the term “finds” would be appropriate given that each usage refers to what
12 would essentially be a fact-finding determination by the court. The modification is noted here to
13 the extent that the Drafting Committee may wish to give further thought to whether there are any
14 specific provisions in which the term “concludes” or “determines” might be preferable.

15
16 2. Subsection (b) provides that the receiver’s payment of the fees and expenses of
17 professionals can occur only after the submission to the court of an itemized statement and court
18 approval following notice and a hearing. As drafted, subsection (b) does permit the receiver to
19 pay the fees and expenses of professionals with the written consent of the mortgagee or assignee
20 of rents when the receiver is appointed in conjunction with the foreclosure of the mortgage or the
21 enforcement of the assignment of rents.

22
23 3. Subsection (c) derives from Minn. Stat. Ann. § 576.32, subd. 2(b), and provides that if
24 the receiver is providing professional services, any interim payments that have not been
25 approved by the court are subject to approval in connection with the receiver’s final report under
26 Section 23.

27
28 This provision prompted the following comment from the Style Committee liaison:

29
30 Subsection (b) seems to require a filing and court approval before any fees or expenses
31 are paid. But (c) implies that “interim” payments may be made without initial court
32 approval. Are there standards for that or is it the receiver doing it at his/her perils. And
33 we’re talking here about an interim payment only to the receiver. Does this need to be
34 fleshed out more?

35
36 The comment is shared here for the Drafting Committee’s further consideration as to whether the
37 existing draft is sufficiently clear. For example, as currently drafted, subsection (b) suggests that
38 the receiver could pay professionals upon consent of the mortgagee in a foreclosure situation (as
39 the payment would be coming from the mortgagee’s collateral), but the draft may be ambiguous
40 as to whether that consent is an additional requirement or merely a substitute for the judicial
41 approval otherwise required.

42
43 **SECTION 16. RECEIVER’S CONDUCT OF FORECLOSURE OR EXECUTION**

44 **SALE.** With court approval after notice and a hearing, a receiver may cause a foreclosure sale

1 or execution sale of receivership property in the same manner as the person that obtained the
2 appointment of the receiver.

3 **Reporter's Notes**

4 1. Section 16 is new to this draft, and reflects the suggestion of Commissioner Burton that
5 the Act should authorize the receiver to conduct a foreclosure sale using the same processes that
6 would have been available under existing law to the creditor who obtained the appointment of a
7 receiver.
8

9 2. The Reporter fully understood the Committee's discussion of this suggestion during the
10 September 2013 meeting presumed that the suggestion would appear as one of the "Alternatives"
11 under now-Section 17, which addresses transfer by the receiver other than in the ordinary course.
12

13 Upon further reflection, however, Commissioner Burton's suggestion plainly envisions
14 that the receiver would be conducting a foreclosure or execution sale under existing state law
15 processes. Such a sale would not be a receiver sale outside the context of a foreclosure, which
16 was the intended focus of now-Section 17. Further, such a sale would be subject to the already-
17 existing state law structure for foreclosure or execution sales, which might not be consistent with
18 other provisions in now-Section 17.
19

20 For this reason, the Reporter concluded that to place Commissioner Burton's suggestion
21 as an "Alternative" under now-Section 17 would "mix apples and oranges" (so to speak). As a
22 result, the Reporter has instead placed the provision into the draft as a separate stand-alone
23 section.
24

25 **SECTION 17. TRANSFER OF RECEIVERSHIP PROPERTY OTHER THAN IN**
26 **ORDINARY COURSE OF BUSINESS.**

27 **Alternative A**

28 (a) With court approval after notice and a hearing, a receiver may transfer receivership
29 property other than in the ordinary course of business. The transfer is free and clear of a lien of
30 the person that obtained the appointment of the receiver, a subordinate lien, and rights of
31 redemption but is subject to a senior lien unless the holder of the lien authorized the transfer free
32 and clear of the lien.

33 **Alternative B**

34 (a) With court approval after notice and a hearing, a receiver may transfer receivership

1 property other than in the ordinary course of business if the receiver was appointed in connection
2 with the foreclosure of a mortgage or enforcement of an assignment of rents and the mortgagor
3 or assignor of rents agreed in a signed record to sale of the property by a receiver [pursuant to
4 this [act]]. The transfer is free and clear of liens and rights of redemption unless the transfer
5 agreement provides otherwise.

6 **Alternative C**

7 (a) With court approval after notice and a hearing, a receiver may transfer receivership
8 property other than in the ordinary course of business. The transfer is free and clear of liens and
9 rights of redemption.

