Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

The Bankruptcy Code is more than 40 years old, and its last major amendments, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are 14 years old. In that time, the amount of debt Americans now hold has increased, how they incur that debt has changed, and the types of problems that debt can create have evolved. Technological changes also have transformed how Americans find information about legal options and professional services available to them.

The ABI Commission on Consumer Bankruptcy was created in December 2016 to research and recommend improvements to the consumer bankruptcy system that can be implemented within its existing structure. The Commission's Final Report contains recommendations for amendments to the Code and Rules designed to make the consumer bankruptcy system more accessible and efficient for both financially struggling Americans and the professionals who serve them. After soliciting public feedback, Commission members identified nearly 50 discrete issues for study and divided these issues among three advisory committees composed of 52 bankruptcy professionals. The commissioners and committee members represent all diverse stakeholders in the bankruptcy system.

Some of the issues and recommendations addressed in the Final Report include:

Issue	Recommendation
Student Loans	Student loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it. The Commission recognizes that recent graduates should generally be required to repay government-made or guaranteed student loans, but it recommends statutory amendments to discharge student loans that are • made by nongovernmental entities; • incurred by a person other than the person receiving the education; • being paid through a five-year chapter 13 plan; or • first payable more than seven years before a chapter 7 bankruptcy is filed. In addition, the Commission recommends administrative procedures and interpretations of current law to facilitate reasonable relief from student loan indebtedness.

Remedies for Discharge Violation	Current law presents difficulties both in enforcing the discharge injunction and in determining its scope. Most courts allow enforcement of the discharge only through contempt proceedings, which may not provide effective relief. The Commission recommends: • the creation of a statutory private right of action for violations of the discharge, like the action for violations of the automatic stay, which would provide the full range of sanctions, including costs, attorney fees, and punitive damages; and • amendments to the Bankruptcy Rules allowing motions to determine whether particular creditor conduct would violate the discharge.
Protection of Interests in Collateral Repossessed Prepetition	The circuit courts are divided on the question of whether collateral seized by a creditor before a bankruptcy filing must be returned to the party entitled to possession afterward. To balance the need of the debtor for return of the collateral, often a vehicle, and the need of the creditor for adequate protection, the Commission's principal recommendation is: • § 362(a)(3) should be amended to provide expressly that a creditor's retention of estate property violates the automatic stay, but only if proof of insurance or other security is provided for property subject to loss of value.
Chapter 7 Attorney's Fees	Current law largely prohibits collection, after the bankruptcy case is filed, of unpaid attorney fees for a chapter 7 debtor's representation. This often leads either to delayed filings so that the anticipated fee can be paid in advance, or to the filing of chapter 13 cases simply to ensure fee payment. The Commission recommends: • several steps to reduce the overall fees needed for chapter 7 representation, allowing prompter advance payment; and • consideration of changes in the debtor's discharge to allow the collection of unpaid fees postpetition, including: — delay of discharge to allow collection of attorney fees; and — an exception from discharge, with judicial oversight.
Attorney Competency and Remedying Lawyer Misconduct	There are well-established rules of conduct governing attorney conduct in bankruptcy cases. The Commission recommends: • vigorous enforcement of these rules by the responsible entities; • the formation of committees or other bodies at the local level to investigate and resolve complaints against offending attorneys; • the publication of all disciplinary orders; and • the award of enhanced fees, as authorized by § 330(a)(3)(E), for board-certified or otherwise demonstrably skillful and experienced practitioners.

Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

Credit Counseling and Financial Management Course	The Commission recommends: • eliminating prepetition credit counseling, because requiring individuals to receive a credit counseling briefing as a prerequisite for any bankruptcy filing imposes costs in money, time, and complexity that are not outweighed by any benefit in helping them avoid unnecessary filings; • eliminating the requirement for a course in financial management in chapter 7, but retaining it in chapter 13, with further study of its effectiveness.; and •amending the Fair Credit Reporting Act to require consumer reporting agencies to report the debtor's successful completion of a financial management course, so that the effectiveness of the course may be measured by changes in the debtor's credit rating.
Means Test Revisions & Interpretations	The means test assesses a debtor's ability to repay debt by calculating the debtor's disposable income—total income less defined living expenses. The means test determines both whether a debtor should be presumed to be abusing chapter 7 and so barred from relief under that chapter, and whether a debtor's chapter 13 plan may be denied confirmation because it provides for inadequate payments on unsecured claims. The test incorporates numerous detailed provisions for determining both income and allowed deductions. The Commission recommends retaining the means test, but amending it • to require reduced documentation from debtors with below-median income; • to exclude from income public assistance, government retirement, and disability benefits, capped by the maximum allowed Social Security benefit; • to remove the presumption of abuse if the debtor shows special circumstances, even if the circumstances arose voluntarily; and • to allow certain statutory expense deductions from income only to the extent actually incurred by the debtor and necessary for the support of the debtor and debtor's dependents.
Chapter 13 Debt Limits	To expand the availability of relief under chapter 13 and reduce the need for individuals to file under chapter 11, the Commission recommends: • increasing the chapter 13 debt limit to $3 million, eliminating the distinction between secured and unsecured debts; and • for married couples, applying the limit separately to each spouse and not aggregating the spousal debt, even in joint cases.

Racial Justice in Bankruptcy	The Commission finds, based on substantial empirical evidence, that African Americans are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge. To ensure that all individuals have equal access to justice, the Commission recommends several actions, including: • organizational training programs for bankruptcy professionals aimed at reducing implicit racial bias; • amendment to 28 U.S.C. § 159 requiring both the collection of race and ethnicity information on bankruptcy petitions and the dissemination of that data by the Administrative Office of U.S. Courts; and • in the absence of such an amendment, consideration of collecting race and ethnicity information on bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.
Reserve Fund in Chapter 13 Cases	Reflecting the advice of nearly all financial management professionals, the Commission finds that chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund, held by the trustee, to address unanticipated expenses. The Commission recommends: • amendments to § 1322(b) to allow such a reserve fund, not to exceed one month of scheduled expenses, subject to restoration to the extent drawn upon, excluded from disposable income, and payable to meet unanticipated expenses on notice and an opportunity to object; and • consistent amendments to the relevant bankruptcy rules and forms. In the absence of these amendments, the Commission recommends that current law be interpreted to allow the creation of such a limited reserve fund through the debtor's plan, with provisions for disbursement from the fund on notice and opportunity to object, and for differing disposition of the fund at the conclusion of the case depending on the debtor's income level: payment of the fund balance to debtors with below-median income, and for above-median debtors, payment to the unsecured creditors.
Chapter 7 Trustee Compensation	The Commission finds that chapter 7 trustees are substantially undercompensated. The Commission recommends statutory amendments that would: • increase the trustees' base compensation from $60 to $120 in each case, with the increase coming from existing fees rather than an increase in filing fees or a reduction in payments to creditors; and • increase the commission allowed under § 326(a) by increasing the levels of distributions to creditors at which lower percentages of the distributions are paid to the trustee.

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FOURTH YEAR
WILLIAMSBURG, VIRGINIA
JULY 10 - JULY 16, 2015

WITH PREFATORY NOTE AND COMMENTS

September 22, 2015

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UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

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UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

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Prefatory Note

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

- Courts have appointed *pendente lite* receivers to preserve property that is the subject matter of pending litigation, thereby preventing its waste, deterioration, or removal before judgment.

- Courts have appointed receivers after entry of a judgment to preserve the property pending appeal, to carry the judgment into effect, or to enforce the judgment.

- Courts have appointed receivers to preserve the property of a corporation, partnership, or other legal entity in the context of the dissolution or winding up of the entity, or where the entity is operationally dysfunctional because of an ownership or management dispute.

- Courts have appointed receivers, at the behest of one or more creditors, to collect, preserve, administer, liquidate and distribute the property of insolvent debtors.

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

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

- The mortgaged property is located in a state where the foreclosure process takes a substantial period of time (e.g., six months or longer). In such states, during the pendency of the foreclosure proceeding, the mortgaged premises will typically generate substantial rents from tenants or other occupiers. In most loan transactions, these rents have been assigned to the mortgagee as security for the loan, and the lender reasonably expects them to be applied toward reduction of the mortgage debt. Application of these rents to the debt is of particular importance where the value of the mortgaged premises has declined, the mortgage loan is "nonrecourse" (i.e., where the borrower has no personal liability for the loan's repayment), the mortgagee is a special purpose vehicle, or the mortgagee is otherwise unlikely to be able to pay a deficiency. In these situations, application of the rents to the mortgage debt could help to reduce or even eliminate the deficiency that might follow a completed foreclosure. Thus, obtaining the appointment of a receiver prevents the mortgagor from diverting rents to other creditors or insiders of

the mortgagor pending a foreclosure sale.

- The mortgaged property is subject to waste, deterioration, or some other immediate physical harm that threatens to reduce the value of the mortgaged property and thus threatens the mortgagee's security.

- The mortgaged property might be subject to a high vacancy rate or underperforming due to poor property management. In such a case, the mortgagee might wish to provide better and more active property management and to enter into new tenant leases. In this situation, the mortgagee might prefer to secure the appointment of a receiver to provide this day-to-day management, both because (1) the appointment of a receiver would insulate the mortgagee from the liability that the mortgagee would assume if the mortgagee provided this property management directly and thereby became a "mortgagee in possession," and (2) the receiver might be a person with specialized expertise in operating and "turning around" a property of that type.

- The mortgaged collateral might include not only real estate but substantial personal property as well, as would be the case (for example) where the collateral is a hotel or resort property. In this situation, the mortgagee might wish to proceed with foreclosure in a judicial proceeding so as to minimize or avoid any claim that might arise if it disposed of the personal property under Article 9 of the Uniform Commercial Code and the disposition was subsequently attacked as being commercially unreasonable.

- The property might be subject to environmental contamination, and the mortgagee does not want to be in the chain of title or to rely solely on statutory exemptions from federal or state environmental laws that might depend on the mortgagee's status as a secured creditor. See, e.g., 42 U.S.C.A. § 9601(20)(A) (excluding from federal CERCLA "owner and operator" liability any person who "without participating in the management of a … facility, holds indicia of ownership primarily to protect his security interest in the … facility").

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

Likewise, to date, no uniform law addresses the appointment and powers of real estate receivers in a comprehensive fashion. Although the Uniform Assignment of Rents Act (UARA), promulgated in 2005, does address the evidentiary showing necessary to obtain the appointment of a receiver, UARA's focus is limited to appointment at the request of an assignee of rents, and nothing in UARA explicitly addresses either receivership procedure or the scope of the powers

that a receiver of real estate may exercise before foreclosure.

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

- There is substantial variation as to the circumstances that justify the appointment of a receiver, particularly in the case of mortgaged property. Some courts require that the petitioning party establish the existence of waste; other courts do not require the existence of waste if the property's value is insufficient to satisfy the mortgage debt; others simply permit the petitioning mortgagee to obtain a receiver if the mortgage is in default and the mortgagor consented in the mortgage to the appointment of a receiver after default.

- There is substantial variation as to the circumstances, if any, that justify *ex parte* appointment of a receiver and the procedures associated with *ex parte* appointment. Some courts routinely appoint receivers on an *ex parte* basis with no heightened evidentiary showing required, particularly where the mortgagor consented to *ex parte* appointment in the mortgage or deed of trust. Other courts refuse *ex parte* appointment outright, or require the petitioning mortgagee to establish the circumstances justifying appointment without prior notice to the mortgagor.

- There is substantial variation as to the enforceability of provisions in the mortgage or deed of trust by which the mortgagor consents in advance to the appointment of a receiver after default. In some states, such contractual provisions are enforceable as a matter of right. See, e.g., Ind. Code § 32-30-5-1; Minn. Stat. Ann. § 559.17, subd. 2; N.Y. Real Prop. Law § 254(10); N. Mex. Stat. Ann. § 44-8-4(A). By contrast, most existing statutes provide (or have been interpreted to mean) that the decision to appoint a receiver rests in the discretion of the court, without regard to the terms of the mortgage. 4 Clark on Receivers § 950, at 1718 (3d ed. 1959).

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

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

business, or to make improvements to receivership property.

In particular, there is substantial current uncertainty regarding whether a receiver has the power to sell real estate. Customarily, a receiver's ability to sell receivership property varies depending on the circumstances of the receivership. When a court appoints a general receiver for all of the assets of an insolvent debtor, the court commonly authorizes the receiver to gather and sell the assets of the debtor. The court frequently empowers such a receiver, in the receivership order, to sell assets both in the ordinary course of business (such as sales of inventory) and even outside of the ordinary course with court approval.

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

Recently, some commentators have advocated that receivership can be an effective way to dispose of real estate, and mortgaged real property in particular. Indeed, there are at least three specific contexts in which a sale by the receiver might be advantageous:

- *Sale of property securing commercial mortgaged-backed securities (CMBS) loans.* CMBS loans are held in real estate mortgage investment conduits ("REMICs"), which are special purpose vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed securities. The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, but permits some modifications to an existing defaulted loan. Thus, when a REMIC completes a foreclosure sale, it cannot make a new loan on a seller-financing basis. However, if the property can be sold (through a receiver or by the borrower directly) with the buyer assuming the mortgage, the mortgage loan can be modified and restructured under the REMIC rules. Often, this can produce a sale at a higher value than by comparison to a cash sale, and thus is attractive to lenders who want to avoid foreclosing on a property that is worth less than the outstanding mortgage debt. *See generally* John C. Murray and Kenneth R. Jannen, *Public and Private Sales of Real Property by Federal Court Receivers*, ACREL Papers (March 2011).