10 **Alternative D**

11 (a) Unless authorized by Section 16 or by law of this state other than this [act], a receiver
12 may not transfer receivership property other than in the ordinary course of business, except with
13 the consent, in a signed record, of the owner and all persons holding liens on the property.

14 **End of Alternatives**

15 [(b) Subject to Section 21(d), on a transfer free and clear of liens under subsection (a), a
16 lien on the property that is extinguished by the transfer attaches to the proceeds of the transfer,
17 net of reasonable expenses incurred in the transfer, with the same validity and priority as the lien
18 had with respect to the property immediately before the transfer.

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

1 (d) A reversal or modification of an authorization under this section to transfer
2 receivership property does not affect the validity of a transfer under the authorization to a person
3 that acquired the property in good faith, whether or not the person knew of the request for
4 reversal or modification, unless the court stays the authorization and transfer.]

5 **Reporter's Notes**

6 1. The alternatives provided for subsection (a) reflect the range of alternatives discussed at
7 the September 2013 meeting. Alternative D would be appropriate in a state that wanted to forbid
8 any nonordinary course sale, except with the consent of all persons holding an interest in the
9 property. Alternative A would permit a nonordinary course sale with court approval, but subject
10 to the rights of creditors holding liens that are senior to the lien of the creditor who obtained the
11 receiver's appointment. Alternative A would thus prevent a junior creditor from using a
12 receivership to force a sale free and clear of liens over the objection of a senior mortgagee.
13 Alternative B would permit a nonordinary course sale with court approval, free and clear of the
14 rights of lienholders and redemptioners, in connection with the foreclosure of a mortgage or the
15 enforcement of an assignment of rents, where the mortgagor/assignor had agreed to sale by a
16 receiver, either in the documents or otherwise. Alternative C would be the broadest approach,
17 authorizing the receiver to sell free and clear of liens and redemption rights with the court's
18 approval after notice and a hearing.

19
20 Under alternatives A through C, the intent of the provision is to preserve to the receiver
21 the ability to seek authority to sell either free and clear or subject to liens, depending upon the
22 situation. This would facilitate the ability, for example, for the senior mortgagee of a securitized
23 mortgage loan to seek a receiver to facilitate a sale of the property subject to the existing CMBS
24 loan, with that loan being modified in the context of the receiver's sale.

25
26 2. Subsections (b) through (d) would be needed in states that authorized receivers to sell
27 property free and clear. Subsection (b) provides for the transfer of liens to sale proceeds (subject
28 to the possibility, recognized in Section 21, that surcharge of the collateral may be appropriate in
29 some circumstances). Subsection (c) recognizes that the receiver may sell other than by a public
30 auction sale, and provides for the right of a lienholder to credit bid.

31
32 In this draft, subsection (c) does not retain the language in the prior draft that "[u]nless
33 the court orders otherwise after notice and a hearing, the person obtaining the appointment of the
34 receiver may not purchase the receivership property at a private sale." The Chair and the
35 Reporter concluded that such a limitation was not necessary because under every Alternative in
36 subsection (a), any "private sale" (in other words, any sale other than in a public auction setting)
37 already would require court approval following notice and a hearing, regardless of the identity of
38 the proposed purchaser.

39
40 Subsection (d) provides that the title of a good faith purchaser from the receiver is not
41 affected by reversal of the sale order on appeal unless the authorization and sale were stayed

1 pending appeal.

2

3

SECTION 18. EXECUTORY CONTRACT.

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

8 (b) A receiver's performance of an executory contract before court approval under
9 subsection (a) of its adoption or rejection does not constitute an adoption of the contract or
10 preclude the receiver from seeking approval to reject the contract.

11 (c) A receiver's power under subsection (a) to adopt an executory contract is not affected
12 by a provision in the contract that effects or permits a forfeiture, modification, or termination of
13 the contract on account of the appointment of a receiver or the financial condition of the owner.

14 (d) A receiver's right to possess or use property pursuant to an executory contract
15 terminates on rejection of the contract. Rejection constitutes a breach of the contract
16 immediately before the appointment of the receiver. A claim for damages for rejection of the
17 contract must be filed by the later of:

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

19 (2) [30] days after the court approves the rejection.

20 (e) With court approval after notice and a hearing, a receiver may assign an executory
21 contract to the same extent the owner was permitted to assign it under the contract and under law
22 of this state other than this [act] at the time the receiver was appointed.