- *Foreclosure sale at "arms-length" rather than "distress sale."* Under current foreclosure law in all 50 states, a foreclosure sale is a "distress sale," i.e., a public auction sale, typically "on the courthouse steps." Foreclosure by sale has been justified as a means to protect the mortgagor's equity in the mortgaged property, particularly by comparison to the historical approach under which a defaulting borrower simply forfeited its interest in the mortgaged property (and any equity the borrower might have accumulated either through principal reduction or market appreciation). Nevertheless, there is concern that foreclosure sales do not always bring prices that reflect the value that might be obtained in an arms-length, non-distress sale. By contrast to a traditional foreclosure, a receiver could theoretically market the mortgaged property to potential buyers in the context of its operation of the property. Marketing of the property in an

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

- *Foreclosure in a "unified" sale of realty and personalty*. In some circumstances, it might make sense for a creditor to sell "mixed" personal and real property collateral as a going concern in one sale, rather than selling the personalty under Article 9 and the realty in a separate real estate foreclosure. Ostensibly, U.C.C. § 9-604(a) facilitates unified sales of mixed collateral by providing that "[i]f a security agreement covers both real and personal property, a secured party may proceed … as to both the personal property and the real property in accordance with the rights with respect to the real property," in which case Article 9's foreclosure provisions do not apply. U.C.C. § 9-604(a)(2). Unfortunately, § 9-604(a)'s language leaves a number of interpretive questions that compromise its potential effectiveness in the mixed collateral context. These questions include (a) whether the security interests in the realty and the personalty must be created in the same document or can arise under separate documents; (b) whether the personalty and realty must be used in some closely related way to be sold in a unified sale; and (c) whether the secured party must dispose of all of the personalty under the rules of real estate law or can instead dispose of some of it (along with the land) in a unified sale and the rest in an Article 9 disposition. These interpretive gaps might discourage some mortgagees from attempting unified sales.

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

For the reasons described above, substantial benefits could flow to the resolution of distressed commercial mortgage loans if state law explicitly granted a receiver the power of sale as recognized under federal law. Unfortunately, most existing state statutes do not specifically authorize a receiver to conduct a sale of real property, and some courts have held that in the absence of express statutory authority, receivers lack the authority to conduct such sales. See,

e.g., *Kirven v. Lawrence*, 137 S.E.2d 764 (S.C. 1964) (receiver does not have inherent power of sale, as receivership is "custodial" in nature and designed to preserve the status quo); *Andrick Dev. Corp. v. Maccaro*, 311 S.E.2d 95 (S.C. Ct. App. 1984) (same); *Eppes v. Dade Developers, Inc.*, 170 So. 875 (Fla. 1936); *Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. Dist. Ct. App. 2010) (receiver lacked power to sell hotel even though court had authorized the sale; no Florida statute authorizes a court-appointed receiver in a foreclosure case to sell the mortgaged property in contravention of mortgagor's right of redemption). To provide the needed clarity, the Act provides more explicit rules addressing the extent to which a receiver can sell receivership property, either subject to or free and clear of existing liens and rights of redemption.

Summary of the Act. The following paragraphs provide a brief summary of the primary provisions of the Act.

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

- ***Scope.*** The Act applies to receiverships for real property as well as personal property that is related to the real property or used in its operation. § 4(a). It does not govern a receivership for an interest in real property improved by one to four dwelling units, unless (1) the interest is used for agricultural, commercial, industrial, or mineral extraction purposes, other than incidental uses by an owner occupying the property as the owner's primary residence; (2) the interest secures an obligation incurred when the property was used or planned for use for agricultural, commercial, industrial, or mineral extraction purposes; (3) the owner planned or is planning to develop the property with one or more dwelling units to be sold or leased in the ordinary course of the owner's business, or (4) the owner collects rents or other income from an unrelated tenant or other occupier. § 4(b). The Act does not provide the exclusive method for the appointment of a receiver. § 4(d).

- ***Court.*** The state's court of general equity jurisdiction has exclusive jurisdiction of the receivership proceeding. § 5.

- ***Appointment.*** The Act establishes standards under which a court may appoint a receiver in the exercise of its equitable discretion. § 6(a). The Act also establishes standards under which a petitioning mortgage lienholder is entitled to appointment of a receiver, either as a matter of right or as a matter of the court's discretion. § 6(b). Where the court appoints a receiver on an *ex parte* basis, the court may require the party seeking appointment to post security for any damages, attorney's fees and costs incurred by a person injured by an appointment later determined to be unjustified. § 6(c).

- ***Identity and Independence of Receiver.*** Because a receiver holds receivership property for the benefit of all interested parties, the Act requires that the receiver provide sworn evidence of the receiver's independence, § 7(a), (b), subject to an exception to prevent

disqualification based on certain pre-existing relationships that are *de minimis* in nature. § 7(c). While a party seeking the appointment of a receiver may nominate a person to serve as a receiver, the nomination is not binding on the court. § 7(d).

- ***Effect of Appointment.*** On appointment, a receiver has the status and priority of a lien creditor with respect to receivership property. § 9. Appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property, and property acquired after appointment is subject to any pre-receivership security agreement to the same extent as if no receiver had been appointed. § 10. On appointment, persons having possession, custody or control of receivership property must turn the property over to the receiver, and persons owing debts that constitute receivership property must pay those debts to the receiver. § 11. Entry of the order of appointment effects a stay, applicable to all persons, of an act to obtain possession of, exercise control over, or enforce a judgment against receivership property, as well as an act to enforce a lien against receivership property. § 14(a). In appropriate situations, the court can expand the scope of the stay, § 14(b), and grant relief from the stay, § 14(c). However, for policy reasons, certain actions are outside the scope of the stay. § 14(d). The Act also addresses the consequences of a violation of the stay. § 14(e), (f).

- ***Powers and Duties of Receiver; Duties of Owner*.** The Act sets forth the receiver's presumptive powers, § 12(a), as well as those that the receiver may exercise only with court approval. § 12(b). The Act also sets forth the duties of the receiver, § 12(c), and the duties of the owner of receivership property. § 13.

- ***Engagement and Compensation of Professionals*.** The Act authorizes the receiver to engage and pay professionals to assist in the administration of the receivership following court approval. § 15.

- ***Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in Ordinary Course.*** With court approval, the Act permits the receiver to use, sell, lease, license, exchange or otherwise transfer receivership property other than in the ordinary course of business. § 16(b), (c). Unless the agreement of transfer provides otherwise, the transfer is free and clear of rights of redemption and liens other than liens that are senior to the lien of the person who obtained the receiver's appointment. § 16(c). Liens extinguished by the receiver's sale attach to proceeds with the same validity, perfection, and priority as they had with respect to the property sold. § 16(d). The sale may be conducted as a private sale, and creditors with valid secured claims may credit bid. § 16(e). The Act also provides a safe harbor for purchasers, in case a party objects to the sale but fails to get a stay of the order approving the sale. § 16(f). Secured creditors are entitled to the proceeds of their collateral according to the priority rules established by law other than this Act, § 20(g), although the court may award the receiver the reasonable and necessary fees and expenses for carrying out the receiver's duties. § 21(a).

- ***Executory Contracts and Unexpired Leases.*** With court approval, a receiver may adopt or reject an executory contract of the owner relating to receivership property. § 17(b). The Act covers the mechanics for adoption or rejection of executory contracts. § 17(c).

The receiver may also assign an adopted executory contract to the extent permitted by the contract and applicable law other than this Act, but free of so-called "ipso facto" clauses. § 17(d), (f). The Act specifies the consequences of a receiver's rejection of an executory contract. § 17(e). The Act contains protections for purchasers in possession of real property or real property time share interests that are analogous to those contained in the Bankruptcy Code. § 17(g). The Act also limits the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations. § 17(h).

- ***Immunity of Receiver.*** Consistent with the receiver's status as an officer of the court, the Act provides the receiver with immunity for acts or omissions within the scope of the receiver's appointment. § 18(a). Further, the Act incorporates the *Barton* doctrine and provides that a receiver cannot be sued personally for an act or omission in administering receivership property except with the approval of the appointing court. § 18(b).

- ***Claims.*** The Act requires the receiver to notify creditors of the appointment of the receiver unless the court orders otherwise, § 20(a), (e), and requires creditors to file claims with the receiver as a precondition to obtaining any distribution from receivership property or the proceeds of such property. § 20(b). The Act permits the receiver to recommend disallowance of claims. § 20(e). The Act also authorizes the court to forgo the filing of unsecured claims where the receivership property is likely to be insufficient to satisfy secured claims against the property. § 20(f).

- ***Receiver's Reports.*** The receiver must file interim reports (as directed by the court) and, on completion of the receiver's duties, a final report. §§ 19 and 23.

- ***Ancillary Receivership.*** Where a receiver has been appointed by another state, the Act authorizes the court to appoint that person or its designee as an ancillary receiver for the purpose of obtaining possession, custody and control of receivership property located within this state. § 24(a). The Act also permits the court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. § 24(b).

- ***Receivership in Context of Mortgage Enforcement.*** The Act makes clear that the appointment of a receiver on request by a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee of rents a "mortgagee in possession," do not constitute an election of remedies or make the secured obligation unenforceable, and do not constitute an "action" within the meaning of a state's "one-action" rule. § 25(a). In a state with anti-deficiency rules, where a receiver conducts a sale of receivership property free and clear of a lien, the state's anti-deficiency rules will apply to any person that held a lien extinguished by the sale to the same extent those rules would have applied after a foreclosure sale not governed by the Act. § 25(b).

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Affiliate" means:

(A) with respect to an individual:

(i) a companion of the individual;

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

(I) the individual; or

(II) a companion of the individual;

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

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

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

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

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

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

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

(2) "Companion" means:

(A) the spouse of an individual;

(B) the [registered] domestic partner of an individual; or

(C) another individual in a civil union with an individual.

(3) "Court" means [identify court of general equity jurisdiction in this state].

(4) "Executory contract" means a contract, including a lease, under which each party has an unperformed obligation and the failure of a party to complete performance would constitute a material breach.

(5) "Governmental unit" means an office, department, division, bureau, board, commission, or other agency of this state or a subdivision of this state.

(6) "Lien" means an interest in property which secures payment or performance of an obligation.

(7) "Mortgage" means a record, however denominated, that creates or provides for a consensual lien on real property or rents, even if it also creates or provides for a lien on personal property.

(8) "Mortgagee" means a person entitled to enforce an obligation secured by a mortgage.

(9) "Mortgagor" means a person that grants a mortgage or a successor in ownership of the real property described in the mortgage.

(10) "Owner" means the person for whose property a receiver is appointed.

(11) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(12) "Proceeds" means the following property:

(A) whatever is acquired on the sale, lease, license, exchange, or other disposition

of receivership property;

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

(C) rights arising out of receivership property;

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

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

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

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

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

(16) "Receivership property" means the property of an owner which is described in the order appointing a receiver or a subsequent order. The term includes any proceeds, products, offspring, rents, or profits of or from the property.

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

(18) "Rents" means:

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

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

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

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

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

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

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

(20) "Security agreement" means an agreement that creates or provides for a lien.

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

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

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

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

Comment

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

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

The Act defines the term "companion" broadly to account both for the recent past variation among the states in recognition of same-sex marriage and future uncertainty regarding the prevalence of domestic partnerships and civil unions in the wake of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), recognizing a right to same-sex marriage under the U.S. Constitution.

3. "Court." The Act defines the term to refer to the court of general equity jurisdiction within the state.

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

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

6. "Lien." The Act defines "lien" to include any voluntary and involuntary interest in property securing an obligation, and includes a security interest.

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

8. "Mortgagee." The Act defines the term to include any person holding a mortgage. The term includes an assignee of rents.

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

10. "Owner." The Act defines "owner" to mean the person over whose property the receiver is appointed.

11. "Person." The Act uses the standard ULC definition.

12. "Proceeds." The Act defines proceeds in a fashion consistent with its definition under Uniform Commercial Code § 9-102(a)(64).

13. "Property." The Act defines the term broadly to include all legally-recognized interests. "Personal property" includes both tangible and intangible property.

14. "Receiver." The definition derives from Minn. Stat. Ann. § 576.21(p).

15. "Receivership." The definition derives from Minn. Stat. Ann. § 576.21(q).

16. "Receivership property." The definition derives from Minn. Stat. Ann. § 576.21(r). The term encompasses all property that is described in the order appointing the receiver, any subsequent order of the court, and all rents and proceeds of that property.

17. "Record." The Act uses the media-neutral term "record" as a noun to include both written and electronic documents. The limitation of the definition to use of "record" as a noun avoids confusion due to the customary use of the term "record" as a verb in real estate practice.

18. "Rents." This definition is largely identical to the definition used in the Uniform Assignment of Rents Act, and refers to sums that are payable (but not yet paid) on account of the right to occupy land. Once those sums have been paid by the occupier or on the occupier's account, the sums paid constitute "proceeds" of receivership property as defined in § 2(12).

Because this Act's scope exclusion for residential property depends on whether the resident is collecting rents from a non-affiliate, the definition of "rents" delineates the Act's scope with clarity. Likewise, the definition is needed because the owner's failure to turn over rents that a mortgagee is entitled to collect provides grounds for the appointment of a receiver under § 6(b).

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

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

21. "Sign." The Act uses the media-neutral version of the term commonly used in other recent Uniform Acts.

22. "State." The Act uses the standard ULC definition.

SECTION 3. NOTICE AND OPPORTUNITY FOR HEARING.

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

(b) The court may issue an order under this act without written or oral notice to the adverse party only if:

(i) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(ii) the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.

(c) No evidence other than the affidavit or verified pleading shall be used to support the application for the appointment of a receiver unless the adverse party appears at the hearing or has received reasonable notice of the hearing. Every order appointing a receiver without notice shall be endorsed with the date and hour of entry and shall be filed forthwith in the clerk's office and shall define the injury, state findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if notice was not given. The order appointing a receiver shall remain in effect until the further order of the court.

(d) Bond. No order appointing a receiver or providing for injunctive relief shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the ~~the adverse party is wrongfully enjoined~~ order is improperly entered. When any order appointing a receiver or providing for

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injunctive relief, is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. ~~No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.~~

(e) Form and Scope. If the Court grants injunctive relief, the injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document, and shall be binding, on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

(f) Motion to Dissolve. A party who is adversely affected by an order appointing receiver or for injunctive relief may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion.

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NOTE: This has been modified so that it is consistent with Rule 1.610, of the Florida Rules of Civil Procedure, which governs the issuance of a temporary injunction (without notice). *See below*.

RULE 1.610 INJUNCTIONS

(a) Temporary Injunction.

(1) A temporary injunction may be granted without written or oral notice to the adverse party only if:

(A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.

(2) No evidence other than the affidavit or verified pleading shall be used to support the application for a temporary injunction unless the adverse party appears at the hearing or has received reasonable notice of the hearing. Every temporary injunction granted without notice shall be endorsed with the date and hour of entry and shall be filed forthwith in the clerk's office and shall define the injury, state findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if notice was not given. The temporary injunction shall remain in effect until the further order of the court.

(b) Bond. No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined. When any injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.

(c) Form and Scope. Every injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document, and shall be binding, on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

(d) Motion to Dissolve. A party against whom a temporary injunction has been granted may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion.

Comment

1. Principles of due process and fairness in judicial administration require that persons affected by a receivership should have notice and an opportunity to be heard before a final determination of their legal rights and responsibilities. However, because receivership is a flexible remedy based in equity, it is not appropriate to require a uniform type of notice, a uniform duration of notice, or a hearing prior to every determination made in the administration of a receivership.

Consistent with due process requirements, Section 3(a) incorporates the idea that any court order under this Act—from the order appointing the receiver to the order discharging the receiver—may be made only "after notice and opportunity for a hearing." Section 3(a) expresses this concept, however, in a flexible fashion that permits the court to require notice and opportunity for a hearing that is appropriate in the particular circumstances.

Deleted: without prior notice if the circumstances require issuance of an order before notice is given;¶
(2) after notice and without a prior hearing if the circumstances require issuance of an order before a hearing is held; or¶
(3) after notice and without a hearing if no interested party timely requests a¶
hearing.¶

For example, when a receiver proposes to sell property free and clear of liens under Section 16, there are no plausible circumstances that would require such a sale to occur without notice to interested persons and without the opportunity for a hearing at which a party objecting to the sale may be heard as to the basis for the party's objection. Thus, a court should not issue an order approving such a sale without prior notice to interested persons and the actual conduct of a hearing on the proposed merits of the sale terms.

By contrast, in many circumstances, such as when the court is approving a routine periodic report by the receiver, the court might require prior notice to interested persons, but might indicate that no hearing would be held before the court's entry of the order unless an interested party requested a hearing in a timely fashion.

SECTION 4. SCOPE; EXCLUSIONS.

(a) This chapter applies to a receivership initiated ina court of this state for an interest in real property and any personal property related to or used in operating the real property.

(b) This chapter does not apply to:

(1) Actions in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver;

(2) Actions authorized by or commenced under federal law;

(3) Residential real property of an individual owner that is occupied by the individual, a spouse, child or other dependant;

(4) Property of an individual exempt from forced sale, execution, or seizure under the laws of this state; or

(5) Personal property of an individual that is used primarily for personal, family or household purposes.

(c) This chapter does not limit the authority of a court to appoint a receiver under law of this state other than this chapter.

(d) This chapter does not limit an individual owner's homestead and exemption rights under the laws of this state or federal law.

(e) Unless displaced by a particular provision of this chapter, the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement this chapter.

Legislative Note: *In many states, there are statutes under which a governmental unit or official may be appointed as a receiver for an organization such as a hospital, insurance company, or*

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¶
2. Section 3 recognizes the possibility that in some circumstances, a court might enter an order appointing or directing a receiver on an *ex parte* basis (without prior notice). The Act does not list all of the circumstances in which an interested party can obtain *ex parte* relief, and any attempt to provide a comprehensive list would undoubtedly fail to foresee some circumstance in which ex parte relief would be justified. Instead, Section 3 makes clear that an *ex parte* order is appropriate only if the circumstances require that the court issue an order before notice can be given or a hearing held. As a matter of best practices, the order appointing the receiver should specify the particular circumstances justifying *ex parte* relief.¶
¶
In cases of *ex parte* appointment, principles of due process require that notice be given after the order is entered and that prompt opportunity for a post-order hearing be provided. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Thus, for example, if the court orders the appointment of a receiver for mortgaged property on an *ex parte* basis, w ... [1]

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Deleted: a receivership for an interest in real property improved by one to four dwelling units unless

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other organization affected with a public interest. This act generally would not govern the receivership, but the bracketed language at the end of subsection (c) would permit a state to modify its existing receivership statute to incorporate some or all provisions of this act.

Comment

1. Subsection (a) provides that except to the extent Section 4 otherwise limits, the Act governs receivership of real property and any personal property that is related to the real property or used in its operation. Thus, for example, if the mortgagee of real estate used by the mortgagor as a hotel sought the appointment of a receiver following the mortgagor's default, the court could appoint a receiver under this Act for both the real estate and any personal property of the owner used in the operation of the hotel (e.g., furnishings, food/beverage inventories, franchise agreement, and accounts receivable). In a receivership for an owner engaged in farming operations on land, the court could appoint a receiver for the owner's interest in the land, growing crops, farm equipment, and other farm products. Likewise, owners of natural resource development projects often finance their operations through large credit facilities which include real property collateral (the mineral estate and/or the surface estate), personal property collateral, and fixtures. The court could appoint a receiver under this Act for all of the real and personal

property assets the owner used in or related to operating such a project.

If mineral rights have not been severed from the surface estate, appointment of a receiver for the surface estate would include the unsevered mineral rights. If mineral rights have been severed and the court appoints a receiver for the owner of the mineral rights, the receivership property would include the mineral rights, but would include no rights in the surface estate other than easement or other use rights associated with ownership of the mineral rights. In such a case, the receiver (subject to express direction from the court) either could exploit the mineral rights or market and sell the mineral rights using the receiver's power under Section 16 of this Act.

2. Subsection (b) provides the Act's primary scope exclusion. In general, the Act is intended to apply to property that is "commercial" in nature. This does not mean that the Act cannot apply to "residential" property. Any dichotomy between "commercial" and "residential" property is essentially false. Not only can parcels of land be subject to mixed uses, but if property is occupied by someone other than its owner, property that is "residential" from the perspective of the tenant is essentially commercial property in the hands of its owner (e.g., the landlord). Section 4(b) thus establishes the scope of this Act based on a different dichotomy, distinguishing between commercial property (appropriately subject to this Act) and consumer property (to which this Act would not apply).

For this reason, subsection (b) provides that under this Act, the court may not appoint a receiver for an interest in real property improved with one to four dwelling units, unless (1) the interest is used for agricultural, commercial, industrial, or mineral extraction purposes, other than incidental uses by an owner occupying the property as the owner's primary residence; (2) the interest secures an obligation incurred at a time when the property was used or planned for use for agricultural, commercial, industrial, or mineral extraction purposes; (3) the owner planned or is planning to develop the property into one or more dwelling units to be sold or leased in the ordinary course of the owner's business; or (4) the owner is collecting or has the right to collect rents or other income from the property from a person other than an affiliate of the owner. Property that is improved by one to four dwelling units, but falls into one of these four categories, is essentially "commercial" in nature and thus is covered by this Act.

The following examples demonstrate the application of subsection (b):

Example 1. Henning owns a 25-unit apartment building subject to a mortgage in favor of Bank. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Because the land is improved by more than four dwelling units, subsection (b)'s scope limitation does not apply.

Example 2. Henning owns 640 acres of farmland subject to a mortgage in favor of Bank. Henning grows corn and soybeans on the land as part of a farming operation, and lives in a single-family home located on the land. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Although Henning occupies the property as his personal residence, he uses it for

agricultural purposes that are not incidental to his residential occupancy within the meaning of subsection (b)(1).

Example 3. Henning owns 640 acres of farmland subject to a mortgage granted to Bank at a time when Henning grew corn and soybeans on the land as part of a farming operation, and lives in a single-family home located on the land. Henning goes into default on the mortgage after ceasing farming operations, and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Although Henning occupies the property as his personal residence, he used it for non-incidental agricultural purposes at the time he granted the mortgage to Bank. Thus, under subsection (b)(2), the property does not fall within the general scope exclusion for property improved by one to four dwelling units.

Example 4. Henning owns and occupies a single-family home on 5 acres of land, subject to a mortgage in favor of Bank. On the land, Henning maintains a garden in which he grows vegetables for the consumption of his family and friends. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. The court may not appoint a receiver under this Act. Henning occupies the home as his personal residence, and his agricultural activity is incidental to his residential use within the meaning of subsection (b)(1).

Example 5. Henning owns an unoccupied single-family home on one acre of land, subject to a mortgage in favor of Bank. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. The court may not appoint a receiver under this Act. Although Henning does not occupy the property as his personal residence, it does not fall into any of the four categories articulated in subsection (b) and is thus "residential" in nature (even if not currently subject to residential use).

Example 6. Same as Example 5, except that the home is occupied by Gabriel, an unrelated friend to whom Henning leased the home for an agreed rental of $1,000/month. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Although Gabriel's use of the home is residential in nature, Henning's right to collect rents from Gabriel is commercial activity that brings the property within the intended scope of this Act. Thus, under subsection (b)(4), the property does not fall within the general scope exclusion for property improved by one to four dwelling units.

Example 7. Same as Example 5, except the home is occupied by Henning's son Andrew, to whom Henning leased the home for an agreed rental of $500/month. The court may not appoint a receiver under this Act. Even though Henning has a right to collect rents from Andrew, his doing so in the context of a family transaction is not "commercial" activity within the intended scope of the Act.

Example 8. Henning owns a 20-acre parcel of undeveloped land, subject to a mortgage in favor of Bank. Henning goes into default on the mortgage, and Bank seeks the

appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Because the land is not improved by any dwelling unit (and thus is not residential in nature), subsection (b)'s scope limitation does not apply.

Example 9. Same as example 8, except that Henning acquired the land with the specific intent of eventually building a home on the land that he would occupy in his retirement. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Because the land is not currently improved by a dwelling unit (and thus is not residential in nature), notwithstanding Henning's future intent to use the land for residential purposes, subsection (b)'s scope limitation does not apply.

Example 10. Henning owns 1000 acres of land, subject to a mortgage in favor of Bank. Henning subdivided the property and began constructing homes for sale, but the development failed and Henning defaulted after completing only two homes. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Even though the land is improved with only two dwelling units, Henning's development is clearly commercial in character. Thus, under subsection (b)(3), the property does not fall within the general scope exclusion for property improved by one to four dwelling units.

Example 11. Henning owns a parcel of land, subject to a mortgage in favor of Bank, on which he built a "spec" home that remains unsold. Henning goes into default on the mortgage, and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Even though the land is improved with only one dwelling unit, Henning's development of the land is commercial in nature. Thus, under subsection (b)(3), the property does not fall within the general scope exclusion for property improved by one to four dwelling units.

Example 12. Same as Example 11, except that Henning moves into the home and occupies it as a residence while trying to sell it. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Under subsection (b)(1), Henning's continuing attempts to sell the property constitute a commercial use within the intended scope of this Act, despite his temporary occupation of the property as a residence. Likewise, under subsection (b)(3), because Henning originally constructed the home for sale in the ordinary course, Henning's development of the land is commercial in nature. Thus, the property does not fall within the general scope exclusion for property improved by one to four dwelling units.

Example 12 demonstrates the general principle that under this Act, if a person owns land that is within the scope of this Act, that person cannot simply remove the land from the scope of this Act merely by moving onto the land and beginning to occupy it as a residence.

Example 13. Henning owns and occupies a home on one acre of land subject to a mortgage in favor of Bank. Henning supports himself on his profits from "day trading," buying and selling stocks for his personal portfolio. He engages in his day trading activities on the internet from one of the bedrooms in the home. Henning defaults on the mortgage, and Bank seeks the appointment of a receiver. The court may not appoint a receiver under this Act. The land is improved by one dwelling unit, and Henning's day-trading activities should be considered incidental to his occupancy of the home as his primary residence within the meaning of subsection (b)(1).

For purposes of subsection (b)(4), an owner "has the right to collect rents or other income" only if the owner has a legally enforceable agreement (e.g., a lease, license, or other form of occupancy agreement) under which another person has the right to occupy the property.

Example 14. Henning owns a vacation home subject to a mortgage in favor of Bank. Henning owns the vacation home for the exclusive use of himself, his family, and his guests (from whom he collects no rent). Henning defaults on the mortgage, and Bank seeks the appointment of a receiver. The court may not appoint a receiver under this Act. The land is improved by one dwelling unit; further, Henning has not entered into any occupancy agreements and does not have the "right to collect rents" within the meaning of subsection (b)(4). Thus, the land is not commercial in character and does not fall within the intended scope of the Act.

Example 15. Same facts as Example 14, except that Henning rents the house (to persons unrelated to him) for one-week rentals during periods in which Henning is not using the home. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Although the land is improved by one dwelling unit, Henning has the right to collect rents from nonaffiliates within the meaning of subsection (b)(4). Thus, his use of the property is commercial in nature and brings the property within the intended scope of the Act.