23 (f) If a receiver rejects an executory contract for the sale of receivership property that is
24 real property of which the purchaser is in possession or a real property timeshare interest, the

1 purchaser may:

2 (1) treat the rejection as a termination of the contract, in which case the purchaser
3 has a lien on the property for the recovery of any portion of the purchase price that the purchaser
4 paid; or

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

10 (g) A receiver may reject an unexpired lease only if:

11 (1) the lease violated a provision of a mortgage, assignment of rents, or any other
12 loan document related to the mortgage or assignment at the time the lease was executed; or

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

16 (h) A receiver may not reject an unexpired lease if the tenant is not in default and the
17 tenant:

18 (1) has an enforceable nondisturbance agreement with the mortgagee; or,

19 (2) occupies the leased premises as the tenant's primary residence under a lease

20 [for a term of one year or less] entered into by the tenant in good faith.

21 **Reporter's Notes**

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

1 2. This section reflects the prevailing common law that the receiver does not inherently
2 become bound to the owner’s existing executory contracts upon appointment. See Clark on
3 Receivers, § 423, at 574 (2d ed.) (“A receiver is not strictly speaking the successor of the
4 defendant, individual or corporation and an executory contract of the defendant is not binding on
5 the receiver but may be broken by the receivership and give rise to damages resulting in a claim
6 against the assets in the hands of the receiver.”). Consistent with the common law, subsection (a)
7 generally permits the receiver to evaluate whether executory contracts relating to receivership
8 property are beneficial or burdensome, and to either adopt or reject (with court approval)
9 executory contracts based upon the receiver’s evaluation. Subsection (a) permits the court to
10 condition the receiver’s adoption of a contract upon appropriate terms regarding assurance of the
11 receiver’s ability to perform. Subsection (b) provides that the receiver’s temporary performance
12 of the contract does not prevent the receiver from later seeking court approval to reject it.
13 Subsection (c) makes clear that the receiver’s ability to adopt an executory contract is not
14 affected by contractual provisions that would otherwise permit the other contracting party to
15 terminate the contract based upon the appointment of a receiver or the owner’s financial
16 condition.

17
18 3. Under subsection (e), the receiver can assign an executory contract, but only to the extent
19 permitted by the contract and applicable law.
20

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

27 5. It is customary for many commercial lenders to enter into subordination, nondisturbance
28 and attornment (SNDA) agreements with tenants under commercial leases. Subsection (h)
29 provides that a receiver cannot reject a lease if the rejection would violate the terms of an
30 enforceable SNDA agreement.
31

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

38 6. Subsection (f) addresses situations where the receiver attempts to reject an executory
39 contract for the sale of receivership real property of which the purchaser is in possession (i.e., an
40 executory installment land contract or “contract for deed”) or an executory contract for a real
41 property timeshare interest. It gives the purchaser the choice to (a) treat the rejection as a
42 termination of the contract (in which case the purchaser has a lien against the property for the
43 recovery of purchase money already paid) any portion of the purchase price that the purchaser
44 had paid; or (b) retain its rights under the contract. If the purchaser takes the latter option, it must
45 continue to perform its obligations, and may offset against its liability thereon any damages
46 caused by the owner’s nonperformance of the contract following rejection, but has no claim or

1 right against other receivership property or the receiver. Subsection (f) would provide these
2 purchasers with protection comparable to that which such purchasers would have under Section
3 365 of the Bankruptcy Code, and its inclusion responds to concerns raised by Committee
4 members and observers in September 2013 that the Act should be sensitive to “forum shopping”
5 concerns (i.e., that it not provide a contracting party with the incentive to seek appointment of a
6 receiver to permit termination of contracts that could not be terminated under bankruptcy law).
7 A definition of “real property timeshare interest” may need to be prepared and inserted in this
8 section prior to Act’s first reading at the 2014 Annual Meeting.

9
10 **SECTION 19. IMMUNITY OF RECEIVER.**

11 (a) A receiver is entitled to all defenses and immunities provided at common law for an
12 act or omission within the scope of the receiver’s appointment.

13 (b) A receiver may be sued in the receiver’s capacity as receiver only with court
14 approval, after notice and a hearing, with respect to the receiver’s acts, omissions, or transactions
15 in administering receivership property.