It is possible that the owner of a building containing two, three, or four dwelling units can occupy one of the units as his or her primary residence while leasing the other unit(s). Under subsection (b)(4), if the owner leases the other unit(s) to nonaffiliates, the owner's use of the property is generally commercial in nature and is thus within the intended scope of the Act.

Example 16. Henning owns a duplex subject to a mortgage in favor of Bank. He occupies one of the units as his personal residence and leases the other unit to his friend Gabriel at an agreed rent of $1000. Henning and Gabriel are not related. Henning defaults on the mortgage and Bank seeks the appointment of a receiver. If the circumstances justify the appointment of a receiver under the standards in Section 6, the court may appoint a receiver under this Act. Although the land is improved by two dwelling units and Henning occupies one unit as his primary residence, Henning has the right to collect rent from Gabriel within the meaning of subsection (b)(4), bringing the property within the intended scope of this Act.

As Example 16 demonstrates, the court may appoint a receiver for a duplex, triplex, or quadplex

in which the owner occupies one unit as the owner's primary residence and leases out the other unit(s). In such a case, while this Act does authorize the court to appoint a receiver for the entire building, the Act does not address whether the receiver may eject the owner from occupancy of the owner's unit during the receivership, or charge the owner rent for the owner's continued occupation of the unit. The Act leaves resolution of these questions to other applicable law. See, e.g., Restatement (Third) of Property: Mortgages § 4.3, comment d (receiver "may not collect rent or a use or occupancy charge from a mortgagor who actually occupies the premises and is personally liable on the mortgage obligation").

3. The exclusion of residential property from the Act does not mean that a court could never appoint a receiver for such a property. Instead, the exclusion in subsection (b) means only that ***this Act*** may not be used to be appoint a receiver. A court could appoint a receiver for such residential property under other state law, if other state law would permit appointment of a receiver for residential property under the circumstances. For this reason, subsection (d) makes clear that this Act does not provide the exclusive basis by which a court may appoint a receiver.

Further, the mere fact that land is within the scope of this Act does not justify the appointment of a receiver. The court should appoint a receiver for property within the scope of this Act only if the court concludes that the standards for appointment in Section 6 have been satisfied.

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

SECTION 5. POWER OF COURT. The court that appoints a receiver under this [act] has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property.

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

Comment

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

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

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

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

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

4. This Act does not address the extent to which a person has a right to jury trial in the resolution of a controversy pending in the receivership court. The Act leaves this question to other applicable law.

SECTION 6. APPOINTMENT OF RECEIVER.

(a) The court may appoint a receiver:

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

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

(B) has been or is about to be the subject of a voidable transaction;

(2) after judgment:

(A) to carry the judgment into effect; or

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

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

(4) 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 or other enforcement of a mortgage, the court may appoint a receiver for the mortgaged property if:

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

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

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

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

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

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

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

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

Subsection (b) includes bracketed alternatives. Under the first, a mortgagee is entitled to appointment of a receiver in the six circumstances listed in subsection (b). Under the second, these six circumstances would justify appointment of a receiver, but appointment would be subject to the court's discretion rather than an entitlement. Under Section 7 of the Uniform Assignment of Rents Act (UARA), an assignee of rents is entitled to appointment of a receiver under the circumstances expressed in subsection (b). Thus, in a jurisdiction that has enacted UARA, subsection (b) should use the first bracketed alternative to avoid the risk that adoption of this act might create an implied repeal of UARA Section 7. Even if a jurisdiction has not adopted UARA, it may still wish to enact the first bracketed alternative.

Comment

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

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

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

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

Subsection (a)(3) authorizes the court to appoint a receiver under this Act in cases in which courts of this state have appointed or may appoint receivers for real property on equitable grounds. This includes (but is not limited to) the insolvency of the owner of the real property, whether equitable (i.e., the owner's inability to pay its debts when due) or in balance-sheet terms (i.e., when the amount of the owner's liabilities exceed the value of the owner's assets).

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

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

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

By contrast, there is significant recent authority supporting the view that a receivership clause alone provides a sufficient basis to appoint a receiver after the mortgagor's default. See,

e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n Ltd. Partn*., 830 P.2d 1138 (Colo. Ct. App. 1992); *Fleet Bank v. Zimelman*, 575 A.2d 731 (Me. 1990); *Metropolitan Life Ins. Co. v. Liberty Ctr. Venture*, 650 A.2d 887 (Pa. Super. Ct. 1994); *Federal Home Loan Mortg. Corp. v. Nazar*, 100 B.R. 555 (D. Kan. 1989). Likewise, federal courts have routinely held receivership clauses in federally insured mortgages sufficient to justify the appointment of a receiver. See, e.g., *United States v. Berk & Berk*, 767 F. Supp. 593 (D. N.J. 1991); *United States v. Drexel View II, Ltd*., 661 F. Supp. 1120 (N.D. Ill. 1987).

Consistent with this recent authority, both the Restatement (Third) of Property: Mortgages and the Uniform Assignment of Rents Act take the view that a mortgagee/assignee of rents is "entitled" to the appointment of a receiver if the loan documents contain a clause under which the mortgagor consented to appointment. Restatement (Third) of Property: Mortgages § 4.3(b); UARA § 7(a). Furthermore, some state statutes explicitly make clear that the mortgagee is entitled to a receiver following default as a matter of right. See, e.g., Ind. Code § 32-30-5-1 (court "shall" appoint a receiver if "either the mortgagor or the owner of the property has agreed in the mortgage or in some other writing to the appointment of a receiver"); Minn. Stat. Ann. § 559.17, subd. 2 (if assignment of rents contains receivership clause, "the court shall, without regard to waste, adequacy of the security, or solvency of the mortgagor, appoint a receiver");

N.Y. Real Prop. Law § 254(10) (receivership clause "must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage"); N. Mex. Stat. Ann. § 44-8-4(A) (court "shall appoint a receiver in an action by a mortgagee or secured party … where such mortgage, security agreement, contract or other written agreement provides for the appointment of a receiver").

Consistent with this recent trend, the first bracketed alternative in subsection (b) tracks the comparable provision of § 7 of the Uniform Assignment of Rents Act. Under this alternative, a person seeking appointment of a receiver is entitled to a receiver as a matter of right in a proceeding to foreclosure a mortgage or enforce an assignment of rents if one or more of the following conditions exists: (1) appointment is necessary to protect the mortgaged property or rents arising from the property from waste, loss, transfer, or dissipation; (2) the loan documents contain a receivership clause; (3) the owner otherwise consents; (4) the property's value is not sufficient to satisfy the secured obligation; (5) the owner has failed to turn over rents that the creditor is entitled to collect; or (6) a subordinate creditor has obtained the appointment of a receiver for the property. Under the second bracketed alternative, the presence of one or more of these six factors is grounds for appointment in the court's discretion. The Legislative Note makes clear that in jurisdictions that have enacted the Uniform Assignment of Rents Act, the state should make certain that Section 6(b) adopts the "matter of right" alternative, so as to avoid any possibility that the enactment of this Act might work an implied repeal of the provisions of UARA Section 7. Likewise, in states in which statutory law or case law makes appointment of a receiver mandatory in certain cases involving mortgage enforcement, the first bracketed alternative should be adopted to facilitate the Act's consistency with existing state law. Even a state that currently has no rule of law making the appointment of a receiver mandatory in some cases nevertheless may choose to enact the first bracketed alternative.

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

Subsection (b) authorizes the court to appoint a receiver "in connection with foreclosure or other enforcement of a mortgage …." The section permits a mortgagee foreclosing nonjudicially to petition the court directly for the appointment of a receiver, without having to institute an entirely separate action for specific performance of an assignment of rents or some other civil action to which the receivership could serve as an ancillary remedy.

The reference in paragraph (b)(1) to "the mortgaged property" includes proceeds. Thus, protection against the waste, loss, transfer, dissipation, or impairment of insurance proceeds of the mortgaged real property can be the basis for the appointment of a receiver.

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

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

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

Memorandum

"A receiver is typically appointed in foreclosure proceedings to preserve the status quo, preserve the property, and collect and apply rents and profits to the payment of the mortgage." *DeSilva v. First Cmty. Bank of Am.*, 42 So.3d 285, 290 (Fla. 2d DCA 2010); *see also Baumgartner*, 128 So. at 248 (observing same). "The appointment of a receiver ... should be approached with caution and circumspection." *DeSilva*, 42 So.3d at 288 (alteration in original) (quoting *Edenfield v. Crisp*, 186 So.2d 545, 548 (Fla. 2d DCA 1966)). A cautious approach to the appointment of a receiver is appropriate because such an appointment "is in derogation of the fundamental right of the legal owner to possession of the property." *Twinjay Chambers P'ship. v. Suarez*, 556 So.2d 781, 781 (Fla. 2d DCA 1990); *see also Plaza v. Plaza*, 78 So.3d 4, 6 (Fla. 3d DCA 2011) ("Appointing a receiver is a rare and extraordinary remedy."); *Warshall v. Price*, 617 So.2d 751, 752 (Fla. 4th DCA 1993) ("Before ... trial[,] ... a motion for the appointment of a receiver of the property of the defendant is a drastic matter constituting a taking of property and requires a showing of exigent circumstances."); *Electro Mech. Prods., Inc. v. Borona*, 324 So.2d 638, 639 (Fla. 3d DCA 1976) ("The appointment of a receiver is a drastic matter in that it constitutes a taking of property and, therefore, should not be used by the courts except in cases of necessity.").

Under *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241(1930), the seminal case governing the appointment of a receiver, Courts are required to balance the mortgagor's right to own and possess its property against the interests of the mortgagee in protecting its security in the property. Thus, to be entitled to the appointment of a receiver, the movant must show, at a minimum, "that [the] property is subject to a serious loss," and that the movant has a "clear legal right ... to the property." *Plaza*, 78 So.3d 4, 6 (Fla. 3d DCA 2011) (alteration in original) (quoting *Apalachicola N.R. Co. v. Sommers*, 79 Fla. 816, 85 So. 361, 361 (1920)).

Notwithstanding the foregoing, there is no clear standard as to when a receiver should be appointed over real property, when there is waste or another potential adequate remedy at law. *MB Plaza, LLC v. Wells Fargo Bank Nat. Ass'n.*, 113 So. 3d 1020, 1024 (Fla. 2d DCA 2013)("Waste would have provided a justifiable basis for the trial court to exercise its discretion by appointing a receiver in *Seasons Partnership*, but this court did not intend to make waste a condition precedent to such an appointment."); *McAllister Hotel v. Schatzberg*, 40 So. 2d 201, 203 (Fla. 1949) (holding n appointment of receiver should be exercised only in those cases where exigencies demand it and no other protection to the applicants can be devised by the court). In *Sharon Gardens Assoc. v. Florescue*, 629 So.2d 1002 (Fla. 4th DCA1993), (Holding that Plaintiff is not entitled to receiver where partner or partnership was not insolvent); *Wheeler v. Matthews*, 70 Fla. 317 (Fla. 1915) (-holding where a president of an insolvent corp. collects the corporate assets and uses the money to pay some creditors in full, some in part, and some receive none, such conduct does not constitute

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fraud or a spoliation.);*Recarey v. Rader*, 320 So.2d 28 (Fla. 1975) (holding appropriate and effective relief could have been granted and no receiver needed where Appellees demanded the court to appoint a receiver to take charge of assets and operations of the hospital after appellants voted at stockholders' meeting to sell hospital, eliminating all of appellees' equity as stockholders.). *Atco Const. & Development Corp. v. Beneficial Sav. Bank, Fla. Stat.B.*, 523 So. 2d 747 (Fla. 5th DCA 1988); *Florida Reinvestment Corp. v. Cypress Sav. Ass'n*, 509 So. 2d 1352 (Fla. th DCA 1987); *Boyd v. Banc One Mortgage Corp.*, 509 So.2d 966, 967 (Fla. 3d DCA 1987); *see also Chromy v. Midwest Fed. Sav. & Loan Ass'n*, 546 So.2d 1172 (Fla. 3d DCA 1989); *Lakeview Townhomes of California Club, Inc. v. Coral Gables Fed. Sav. & Loan Ass'n*, 656 So. 2d 240, 240 (Fla. 3d DCA 1995); *Orlando Hyatt Associates, Ltd. v. F.D.I.C.*, 629 So. 2d 975, 976– 77 (Fla. 5th DCA 1993) (noting that the assignment of rents statute does not apply to the assignment of profits); *Polycoat Corp. v. City Nat'l Bank of Miami*, 327 So.2d 126, 127 (Fla. 4th DCA 1976) (reversing ex parte receivership because there were no "extreme circumstances of irreparable damage"); *Edenfield v. Crisp*, 186 So.2d 545, 548 (Fla. 2d DCA 1966) (affirming receivership based on allegations that property and assets had been diverted); *See Cassara v. Wofford*, 159 Fla. 565, 28 So.2d 904, 905 (1947) (quashing ex parte receivership because it was not apparent that giving notice of intent to appoint receiver would result in immediate injury).

Considering the foregoing, the proposed provisions of the Uniform Receivership act governing the appointment of a receiver should be adopted. This provision as drafted codifies the standard in Florida as it strikes an appropriate balance between the mortgagor's interest in the

SECTION 7. DISQUALIFICATION FROM APPOINTMENT AS RECEIVER; DISCLOSURE OF INTEREST.

(a) The court may not appoint a person as receiver unless the person submits to the court

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a statement under penalty of perjury that the person is not disqualified.

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

(1) is an affiliate of a party;

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

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

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

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

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

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

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

(3) maintains with a party a deposit account as defined in [U.C.C. Section 9-102(a)(29)].