16 **Reporter’s Notes**

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

24
25 2. Subsection (b) is an adaptation of Wash. Rev. Code Ann. § 7.60.160(1), and is meant to
26 incorporate into the Act the *Barton* doctrine, which derives from the decision of the United
27 States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881). In *Barton*,
28 the Supreme Court held that to sue a court-appointed receiver, the would-be plaintiff must first
29 seek approval of the appointing court. The doctrine rests upon the notion that the appointing
30 court has *in rem* jurisdiction over the receivership property; thus, a forum other than the
31 appointing court would lack subject-matter jurisdiction over the action.

32
33 **SECTION 20. INTERIM REPORT OF RECEIVER.**

34 (a) The court may order a receiver to file an interim report addressing:

35 (1) the activities of the receiver since a previous report;

36 (2) cash receipts and disbursements, including a payment made to or proposed to

- 1 be made to a professional employed by the receiver;
- 2 (3) receipts and dispositions of receivership property;
- 3 (4) if not filed separately, an application for approval of the payment of fees and
- 4 expenses of the receiver; and
- 5 (5) other matters as specified by court order.

6 (b) If a person does not object to a matter addressed in an interim report under subsection

7 (a), the person waives the objection.

8 **Reporter's Notes**

9 1. This section derives from the provisions of Minnesota's receivership statute, Minn. Stat.

10 Ann. § 576.36. It does not automatically require the receiver to prepare interim reports, except

11 as ordered by the court. This approach provides flexibility to accommodate different judicial

12 approaches — courts that have traditionally required only a final report could continue with such

13 an approach, while courts that have traditionally required periodic reporting could specify an

14 appropriate period in the order of appointment.

15

16 The Style Committee raised a question regarding whether the Act requires that the person

17 receive notice or service of the report as a precondition for the waiver of an objection based upon

18 the person's failure to object, as well as the intended time frame for the rejection. The

19 Committee should discuss whether the Act should address, or the extent to which it should

20 address, such procedural matters.

21 **SECTION 21. CLAIM AGAINST RECEIVERSHIP.**

22

23 (a) Unless the court orders otherwise, a creditor claim arising before a receiver is

24 appointed, whether contingent, liquidated, unliquidated, or disputed, other than a claim of a

25 creditor holding a lien on receivership property, must be submitted to the receiver under this

26 section. A claim not timely submitted is barred from sharing in a distribution to creditors from

27 the receivership.

28 (b) Except as otherwise provided in Section 18(d), a creditor claim under this section

29 must be submitted not later than [90] days after the receiver gives notice to creditors, unless the

30 court reduces or extends the period. The claim must set forth the name and address of the

1 creditor and the nature and amount of the claim, be signed by the creditor [under penalty of
2 perjury], and include a copy of any document on which the claim is based. [A claim submitted
3 in accordance with this subsection is prima facie evidence of the validity and amount of the
4 claim.]

5 (c) At any time before entry of an order approving a receiver’s final report, the receiver
6 or a party may file with the court a written objection to a creditor claim under this section, setting
7 forth the ground for the objection. The court shall determine the objection after notice and a
8 hearing. If a claim is properly submitted with the receiver and not disallowed by the court, the
9 creditor shall share in a distribution from the receivership as the court directs according to law of
10 this state other than this [act].

11 (d) A creditor with a duly perfected lien on receivership property shall receive the
12 proceeds from the disposition of the property in accordance with the creditor’s priority under law
13 of this state other than this [act]. However, the receiver may recover from property securing an
14 allowed claim the reasonable, necessary expenses of preserving, protecting, or disposing of the
15 property to the extent of a benefit to the creditor or the property.

16 **Reporter’s Notes**

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

23
24 2. Subsection (a) requires unsecured creditors to file a proof of claim, unless the court
25 orders otherwise. The Committee may wish to discuss whether the Act should require a filing
26 from secured creditors and, if so, whether there should be any consequence stated for failure to
27 file or an explicit savings provision.

28
29 The intent behind the “unless the court orders otherwise” language is to permit the
30 receiver to seek court approval to forgo the claims process if circumstances reveal that the

1 receivership will not result in funds being available for distribution to creditors. This scenario
2 would be common, for example, where the receiver is appointed in conjunction with the
3 foreclosure of a mortgage on property on which the balance of the mortgage debt exceeds the
4 value of the property. The intent of the Act is to permit the receiver to seek court approval to
5 forgo the claims process altogether in such a case, and thus avoid the expense associated with
6 soliciting and reviewing claims that will not be paid in any event.

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). The Minnesota statute
12 provides no comparable presumption of validity. The Committee may wish to discuss whether a
13 claim should be treated as prima facie evidence of its validity.