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

Comment

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

Existing law in some states permits a court to appoint an interested person as receiver with the consent of all parties. See, e.g., Okla. Stat. Ann. tit. 12, § 1552. Because significant abuse might result from the appointment of an interested person as a receiver, this Act requires the receiver's independence.

Subsection (a) requires the prospective receiver to provide sworn evidence of its independence, and subsection (b) sets forth the circumstances that would disqualify a person from service as a receiver. Subsection (c) makes clear, however, that a person is not disqualified as a receiver merely because that person has served as a receiver in or is owed compensation relating to a prior unrelated dispute. Mortgage lenders frequently seek the appointment of a receiver based on that person's competent service as receiver in one or more prior transactions; the principle of independence would be too strict if it prevented a court from appointing such a person as receiver despite a demonstrated track record of competence and the lack of any other apparent conflict of interest.

Subsection (c) also makes clear that an individual is not disqualified from service as a receiver for an owner's property merely because the receiver is obligated to a creditor of the owner on a consumer loan that is not in default, or because the receiver maintains a deposit account with such a creditor. For example, an individual would not be disqualified from serving as receiver in a case in which Last National Bank is a creditor merely because the receiver's home mortgage was originated or is serviced by Last National Bank.

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

SECTION 8. RECEIVER'S BOND; ALTERNATIVE SECURITY.

(a) Except as otherwise provided in subsection (b), a receiver shall post with the court a bond that:

(1) is conditioned on the faithful discharge of the receiver's duties;

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

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

(4) is effective as of the date of the receiver's appointment.

(b) The court may approve the posting by a receiver with the court of alternative security, such as a letter of credit or deposit of funds. The receiver may not use receivership

property as alternative security. Interest that accrues on deposited funds must be paid to the receiver on the receiver's discharge.

(c) The court may authorize a receiver to act before the receiver posts the bond or alternative security required by this section.

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

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

Comment

1. The purpose of the receiver's bond is to ensure that the receiver faithfully performs the receiver's duties, renders a true accounting of receivership property and receivership receipts and disbursements, and obeys the lawful orders of the court. 1 Clark on Receivers § 119, at 172 (3d ed. 1959). The bond thus provides a source of recovery for persons harmed by the receiver's misfeasance (such as, for example, the receiver's wrongful disbursement of receivership funds).

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

Under subsection (a), this Act leaves the amount of the receiver's bond to the discretion of the judge based on the particular circumstances of the case. Because receivership is by its nature a flexible remedy, rather than dictate a fixed amount for the bond or an amount calculated through a mandatory formula, the Act allows the court the flexibility to require bonding in an amount appropriate to the circumstances of the receivership. If the court is appointing a receiver for commercial real estate such as an office building or shopping center, for example, best practices would suggest that the court should require a bond amount based on expected monthly

cash flow through the receivership.

2. Although it is not a common practice for receivers to post alternative security, subsection (b) permits the court to approve the posting of alternative security (such as a letter of credit or deposit of funds) in lieu of a bond. The receiver may not use receivership property as alternative security.

3. Although subsection (a) requires that the receiver's bond must be effective as of the date of appointment, subsection (c) makes clear that the court may authorize the receiver to act before the bond (or any alternative security) has been posted with the court.

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

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

To provide finality to the surety on the receiver's bond, subsection (d) provides a one-year period for filing claims against the bond, and is modeled on a similar provision in Wash. Rev. Code Ann. § 7.60.045. As the Legislative Note makes clear, the period specified in subsection (d) should be consistent with the applicable limitations period for obtaining relief from a judgment.

SECTION 9. STATUS OF RECEIVER AS LIEN CREDITOR. On appointment of a receiver, the receiver has the status of a lien creditor under:

(1) [U.C.C. Article 9] as to receivership property that is personal property or fixtures; and

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

Comment

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

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

Nevertheless, Uniform Commercial Code Article 9 requires that a security interest be perfected to ensure its priority versus certain third parties (including lien creditors). As a result, a receiver can assert priority over an unperfected security interest in personal property which the receiver finds in his possession. *Id.* § 274.2, at 426.

Consistent with the foregoing, Section 9 (which is a simplified version of Minnesota's receivership statute, Minn. Stat. Ann. § 576.30) provides that the receiver has the status of a lien creditor as to both personal and real property. Under Article 9 of the UCC, the term "lien creditor" includes "a receiver in equity from the time of appointment." U.C.C. § 9-102(a)(52)(D). Section 9 makes clear that a receiver appointed under this Act also has the status and priority of a "lien creditor" as to personal property under Article 9.

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

Section 9 also gives the receiver the status and priority of a lien creditor under the state's recording statute with respect to receivership property that is real property. The application of Section 9 would produce different results in different states with respect to an unrecorded interest in real property (such as an unrecorded mortgage). In the majority of states, an unrecorded mortgage would nevertheless have priority over a subsequent judgment lien. See Stoebuck & Whitman, The Law of Property § 11.10, at 880-881 ("Often this conclusion is based on the literal language of the pertinent judgment lien statute, which typically imposes the lien on 'the defendant's real property—not the record property, the courts frequently hold, but the actual property as depleted by unrecorded conveyances. An alternative basis for the same result is that the creditor is simply not a 'purchaser' in the sense used by the recording statute."). In a minority of states, an unrecorded mortgage is subordinate to a subsequent judgment lien, because the recording statute either explicitly so provides or has been so interpreted by the state's courts. See *Schleuter Co. v. Sevigny*, 564 N.W.2d 309 (S.D. 1997); *Solans v. McMenimen*, 951 N.E.2d 999 (Mass. Ct. App. 2011); *McDuff Estate v. Kost*, 158 A. 373 (R.I. 1932).

SECTION 10. SECURITY AGREEMENT COVERING AFTER-ACQUIRED PROPERTY. Except as otherwise provided by law of this state other than this [act], property that a receiver or owner acquires after appointment of the receiver is subject to a security

agreement entered into before the appointment to the same extent as if the court had not appointed the receiver.

Comment

Section 10 is adapted from Washington's receivership statute, Wash. Rev. Code Ann. § 7.60.240. Section 10 provides that if the owner had entered into a pre-appointment security agreement covering after-acquired property, that agreement is effective against property acquired after the receiver's appointment to the extent provided under other law. By contrast, under bankruptcy law, the filing of a bankruptcy petition terminates the effectiveness of an after-acquired property clause contained in any prepetition security agreement entered by the debtor. 11 U.S.C. § 552(a). While this limitation on the effectiveness of an after-acquired property clause makes sense in the context of bankruptcy, it is not appropriate in the context of many commercial real estate receiverships that involve operating businesses. Section 10 thus ensures that the appointment of a receiver should have no impact on the effectiveness of an after-acquired property clause in a pre-petition security agreement.

As used in Section 10, "property that a receiver … acquires after appointment of the receiver" is limited to property in which the owner has some interest (i.e., property that is receivership property), but not property that a receiver acquires in which the owner has no interest (i.e., property that is not receivership property).

> ***Example 1***. Henning owns and operates the Broadway Hotel. Bank holds a recorded mortgage on the land and a security interest (properly perfected by filing) in all present and after-acquired inventory and equipment used in the operation of the Broadway Hotel. At the request of a judgment creditor of Henning, the court appoints Smith as a receiver for the Broadway Hotel. Smith has significant experience in operating hotels, is frequently appointed as a receiver for hotels, and at any one time typically is operating from five to ten hotels as a receiver. In the context of operating the Broadway Hotel as receiver, Smith acquires a dozen new beds and places them into several of the rooms to replace existing worn-out beds. The beds constitute "after-acquired equipment" subject to the Bank's pre-receivership security agreement.
>
> ***Example 2***. Same as Example 1. Smith acquires a computer for Smith's use in accounting, recordkeeping and reporting both as to Smith's operations of the Broadway Hotel and as to Smith's operations of other hotels for which he serves as receiver. To acquire the computer, Smith uses Smith's personal funds, not revenues generated from the operation of the Broadway Hotel. As Henning has no ownership rights in the computer, Bank has no security interest in the computer pursuant to its pre-receivership security agreement with Henning.

SECTION 11. COLLECTION AND TURNOVER OF RECEIVERSHIP PROPERTY.

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

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

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

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

(c) If a creditor has possession, custody, or control of receivership property and the validity, perfection, or priority of the creditor's lien on the property depends on the creditor's possession, custody, or control, the creditor may retain possession, custody, or control until the court orders adequate protection of the creditor's lien.

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

Comment

1. When a receiver is appointed for commercial real estate, the receiver's ability to carry out its duties successfully depends on the receiver's ability to obtain control over all receivership property (whether in the hands of the owner or third persons) and to collect accrued but unpaid rents arising from the real estate. To this end, Section 11 facilitates the ability of the receiver to gather receivership property and to collect debts that are receivership property.

Subsection (a)(1) facilitates the receiver's ability to collect debts that constitute receivership property. The obligor on a debt that is matured, payable on demand, or payable on order must pay the debt to the receiver on demand, except to the extent that the obligor has a right of setoff or recoupment under other law. Subsection (a)(1) thus provides the receiver with

an ability to collect debts that is comparable to that possessed by a trustee or debtor-in-possession under Section 542(b) of the Bankruptcy Code, 11 U.S.C. § 542(b).

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

2. Subsection (b) provides that a person who owes money to the owner and has notice of the receiver's appointment may not satisfy that obligation by paying the owner. The rule established by subsection (b) is consistent with background principles of commercial law. See, e.g., U.C.C. § 9-406(a) ("[A]n account debtor … may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification … that that amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.").

> ***Example 1***: Henning owns a 10-unit apartment building. Gabriel occupies Unit 1 pursuant to a written lease at a rental of $1,000/month. On April 1, at the request of a judgment creditor, the court appoints Smith as a receiver for the building. On April 2, Gabriel pays Henning $1,000 for April rent. On April 3, Gabriel receives a letter from Smith informing Smith of his appointment and directing Gabriel to pay the $1,000 April rent directly to Smith. Gabriel's April 2 payment to Henning discharged his liability for April rent.
>
> ***Example 2***: Same as Example 1, except that Gabriel receives notice of Smith's appointment on April 2 and pays Henning $1,000 on April 3. Gabriel's April 3 payment to Henning did not discharge his liability for April rent, and as receiver Smith can enforce Gabriel's liability for April rent through applicable legal processes.

Under best practices, a competent receiver will accompany any demand for payment from a debtor with a copy of the order of appointment, thus making it clear that the debtor has notice of the receiver's appointment. Nevertheless, in some cases, a debtor might have "notice" of the appointment of a receiver within the meaning of subsection (b) even if the person has not actually received a copy of the order appointing the receiver. If a receiver makes a demand of a debtor for payment of a debt under Section 11 without having provided the debtor with a copy of the order or other evidence of its appointment, the debtor may request (and the receiver must provide) reasonable proof of its appointment. Cf. U.C.C. § 9-406(c).

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

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

The Act does not specifically define "adequate protection" or specify what constitutes adequate protection under subsection (c), but leaves this determination to the discretion of the court based on the circumstances of the case. In general, however, any form of payment or security that would constitute adequate protection under the Bankruptcy Code, 11 U.S.C. § 361, would suffice to constitute adequate protection under this Act.

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

SECTION 12. POWERS AND DUTIES OF RECEIVER.

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

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

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

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

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

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

(6) on subpoena, compel a person to submit to examination under oath, or to

produce and permit inspection and copying of designated records or tangible things, with respect to receivership property or any other matter that may affect administration of the receivership;

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

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

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

(b) With court approval, a receiver may:

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

(2) make improvements to receivership property;

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

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

(5) pay compensation to the receiver as provided in Section 21, and to each professional engaged by the receiver as provided in Section 15;

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

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

(c) A receiver shall:

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

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

license, exchange, collection, or other disposition of the property;

(3) file with the [appropriate real property recording office] a copy of the order appointing the receiver and, if a legal description of the real property is not included in the order, the legal description;

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

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

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

Comment

1. Existing receivership law in most states does not adequately set forth the powers that a receiver may (or may not) exercise, either with or without prior approval of the court. This can result in uncertainty regarding the ability of a receiver to borrow money, to approve or reject executory contracts entered into by the owner of the property (including unexpired leases), to sell receivership property either in or outside of the ordinary course of business, or to make improvements to receivership property. Those adhering to best practices in preparing receivership orders of appointment typically ensure that the order incorporates the powers identified in this section, and thus subsections (a) and (b) attempt to incorporate these principles of best practice into receiverships arising under this Act.

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

2. Subsection (a) sets forth the general powers that the receiver may exercise as a matter of the receiver's default powers, except to the extent that the receivership order or other law explicitly restricts the receiver. In particular, subsection (a) addresses the receiver's authority to sell, lease, license, or otherwise transfer receivership property in the ordinary course of business. Subsection (a) thus allows the receiver to conduct ordinary course sales (such as sales of inventory) in the process of operating a business. It also permits the receiver of a partially-completed condominium project to sell completed units. The draft does not contain a definition of "ordinary course of business," but leaves the term to judicial development.

Subsection (a)(6) permits a receiver to compel a person to submit to examination under

oath after issuance of a subpoena. However, the Act does not independently create authority in a receiver to issue a subpoena. If the law of the state other than this Act gives the receiver the power to issue a subpoena, subsection (a)(9) would permit the receiver to do so.

Subsection (b) sets forth specific powers that the receiver can exercise only if specifically authorized by the court (following notice and an opportunity for a hearing as prescribed in Section 3). These powers include the power to sell, lease, license or otherwise transfer receivership property other than in the ordinary course of business, to make improvements to receivership property, to adopt or reject executory contracts of the owner, to allow or disallow claims against the receivership, to pay compensation to professionals, to make distributions of receivership property, and to incur debt for the use or benefit of receivership property other than in the ordinary course of business.

Because this Act is intended to facilitate the appointment and operation of receivers in a variety of different contexts, the Act does not establish specific standards for a court's approval of a request by the receiver to borrow outside the ordinary course of business. Subsection (b)(1) is not intended, however, to give the court a "blank check" to authorize the receiver to borrow funds and grant the lender of those funds priority over pre-existing liens on receivership property. Under the weight of existing authority, such "priming loans" are not appropriate in cases involving the operation of a private business, without the consent of the pre-existing lienholders, except as necessary to preserve the property. See, e.g., 2 Clark on Receivers, § 470(b), at 772-773 (3d ed. 1959) (collecting cases). Subsection (b)(1) does not displace this authority.

Whether a receiver's powers are default powers authorized under subsection (a) or specific powers granted by the court under subsection (b), section (d) makes clear that the court may expand, modify, or limit powers previously granted to the receiver. Thus, for example, if the initial order of appointment did not authorize the receiver to make any improvements to receivership real property, the court could subsequently (following notice and opportunity for a hearing as required in Section 3) authorize the receiver to make an improvement that the receiver believed was necessary in the context of operating the property.

3. Section 12(c), which describes the receiver's duties, is adapted from Minn. Stat. Ann. § 576.29, subd. (2).

Subsection (c)(2) requires the receiver to "account for" receivership property. This accounting is evidenced by the receiver's interim reports (if required by the court) under Section 19 and the final report provided under Section 23. These reports require the receiver to identify items of receivership property and any dispositions of receivership property. As a party in interest in the receivership, the owner has the right to receive a copy any reports filed by the receiver.

Subsection (c)(3) includes a duty for the receiver to record a copy of the order of appointment in the real estate records in any county in which real property that is receivership property is located. This Act does not authorize or empower the receiver to record a copy of the order without payment of the applicable recording fee, but the receiver is authorized to pay the

applicable recording fee and to obtain reimbursement of that fee under Section 21.

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

Section 12(c) does not articulate specific consequences of a receiver's failure to carry out the receiver's duties. This generality is appropriate, as a receiver's failure could range from the trivial (e.g., the receiver's preparation of an interim report that inadvertently did not disclose the payment of a bona fide, undisputed debt) to the profound (e.g., the receiver's misapplication of receivership funds to the receiver's personal benefit). Instead, the Act leaves to the discretion of the court what particular consequences (such as the disallowance of some or all of the receiver's fees under Section 21, or the replacement of the receiver under Section 22) would follow from any particular failure by the receiver.

SECTION 13. DUTIES OF OWNER.

(a) An owner shall:

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

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

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

(4) on subpoena, submit to examination under oath by the receiver concerning the

acts, conduct, property, liabilities, and financial condition of the owner or any matter relating to the receivership property or the receivership; and

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

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

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

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

(2) sanction the failure as civil contempt.

Comment

1. Section 13 describes the duties of the owner, and derives from the Washington receivership statute, Wash. Rev. Code Ann. § 7.60.080. Subsection (a)(1) requires the owner to cooperate fully with the receiver in the administration of the receivership and the receiver's performance of its duties. This duty of cooperation includes the duty to take reasonable steps to assure that third parties in possession, custody, or control of receivership property (or records or information related to receivership property) comply with the receiver's efforts to obtain possession, custody, or control of that property.

Subsection (a)(2) requires the owner to preserve and turn over to the receiver all receivership property in the owner's possession, custody, or control. Consistent with the definition of property in Section 2(13) of this Act, this turnover obligation includes both tangible and intangible property. Subsection (a)(3) obligates the owner to make available to the receiver any records related to receivership property and any passwords or authorizations needed to facilitate the receiver's access to information regarding receivership property (such as banking or accounting information, information on websites or electronic databases, or other information in the hands of third parties).

To facilitate the receiver's ability to carry out its duties with regard to the receivership and receivership property, subsection (a)(4) obligates the owner to submit to examination by the receiver, under oath, regarding the owner's financial condition, the owner's actions with regard to receivership property, and other matters relevant to the receiver's ability to carry out the receiver's duties. The Act leaves to other applicable law the question of whether the receiver has

the power to issue subpoenas. If other applicable law grants such power to a receiver, the receiver may issue a subpoena for an examination of the owner.

2. Subsection (b) makes clear that if the owner is not an individual, the owner's duties under this Act extend to any officer, director, member, partner, trustee, or other individual or nonindividual exercising or having the power to exercise control over the affairs of the owner. In the context of a receivership involving the property of a publicly-traded corporation, for example, the owner's obligation would extend to officers and directors, but not to a shareholder unless that shareholder held a controlling stake in the corporation.

3. If the owner's failure to fulfill a duty imposed by this Act causes the receiver to suffer actual harm, subsection (c) authorizes the court to impose on the owner and award to the receiver damages, including reasonable attorney's fees and costs, on account of the owner's failure. This permits the court, in appropriate cases, to shift the cost of the owner's noncompliance from affected creditors to the owner. For example, if the owner refuses to turn over receivership property and the receiver has to incur $5,000 in expenses and attorney fees to locate and take possession of the property, subsection (c) permits the court to impose liability for that amount on the owner as a sanction for the owner's noncompliance.

Subsection (c) also recognizes that in appropriate cases, the court may sanction the owner's noncompliance as civil contempt. Subsection (c) is not intended, however, to limit the scope of the court's equitable powers to address an owner's noncompliance with any duties imposed by Section 13. In appropriate circumstances, a court may use other equitable remedies, such as the imposition of an injunction or a constructive trust, to address an owner's failure to comply with its duties under the Act. If the receiver seeks and obtains a recovery under subsection (c), that recovery is receivership property and not the proceeds of the receiver's personal cause of action.

SECTION 14. STAY; INJUNCTION.

(a) Except as otherwise provided in subsection (d), after notice and a hearing, the court may enter an order providing for a stay, applicable to all persons, of any act, action, or proceeding:

(1) to obtain possession of, exercise control over, or enforce a judgment against all or a portion of the receivership property as identified in the order creating the stay; and

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

The court shall include in its order a specific description of the receivership property subject

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(1) to obtain possession of, exercise control over, or enforce a judgment against all or a portion of the receivership property as defined in the order creating the stay; and

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

The court shall include in its order a specific description of the receivership property subject to the stay, and shall include the following language in the title of the order: "Order Staying Certain Actions to Enforce Claims against Receivership Property".

(b) Except as otherwise provided in subsection (d), the court may enjoin an act, action, or proceeding against or relating to receivership property, as defined in Section 2, Subsection 16, if the injunction is necessary to protect against misappropriation of, or waste relating directly to, the receivership property, as defined in Section 2, Subsection 16.

(c) A person whose act, action, or proceeding is stayed or enjoined under this section may apply to the court for relief from the stay or injunction and the court after hearing on notice may grant relief for cause shown.

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

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

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(2) any act, action, or proceeding to perfect, or maintain or continue the perfection of, an interest in receivership property, as defined in Section 2, Subsection 16;

(3) commencement or continuation of a criminal proceeding;

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

(5) establishment by a governmental unit of a tax liability against the receivership property, or the owner of such receivership property, as defined in Section 2, Subsection 16, or an appeal of any such liability.

(e) Any intentional act that has the effect of violating a stay or injunction under this section may be voidable as ordered by the court.

(f) The scope of the receivership property subject to the stay described in this Section 14, Subsection (a) may be modified upon request of the receiver or other person, after hearing on notice.

(g) In connection with the entry of an order under subsection (a) or (b), the court shall determine whether an additional bond or alternative security will be required as a condition to entry of the stay or injunction and, if required, direct the party requesting the stay or injunction to post a bond or alternative security as a condition for the stay or injunction to become effective.

Comment

1. As the Clark treatise on receivership explains, it is customary for the order appointing a receiver to impose by its express terms an injunction against acts, actions, or proceedings that

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(1) award actual damages caused by the violation, reasonable attorney's fees, and costs; and¶
(2) sanction the violation as civil contempt.¶

could interfere with the receiver's possession and management of receivership property or the performance of the receiver's duties:

> The order of appointment may properly include an order directed against the defendant, if an individual and if a corporation against its officers, servants, agents and employees, ordering each and all of them to deliver up the defendant's property to the receiver and enjoining each and all of them from interfering with the control and possession of the property, and if a corporation, from exercising any privileges or franchises granted to the corporation. The injunction may go further and enjoin each and all of them from collecting or receiving any debts due to the defendant, individual or corporation and from paying out, selling, or transferring any property of the estate including monies, funds, lands, tenements or effects of any kind whatsoever of the defendant.
>
> The court may protect its possession and control of property within its territorial jurisdiction even without a specific injunction. The order of appointment impliedly enjoins parties to the cause and warns any other person from interfering with the court's control and possession. [2 Clark on Receivers, § 625.1(a), at 1024 (3d ed. 1959).]

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

The stay created by Section 14 is narrower in scope than the automatic stay arising in a bankruptcy proceeding. Section 14 does not prevent the owner from seeking bankruptcy protection, nor does it prevent other creditors from placing the owner into bankruptcy, even if the bankruptcy filing would result in an interference with the receiver's possession, custody, or control of receivership property. See, e.g., *Gilchrist v. GE Capital Corp.*, 262 F.3d 295 (4th Cir. 2003) (federal court receivership order does not bar creditors from filing involuntary petition against debtor).

2. Subsection (b) authorizes the court to grant an injunction against an act, action, or proceeding that is not stayed under subsection (a) as necessary to protect receivership property or facilitate the administration of the receivership. Subsection (b) is limited, however, to acts, actions, or proceedings against receivership property, the receiver, or the owner; therefore, subsection (b) would not authorize the court to stay an action against a guarantor or co-obligor.

3. Subsection (c) permits any person subject to the stay or injunction to apply to the court for relief from the stay or injunction for cause. An interested person who wishes to seek relief but is not a party should intervene in the receivership action.

The Act does not define "cause," but leaves to judicial development the circumstances that would justify relief. Nevertheless, "cause" under subsection (c) certainly includes the right of a senior lienholder to obtain the appointment of a receiver under this Act or to proceed with a foreclosure after default. Under traditional law, rents collected by a receiver appointed at the request of a junior lienholder could be applied to the reduction of the junior lienholder's debt until the senior lienholder took appropriate steps to enforce its right to collect rents. See, e.g., Restatement (Third) of Property: Mortgages § 4.5(b). If a junior lienholder obtains the

appointment of a receiver for mortgaged property, the court must allow a senior lienholder to enforce its right to collect rents. Cf. Section 6(b)(6) (appointment of receiver at request of junior lienholder justifies appointment of receiver at request of senior creditor).

> ***Example 1***. Henning owns a parcel of commercial real estate subject to two liens: a senior mortgage held by First Bank, and a junior mortgage held by Second Bank. Second Bank obtains the appointment of a receiver. Henning is in default under the First Bank mortgage, First Bank holds a recorded assignment of rents, and First Bank is entitled to the appointment of a receiver under the standards in Section 6. While the appointment of the receiver at the request of Second Bank triggers a stay under subsection (a), First Bank may request relief from stay to have a receiver appointed its request, and is entitled to that relief. The court must either appoint a different receiver, or order that any sums collected by the existing receiver must thereafter be applied to the debt of First Bank.
>
> ***Example 2***. Same as Example 1, except First Bank requests relief from stay to institute a judicial or (if allowed by applicable law) nonjudicial foreclosure proceeding. The court should ordinarily grant relief from stay to permit First Bank to foreclose its mortgage in accordance with otherwise applicable law.

4. Subsection (d) provides a list of exceptions to the stay created by subsection (a) or an injunction under subsection (b). Subsection (d)(1) makes clear that the stay does not prevent the creditor who sought appointment of the receiver from foreclosing its mortgage or enforcing its assignment of rents. Thus, if a mortgagee seeks and obtains the appointment of a receiver for the mortgaged property, that mortgagee may institute a judicial or (if permitted by applicable law) nonjudicial foreclosure proceeding without violating the stay.

Subsection (d)(2) protects the ability of a creditor to take appropriate steps to perfect a lien or maintain the priority of that perfection despite the appointment of a receiver without having to seek relief from the court. It permits a person with a security interest in receivership property to perfect that interest following appointment of a receiver. Likewise, it permits a creditor to file a continuation statement to maintain its perfection so long as that continuation statement was filed within the applicable period to ensure that the creditor maintained continuous perfection. Further, it permits a creditor holding a possessory lien on receivership property to retain possession, as authorized under Section 11(c), until such time as the court enters an order providing adequate protection of the creditor's lien. Subsection (d)(2) would also permit a creditor that had provided labor or materials incorporated into an improvement on receivership real property, but had not been paid, to take whatever actions are necessary under the applicable mechanics' lien statute (including the filing or recording of a notice of lien claim or the institution of a civil action with the applicable period required to perfect that lien) to ensure the perfection and priority of that creditor's mechanics' lien. Subsection (a), however, would prevent the mechanics' lien creditor from conducting a sale of the property to enforce its lien without first obtaining relief from the stay.

Subsection (d)(3) permits the commencement or continuation of criminal proceedings against the owner. Subsection (d)(4) permits governmental actors to take actions or enforce nonmonetary judgments pursuant to police and regulatory powers. Subsection (d)(5) permits a

governmental unit to establish a tax liability against the owner or receivership property, but does not permit the governmental unit to conduct a tax sale of receivership property without obtaining approval from the court.

5. Subsection (e) permits the court to declare an act void as being in violation of the stay under subsection (a) or an injunction under subsection (b). This means that an act in violation of the stay is merely voidable rather than void.