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

22
23 Subsection (d) provides a surcharge provision comparable in its application and intended
24 scope to a bankruptcy trustee’s surcharge authority under 11 U.S.C. § 506(c).

25
26 **SECTION 22. REPLACEMENT OF RECEIVER; TERMINATION OF**
27 **RECEIVERSHIP.**

28 (a) The court shall replace a receiver if:

29 (1) the receiver fails to provide the security required by Section 8; or

30 (2) the receiver dies, resigns, or refuses or fails to fulfill the receiver’s duties

31 under this [act].

32 (b) If the court finds that a receiver removed under subsection (a) has accounted fully for
33 and turned over to the successor receiver all receivership property and has filed a report of all
34 receipts and disbursements during the removed receiver’s tenure, the court shall enter an order
35 discharging the removed receiver from all further duties and responsibilities as receiver.

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

7 **Reporter's Notes**

8 1. This section is adapted with some minor changes from the Washington receivership
9 statute, Wash. Rev. Code Ann. § 7.60.280, and with a number of suggestions from the Style
10 Committee.

11
12 2. The bracketed language in subsection (c), which would authorize the court to assess costs
13 and other sanctions against the person who procured appointment of the receiver wrongfully or
14 in bad faith, was located in the prior draft in what is now Section 23, but was moved into Section
15 22 upon the suggestion of several members of the Drafting Committee that it was more
16 appropriately located in Section 22.

17 **SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.**

18
19 (a) On completion of a receiver's duties, the receiver shall file a final report setting forth
20 all receipts and disbursements of the receivership. The final report must include:

21 (1) a description of the activities of the receiver in the conduct of the receivership;

22 (2) a list of all receivership property at the commencement of the receivership and
23 any receivership property added thereafter;

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

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

28 (b) After notice and a hearing, the court may approve a final report filed under

1 subsection (a). The approval discharges the receiver and the surety on the receiver's bond for all
2 matters contained in the report.

3 **Reporter's Notes**

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

8
9 2. Subsection (c) of the September 2013 draft contained provisions regarding the power of
10 the court to terminate the receivership once it became apparent that the receivership had been
11 improvidently granted. The modified version of those provisions now appears in Section 22(c)
12 of this draft.

13
14 **SECTION 24. ANCILLARY RECEIVERSHIP.**

15 (a) The court may appoint a person appointed as a receiver in another state as an
16 ancillary receiver with respect to property located in this state or subject to the jurisdiction of the
17 court if:

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

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

21 (b) A court that appoints an ancillary receiver under subsection (a) may enter any order
22 necessary to effectuate a judicial order entered in another state appointing or directing the
23 receiver.

24 (c) Unless the court orders otherwise, an ancillary receiver appointed under subsection
25 (a) has the powers and duties set forth in this [act] and shall comply with this [act].

26 **Reporter's Notes**

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

29 2. Subsection (a) addresses the appointment in this state of an ancillary receivership to a
30 receivership already existing in another state. It provides that the foreign receiver may be

1 appointment as an ancillary receiver for property in this state, as long as the receiver would be
2 eligible for appointment under the Act and appointment would be in furtherance of the purposes
3 of the foreign receivership.

3. Subsection (c) provides that an ancillary receiver’s powers and duties are determined by
this Act, but this Committee may wish to consider whether or to what extent the Act should
address conflict issues that might arise from state-to-state differences in applicable receivership
laws. The following examples are provided for the benefit of the Drafting Committee members
to consider this issue in further detail (without any particular suggested outcome).

4
5 Example 1. X is appointed as a receiver for Parcel A in State A at the request of Bank,
6 which holds a mortgage on Parcel A. The mortgage contains cross-collateral and cross-default
7 provisions that would make default on the mortgage also constitute a default on a mortgage held
8 by Bank on Parcel B located in State B. Both mortgages specify that the mortgagor consents to
9 the appointment of a receiver for the mortgaged property upon default, without regard to the
10 adequacy of security. Based upon the cross-default provision, Bank seeks the appointment of X
11 as an ancillary receiver for the mortgaged property in State B, even though there is no monetary
12 default on the mortgage note on the State B property and that property is fully leased with prime
13 tenants. State A’s law makes appointment mandatory in case of mortgagor consent, but State
14 B’s law does not, because State B has adopted the Act without Section 6(b) (which would give
15 the mortgagee an entitlement to appointment based on mortgagor consent). In this circumstance,
16 should State A’s law control, or is the court of State B free to refuse appointment in its
17 discretion?
18