6. Subsection (f) permits the receiver to recover actual damages, including costs and attorney fees, from a person that knowingly violated the stay or injunction. In addition, subsection (f) authorizes the court to sanction any knowing violation by civil contempt, without regard to whether any person suffered actual damages as a result. Subsection (f) is not intended, however, to limit the scope of the court's equitable powers to address a violation of the stay or injunction using other equitable remedies. If the receiver seeks and obtains a recovery under subsection (f), that recovery is receivership property and not the proceeds of the receiver's personal cause of action.

SECTION 15. ENGAGEMENT AND COMPENSATION OF PROFESSIONAL.

(a) With court approval, a receiver may engage an attorney, accountant, appraiser, auctioneer, broker, or other professional to assist the receiver in performing a duty or exercising a power of the receiver. The receiver shall disclose to the court:

(1) the identity and qualifications of the professional;

(2) the scope and nature of the proposed engagement;

(3) any potential conflict of interest; and

(4) the proposed compensation.

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

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

approved by the court.

Comment

1. The receiver's ability to carry out its duties frequently requires the receiver to obtain the services of professionals (such as lawyers, accountants, brokers, appraisers, or auctioneers). Under subsection (a), the receiver must obtain the court's approval to engage and retain professionals, but this approval may come in the order of appointment. While subsection (a) uses the singular ("the receiver may engage an attorney …."), the Act contemplates that when the nature of the receivership so demands, the receiver may engage more than one attorney or more than one other type of professional as needed.

2. Section 15 requires the receiver to disclose any potential conflict of interest that exists with respect to a professional for whom the receiver seeks appointment. Subsection (b) makes clear that the court has discretion to approve the engagement of a professional despite the presence of existing relationships that might be nominal or *de minimis* conflicts of interest. For example, the fact that an attorney has previously represented a creditor holding a claim against the owner in an unrelated matter does not preclude the court from approving the receiver's engagement of that attorney. Nevertheless, while subsection (a) acknowledges the court's discretion, the court should not approve the engagement of a professional under circumstances where a serious or substantial conflict of interest exists.

Subsection (b) makes clear that the receiver may provide certain types of professional services on the receiver's own behalf, and may be compensated for those services, if the receiver is licensed to provide those services. See, e.g., Wash. Rev. Code Ann. § 7.60.180(3). A receiver may serve as an attorney, accountant, auctioneer, or broker, but not as an appraiser. The Act intentionally omits "appraiser" from this list because dual service as both a receiver and appraiser involves an inappropriate conflict of interest, particularly in circumstances in which the receiver seeks approval for the sale of receivership property under Section 16.

3. Subsection (c) makes clear that the receiver cannot pay the fees and expenses of professionals without first submitting to the court an itemized statement and obtaining court approval.

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

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

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

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

(c) With court approval, a receiver may transfer receivership property other than in the ordinary course of business by sale, lease, license, exchange, or other disposition. If the court orders a transfer of receivership property free and clear of liens pursuant to this Section, said property shall be free and clear of any and all liens, and all proceeds from said transfer shall be subject to any and all liens that were valid at the time of transfer.

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

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

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

Comment

1. Traditionally, a receiver's ability to sell receivership property varied depending on the circumstances of the receivership. For example, when a court appointed a general receiver for all of the assets of an insolvent debtor, the court would typically empower the receiver to gather and sell the assets of the debtor. By contrast, when a court appointed a limited receiver to take possession of a specific asset —

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appointed in conjunction with foreclosure proceedings were often viewed as having the power to operate, maintain, and preserve the property pending the foreclosure sale—but not to sell the property, as the sale would instead take place under the applicable foreclosure procedures.

Many have advocated that receivership is an effective way to dispose of real estate, and in appropriate cases provides a more effective way of disposing of mortgaged real property than the foreclosure process. Under current foreclosure law in all American jurisdictions, a foreclosure sale is a "distress sale," i.e., a public auction sale on the courthouse steps (or at some other public place). Foreclosure by public sale is traditionally justified as a means to protect the mortgagor's equity in the mortgaged property, particularly by comparison to the historical approach under which a defaulting borrower simply forfeited its interest in the mortgaged property (and any equity the borrower might have accumulated, either through principal reduction or market appreciation). Nevertheless, public foreclosure sales do not consistently produce prices that approximate the market value that might be obtained in an arms-length, non-distress sale. By contrast, a receiver of mortgaged commercial real property could readily market that property to potential buyers in the context of operating the property during the receivership. Such marketing could permit potential buyers to perform more meaningful and complete due diligence. Further, a sale subject to judicial review and confirmation could produce greater finality regarding the title acquired by the buyer at the sale. Thus, there is adequate justification to expect that in many cases, a receiver sale of mortgaged commercial real estate would produce a higher sale price than a public foreclosure sale would produce.

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

Existing federal statutes explicitly authorize a receiver appointed by a federal court to sell mortgaged property, in either a public or private sale, 28 U.S.C.A. § 2001 et seq., and thus receiver sales occur frequently in the context of federal receiverships. See generally John C. Murray and Kenneth R. Jannen, *Public and Private Sales of Real Property by Federal Court Receivers*, ACREL Papers (March 2011); Kay Kress, *Federal Receiverships* (2005 ABA Business Law Section Meeting). There is no sound justification in commercial policy to permit receiver sales in cases in which federal diversity or subject matter jurisdiction exists but not in cases in which federal jurisdiction would be lacking. Unfortunately, under existing state laws, the

authority for receiver sales is much less clear. Only a few states have statutory provisions that explicitly grant the power of sale to a receiver. See, e.g., Ind. Code § 32-30-5-7; N.C. Gen. Stat. § 1-505; Wash. Rev. Code Ann. § 7.60.260. Despite having no clear statutory authority, courts in Ohio and Michigan have upheld court-authorized receiver sales free and clear of liens and statutory redemption rights. See, e.g., *CSB Bank v. Christy*, No. 305869 (Mich. Ct. App. Oct. 18, 2012) (unpublished); *Park Nat'l Bank v. Cattani, Inc.*, 187 Ohio App.3d 186, 931 N.E.2d 623 (2010); *Huntington Nat'l Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 944 N.E.2d 1210 (2010). In most states, there is no express statutory or judicial authority for receiver sales. See, e.g., *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964) (receiver appointed in foreclosure proceeding cannot sell mortgaged real estate; sale must occur through foreclosure process). A recent Florida court went further, holding that the court lacks the authority to authorize a receiver appointed in a foreclosure case to sell the property free and clear of liens and rights of redemption. *Shubh Hotels Boca, LLC v. Federal Deposit Ins. Corp*., 46 So.3d 163 (Fla. Dist. Ct. App. 2010). See also *Todd Enters., LLC v. MidCountry Bank*, 2013 WL 4045765 (Minn. Ct. App. 2013) (not reported in N.W.2d) (court order authorizing receiver's sale free and clear of borrower's statutory right of redemption was contrary to state mortgage foreclosure statute). Section 16 provides much-needed clarity by rejecting cases following the latter restrictive approach.

Subsection (c) authorizes the receiver (with court approval after notice and opportunity for a hearing as required by Section 3) to sell, lease, license, exchange or otherwise transfer receivership property free and clear of liens and rights of redemption, other than a lien that is senior in priority to the lien of the creditor that obtained the receiver's appointment. The Act gives the court the flexibility to authorize a sale either free and clear of liens or subject to one or more liens, depending on the priority and the direction of the person seeking appointment of the receiver. For example, a senior mortgagee of a securitized mortgage loan could seek a receiver to facilitate a sale of the property subject to the existing CMBS loan, with that loan being modified in the context of the receiver's sale. In such a case, the court should direct that the receiver's sale would be subject to the lien of the senior mortgage. By contrast, a senior mortgagee could instead seek court approval for the receiver to sell the property free and clear of liens and rights of redemption (in which case the receiver's sale would have essentially the same legal effect as a foreclosure sale).

2. In some situations, courts appoint receivers at the behest of creditors holding subordinate liens (such as junior mortgages or subordinate judgment liens). Subsection (c) makes clear that if a creditor holding a junior lien on receivership property obtains the appointment of a receiver, the court cannot authorize the receiver to sell the property free and clear of the senior creditor's lien without the senior creditor's consent. Thus, if a creditor holding a second mortgage obtains the appointment of a receiver and the court approves a sale by the receiver, the buyer at the receiver sale acquires title subject to the first mortgage, unless the first mortgagee consents to the sale free and clear of its lien.

As a practical matter, if a junior creditor obtains the appointment of a receiver but the senior mortgagee does not want the buyer as the new owner, it can effectively deter the sale by declining to accept the buyer; the Garn-St. Germain Act would permit the senior mortgagee to exercise the due-on-sale clause in its mortgage, accelerate the senior indebtedness, and foreclose

the mortgage as a consequence of the receiver's sale. 12 U.S.C. § 1701j-3 et seq. If the sale goes forward, the buyer at that sale could redeem the title by paying off the outstanding balance due under the first mortgage, including any enforceable prepayment fee, to the extent that the senior mortgagee is obligated to accept prepayment of the senior debt. If the senior creditor is a nonconsensual creditor such as the holder of a judgment lien, the senior creditor would have to release its lien if the buyer tendered payment of the obligation secured by that lien.

> ***Example 1***. Henning owns an office building subject to a senior mortgage held by First Bank and a junior mortgage held by Second Bank. By its terms, the loan secured by First Bank's mortgage includes a 5% prepayment charge, which is enforceable under applicable law. Following default, Second Bank obtains the appointment of a receiver and seeks court approval for a sale of the building. The court may not order the sale of the building free and clear of First Bank's mortgage without First Bank's consent. If First Bank does not consent, and the court approves a sale, the buyer at the sale will take the building subject to First Bank's mortgage lien, and could obtain a release of that lien only by paying the full balance of the debt owed to First Bank (including any prepayment fee).
>
> ***Example 2***. Same as Example 1, except that Henning has no right to prepay the First Bank mortgage debt, either under the contract or applicable law. If First Bank does not consent and the court approves a sale, the buyer at the sale will take the building subject to First Bank's mortgage lien, but could not prepay the First Bank mortgage debt prior to its maturity without the consent of First Bank.
>
> ***Example 3***. Henning owns an office building subject to a mechanics' lien held by Contractor and a mortgage held by Bank. Under applicable law, Contractor's mechanics' lien is entitled to priority. Following a default by Henning, Bank obtains the appointment of a receiver and seeks court approval for a sale of the building. Although this Act does not permit the court to approve a sale of the building free and clear of Contractor's lien without Contractor's consent, other applicable law would require Contractor to release its lien on receiving full payment of the sums secured by that lien. Thus, Contractor can be expected to consent to the sale as long as the sale will provide proceeds sufficient to satisfy Contractor's lien in full.

3. Some have argued that a receiver ought not have the power to sell receivership real property unless the sale price was sufficient to satisfy all liens on the property. See 11 U.S.C. § 363(f) (absent consent of lienholder, trustee may sell property of the bankruptcy estate free and clear of lien only if the sale price exceeds the aggregate value of all liens on the property, unless other applicable law permits sale of such property free and clear of liens or the lienholder could be compelled to accept a money satisfaction of its interest). Because the Act views a receiver sale as a potential alternative to a traditional foreclosure sale (at which the collateral might fail to bring a price sufficient to satisfy all mortgage liens), Section 16(c) rejects this view. When receivership property is subject to multiple liens and the value of that property is not sufficient to satisfy the senior mortgage indebtedness, but the senior mortgagee seeks the appointment of a receiver for the purpose of selling the real estate, there is no policy justification to permit junior lienholders a veto power over such a sale (any more than a junior lienholder should be permitted to block a senior lienholder's foreclosure sale). A junior lienholder that wants to protect its junior

position from extinguishment always has the option to redeem its lien by paying off the senior indebtedness. 1 Nelson, Whitman, Burkhart & Freyermuth, Real Estate Finance Law § 7.2 (6th ed. Practitioner's Treatise 2014).

If the senior mortgagee wishes to obtain the appointment of a receiver for the purpose of selling the property, but does not want a sale to proceed at a price less than the balance of the senior mortgage debt, the senior mortgagee can ask the court to condition the receiver's power to sell under Section 16 on receipt of a sale price sufficient to satisfy the outstanding senior debt. If the senior mortgagee wishes to obtain the appointment of a receiver, but does not want the receiver to have the power to sell the property outside the ordinary course, the senior mortgagee can ask the court to specify, in the order of appointment, that the receiver's powers with respect to the mortgaged property are to be merely custodial in nature. Finally, if the court has authorized the receiver to market the property for sale and the receiver proposes a sale at a price that would be insufficient to satisfy the senior mortgage debt, the senior mortgagee (or any other lienholder) has the right to be heard under Section 3 in opposition to the proposed sale terms.

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

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

In some cases, a bona fide dispute might exist between lienholders over the priority of their respective liens. For example, real property under construction might be subject to the lien of a construction mortgage and one or more mechanics' liens, which could (depending on disputed facts) be prior to or subordinate to the construction mortgage. In such a case, if the construction mortgagee obtains the appointment of a receiver for the real estate and there is a bona fide dispute over the priority of the competing liens, subsection (c) permits the court to sell the property free and clear of the competing liens, while later resolving the priority dispute before making a distribution of the proceeds of the sale.

6. Subsection (e) permits (but does not require) the receiver to sell receivership property in a private sale rather than a public auction sale. Giving the receiver the power to market the property in a private sale, with the increased opportunity for due diligence investigation that a private sale might provide, reflects sound policy. This gives the receiver the flexibility to market the property in a fashion calculated to bring the highest possible price. Cf. U.C.C. § 9-610, comment 2 (noting that Article 9 "encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned").