19 Example 2. Assume the reverse situation from Example 1 — in other words, assume that
20 courts in State A do not give mandatory effect to mortgagor consent to appointment and do not
21 permit ex parte appointment, but State B has adopted the Act including Section 6(b) (which gives
22 the mortgagee an entitlement to appointment based on consent) and Section 6(c) (which permits
23 ex parte appointment). Bank seeks the appointment of X, on an ex parte basis, as an ancillary
24 receiver for the property in State B. Should State A’s law control or State B’s law as set forth in
25 this Act?
26

27 Example 3. Assume the same facts as in Example 1, but assume that State A has not
28 enacted this Act and State B has adopted this Act, including Section 17(a), Alt. C (under which
29 the receiver may sell receivership property other than in the ordinary course, free and clear of
30 liens). Bank has begun a foreclosure in State A, which is a judicial process expected to take 2
31 years. Bank seeks the appointment of X as an ancillary receiver for Parcel B in State B, and
32 wishes to have the receiver sell Parcel B as quickly as possible. Is there any concern with having
33 the two parcels be subject to different rules regarding the enforcement process and the receiver’s
34 authority to sell? Or should both parcels be subject to the same rules and, if so, which?
35

36 Example 4. Assume the same facts as in Example 1. Both states have adopted this Act,
37 but while State A allows the receiver to sell outside the ordinary course, State B does not (it has
38 enacted Section 17(a), Alt. D). Bank wants to have the parcels sold in a private negotiated sale,
39 and has negotiated an otherwise suitable price for both parcels that the appointing court in State
40 A is prepared to approve. Bank obtains the appointment of X as an ancillary receiver for Parcel

1 B and State B, and asks the court to give its consent to the order of the court in State A selling
2 both parcels. Should the court in State B consent? Must it refuse?

3
4 3. The Committee may wish to discuss whether the provisions of subsection (b) are
5 sufficient to facilitate appropriate communication and coordination between the primary and
6 ancillary courts.

7
8 **[SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE OR**

9 **ASSIGNEE OF RENTS.** Neither a request by a mortgagee or an assignee of rents for the
10 appointment of a receiver under this [act], the appointment of a receiver under this [act], actions
11 taken by the receiver under this [act], nor the application of the proceeds of receivership property
12 to the secured obligation by the mortgagee or assignee, shall:

13 (1) make the mortgagee or assignee a mortgagee in possession of the real property;

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

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

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

18 (5) limit any right available to the mortgagee or assignee with respect to the secured
19 obligation[.][;]

20 [(6) violate [cite the “one-action” statute of this state][.][; or]]

21 [(7) bar a deficiency judgment pursuant to any law of this state governing or
22 relating to deficiency judgments following the enforcement of any encumbrance, lien, or security
23 interest.]

24 ***Legislative Note:*** A state that does not have a “one action” statute or anti-deficiency legislation
25 should omit subsections (6) and (7), as appropriate.

26
27 **Reporter’s Note**

28 1. Section 25 is an adaptation of Section 11 of the Uniform Assignment of Rents Act, which
29 provides that certain actions taken by an assignee of rents to enforce its security interest in rents

1 (such as direct collection of rents after notification to tenants or through appointment of a
2 receiver) does not itself make the assignee a “mortgagee in possession,” constitute an election of
3 remedies, waive other security held by the assignee, violate a state’s “one-action” rule, or
4 constitute a foreclosure for purposes of triggering a state’s anti-deficiency rule.
5

6 The Reporter has included Section 25 in the existing draft based upon comments raised
7 by Observers, including several members of the Joint Editorial Board for Uniform Real Property
8 Acts, that the decision of a mortgagee or assignee of rents to pursue its right to a receiver under
9 this Act should not trigger a state’s one-action rule. As drafted, Section 25 addresses that
10 concern, but does so in a fashion that makes sure the provisions of this Act do not create any
11 “gap” between the protection afforded to an assignee of rents under UARA and those afforded to
12 a mortgagee under this Act.
13

14 By way of reference, Cal. Code Civ. Proc. 564(d) provides that “Any action by a secured
15 lender to appoint a receiver pursuant to this section shall not constitute an action within the
16 meaning of subdivision (a) of section 726.”
17

18 2. The Chair has offered the following possible simplification of the introductory clause in
19 Section 25: “Neither an act that a person is permitted or required to do under this [act] nor the
20 application of the proceeds of receivership property to the secured obligation by a mortgagee or
21 assignee of rents shall [subsections (1)-(7) remain unchanged].”
22

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

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