Nevertheless, under subsection (c), the receiver may not sell receivership property other than in the ordinary course of business without court approval. Because the court may not enter an order approving the sale without notice and opportunity for a hearing under Section 3, a court

may not approve a private sale without notice of the actual terms of the sale and an opportunity for interested persons to be heard on whether those terms justify court approval.

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

> ***Example***. Henning owns an office building subject to a senior mortgage lien held by First Bank (securing an unpaid balance of $3 million) and a junior lien held by Second Bank (securing an unpaid balance of $1.5 million), as well as a tax lien for unpaid real estate taxes in the amount of $100,000. Second Bank obtains the appointment of a receiver and the court authorizes the receiver to conduct an auction sale of the real estate under Section 16. First Bank does not consent to the sale and under applicable law may refuse prepayment of the senior mortgage debt. Any sale by the receiver will be subject to First Bank's mortgage lien. Second Bank may credit bid against its $1.5 million debt at the sale. If it is the high bidder, it may acquire title to the real estate subject to First Bank's senior mortgage, but free of the tax lien, as long as it tenders funds equal to the costs of the sale and the $100,000 unpaid tax bill.

8. A receiver sale under Section 16 can be set aside because of fraud or other reasons sufficient to justify relief from a judgment or order. Cf. Fed. R. Civ. Proc. 60(b). However, subsection (f) provides that the title of a good faith purchaser from the receiver is not affected by modification of the order approving the transfer or its reversal on appeal, unless the authorization and transfer were stayed before the transfer takes place.

Subsection (f) also provides that the modification of an order approving a transfer or its reversal on appeal does not revive any lien extinguished by the sale unless the authorization and transfer were stayed before the transfer took place. Subsection (f) thus rejects the reasoning of *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (9th Cir. B.A.P. 2008) (while equitable mootness prevented appellate court from reversing a sale that the bankruptcy court had incorrectly approved free and clear of liens, it did not prevent the court from reinstating a junior lien despite the sale).

9. Subsection (b) permits the receiver, with court approval, to use receivership property other than in the ordinary course of business. This permits a receiver to use receivership property in a manner that would differ from its normal use if such use might produce income for the benefit of the receivership. For example, subsection (b) would authorize the receiver of a vineyard and winery operation to permit the occasional use/rental of the property for weddings or receptions even if the owner had not made equivalent use of the property.

SECTION 17. EXECUTORY CONTRACT.

(a) In this section, "timeshare interest" means [an interest having a duration of more than

three years which grants its holder the right to use and occupy an accommodation, facility, or recreational site, whether improved or not, for a specific period less than a full year during any given year].

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

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

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

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

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

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

(f) If at the time a receiver is appointed, the owner has the right to assign an executory

contract relating to receivership property under law of this state other than this [act], the receiver may assign the contract with court approval.

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

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

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

(h) A receiver may not reject an unexpired lease of real property under which the owner is the landlord if:

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

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

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

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

(B) the tenant has an enforceable agreement with the mortgagee or the holder of a senior lien under which the tenant's occupancy will not be disturbed as long as the tenant performs its obligations under the lease;

(C) the mortgagee has consented to the lease, either in a signed record or by its failure timely to object that the lease violated the mortgage; or

(D) the terms of the lease were commercially reasonable at the time the lease was agreed to and the tenant did not know or have reason to know that the lease violated the mortgage.

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

Comment

1. At the time a receiver is appointed for a commercial real estate project, customarily the owner has entered into a number of executory contracts related to the operation of the project. In addition to existing occupancy leases, the owner will frequently have entered into contracts to obtain or provide services (such as cleaning, repair, landscaping, advertising, or marketing services). In some cases, the terms of the contract are favorable and the receiver is content to honor the contract. In other cases, the terms of the contract are unfavorable and the receiver might wish to obtain the needed goods or services at a competitive price from another supplier. In particular, the receiver might not wish to have to perform a long-term supply contract that the owner entered into with an owner-affiliated entity at a noncompetitive, above-market price.

Under established law in receivership cases, a receiver does not automatically become bound to the owner's existing executory contracts on appointment. See 2 Clark on Receivers, § 423, at 710 (3d ed. 1959) ("A receiver is not strictly speaking the successor of the defendant, individual or corporation and an executory contract of the defendant is not binding on the receiver but may be broken by the receivership and give rise to damages resulting in a claim against the assets in the hands of the receiver."). Consistent with this traditional rule, subsection (b) permits the receiver to evaluate whether an executory contract relating to receivership property is beneficial or burdensome, and with court approval to either adopt or reject the contract accordingly.

If the receiver adopts the contract and continues to perform it, subsection (b) permits the court to condition the receiver's adoption on appropriate terms to provide the counterparty with assurance of the receiver's ability to perform. If the receiver rejects the contract, subsection (e) provides that the rejection constitutes a breach of the contract and allows the counterparty to file a claim against the receivership. Subsection (e) addresses only the potential liability of the receivership, however, and not the underlying liability of the owner. Thus, the Act does not (1) discharge the liability of the owner to the counterparty, (2) preclude the counterparty from proceeding against the owner or nonreceivership property of the owner, or (3) preclude the counterparty from proceeding against guarantors or third-party assets securing the owner's obligation to the counterparty.

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

2. The receiver's power of rejection under Section 17 is distinct from the receiver's right to invalidate a transfer of receivership property under other applicable law (e.g., as a fraudulent or otherwise voidable transfer). Likewise, the receiver's power of rejection is distinct from the receiver's right to terminate an executory contract on account of the counterparty's material breach of that contract.

3. When a receiver is appointed for commercial real estate, it might take the receiver some reasonable period of time to review all of the owner's executory contracts and to make a judgment as to whether the adopt or reject any particular contract. During this period of investigation, the receiver may honor a particular contract temporarily, even though the receiver may ultimately choose to reject the contract, both (a) to protect the receiver's ability to enforce the contract in the future should the receiver choose to adopt it and (b) to ensure no interruption in the provision of necessary goods or services to the project. Subsection (c) provides that the receiver's temporary performance of the contract does not prevent the receiver from later seeking court approval to reject it.

> ***Example.*** Henning owns a shopping center subject to a mortgage held by Bank. Henning defaults and the Bank obtains appointment of Smith as a receiver. Prior to the receivership, Henning had entered into a long-term contract with Gabriel, who provided landscaping and lawn services for the center. To ensure no immediate interruption in the maintenance of the center's lawns and flower beds, Smith has Gabriel provide those services during the first month of the receivership, and Smith pays for those services, but Smith's investigation reveals that equivalent services are available at a better price from another provider. Smith's temporary performance of the contract with Gabriel during the first month of the receivership does not constitute adoption of the contract and does not prevent Smith from seeking court approval to reject the Gabriel contract.

4. Contracts sometimes contain remedy provisions under which the appointment of a receiver constitutes a default that allows the counterparty to terminate the contract (often called an "ipso facto" clause) or that allows the counterparty to impose "default" terms. Subsection (d) provides that a counterparty may not exercise an "ipso facto" clause and use the receiver's appointment as a basis to terminate or modify an executory contract and thereby prevent its adoption by the receiver. The prohibition on modification likewise prevents the counterparty from using the receiver's appointment as a basis to impose a contractual penalty so as to increase the effective cost of the receiver's adoption of the contract. For example, if the contract in question is a service contract that purports to permit the counterparty to increase the agreed price in the event a receiver is appointed, the receiver could adopt the contract at the original contract price.

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

ed. 1959) ("If a contract is ordinarily assignable between A & B there seems no reason why the receiver under proper orders of court cannot assign the contract."). The receiver thus cannot assign an executory contract if the contract or applicable law would excuse the counterparty from accepting performance from or rendering performance to an entity other than the owner. For example, if the court appointed a receiver for the real and personal property of a sculptor with whom a client had commissioned a custom work, the receiver could not assign to another artist the sculptor's rights and obligations to finish the custom work.

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

Subsection (g) gives these purchasers protection comparable to the protection under Section 365(i) of the Bankruptcy Code, 11 U.S.C.A. § 365(i), and its inclusion responds to concerns that the Act should be sensitive to "forum shopping" concerns (i.e., that the Act not provide a contracting party with the incentive to seek appointment of a receiver to permit termination of contracts that could not be terminated under bankruptcy law). The definition of "timeshare interest" in this section is a simplified version of the definition contained in the Bankruptcy Code, 11 U.S.C.A. § 101(53D), but should be modified if necessary to conform to the definition used in any time-share legislation adopted by the state.

7. Under the definition of "executory contract" used in this Act, the term includes an unexpired lease of receivership real property. The receiver's ability to reject unexpired leases of receivership real property presents a conundrum. On the one hand, if the property is subject to a number of long-term leases that are "below-market" relative to current rental levels, the receiver might wish to reject those leases, negotiate market-rate leases, and thereby enhance the market value of the property for an ensuing receivership or foreclosure sale. On the other hand, many of those tenants have negotiated those long-term leases in good faith, and rejection of those leases could result in substantial disruption to the tenants' business operations. Further, one or more of those tenants might have negotiated for and obtained from the mortgagee of the project an agreement that the tenant's possession would not be disturbed by virtue of a foreclosure proceeding or other creditor remedy so long as the tenant continued to perform its bargained-for lease obligations. For these reasons, it is appropriate to constrain the receiver's ability to reject unexpired leases.

Subsection (h) protects most tenants holding unexpired leases of real property from having their leases rejected by the receiver. Under no circumstances can the receiver reject the lease of a tenant that occupies the property as a primary residence. Likewise, when the receiver is appointed at the behest of an involuntary lienholder (such as a judgment creditor or mechanics' lienor), the receiver likewise cannot reject a tenant's unexpired lease.

When a receiver is appointed at the behest of a mortgagee, the receiver cannot reject the lease under any of the following circumstances: (a) the lease is senior in priority to the mortgage; (b) the tenant has a nondisturbance agreement with the mortgagee or the holder of a senior lien; (c) the mortgagee has consented, either in a signed record or by its failure to timely object that the lease violates the terms of the mortgage; or (d) the lease was commercially reasonable at the time of the agreement and the tenant did not know or have reason to know that the lease violated the terms of the mortgage.

Example 1. Henning owns an office building subject to a recorded mortgage in favor of Bank. At the time Henning granted the mortgage to Bank, Henning had leased the entire building to ABC Corp. for use as its headquarters under a 20-year lease, and a memorandum of that lease was recorded in the land records. Further, ABC Corp. did not enter into any agreement with Bank subordinating its lease to the lien of Bank's mortgage. Following default by Henning, Bank obtains the appointment of Smith as a receiver for the building. Smith wants to reject ABC Corp.'s unexpired lease unless ABC Corp. will agree to adjust the rent due under the lease to current market levels. Under subsection (h)(3)(A), Smith cannot reject ABC Corp.'s lease, as that lease is entitled to priority over the lien of Bank's mortgage. This result is appropriate, as a foreclosure of Bank's mortgage would not have extinguished ABC Corp.'s lease. Nelson, Whitman, Burkhart & Freyermuth, Real Estate Transfer, Finance and Development 380-389 (9th ed. 2015).

Example 2. Same as Example 1, except that ABC Corp. and Bank entered into a "Subordination, Nondisturbance and Attornment Agreement" under which ABC Corp. agreed to subordinate its lease to the lien of Bank's mortgage, and Bank agreed (for itself and its successors and assigns) that in the event of a foreclosure, ABC Corp.'s possession of the building would not be disturbed as long as ABC Corp. performed all of its obligations under its lease. Under subsection (h)(3)(B), Smith cannot reject ABC Corp.'s lease. By virtue of its nondisturbance agreement, ABC Corp. may remain in possession of the building as long as it does not default in the performance of its lease obligations.

Example 3. Henning owns an office building subject to a recorded mortgage in favor of Bank. Bank's mortgage contains an assignment of leases and rents that provides that Henning may not enter into a lease of the property at a rent substantially below fair market value at the time of the lease without Bank's prior written approval. Without obtaining Bank's prior written approval, Henning leases office space in the building to his friend Gabriel for $1,000 per month at a time when the prevailing market rent for comparable space is $15,000 per month. Two weeks later, following default by Henning, Bank obtains the appointment of Smith as a receiver for the building. Under subsection (h)(3)(D), Smith may reject Gabriel's lease, because the lease was not commercially reasonable at the time Henning and Gabriel contracted and Gabriel had constructive notice (through the terms of the recorded mortgage) that the lease violated the mortgage. See, e.g., Restatement (Third) of Property: Mortgages § 4.4(b), (c) (1997) (receiver may disaffirm lease that contravenes a provision of a prior recorded mortgage or that was made while mortgagor was in default and was not commercially reasonable when it was consummated).

Example 4. Same as Example 3, except that at the time Henning entered into the lease with Gabriel, Henning sought and obtained Bank's written consent to Gabriel's lease. Under subsection (h)(3)(C), Smith may not reject Gabriel's lease, because Bank expressly consented to it.

Example 5. Same as Example 3, except that at the time Henning defaults and Smith is appointed receiver: (a) three years have passed since Gabriel's lease commenced, (b) each year, Henning has provided Bank a copy of the rent roll showing the terms of Gabriel's lease, and (c) Bank never declared a default based on Henning's lease to Gabriel nor took steps to terminate the lease. Under subsection (h)(3)(C), Smith may not terminate the lease, as Bank has consented to Gabriel's lease by virtue of its failure to take steps to terminate the lease despite its awareness that the lease existed and violated the terms of the mortgage. Cf. U.C.C. § 1-303(a), (f) (course of performance can be established through acquiescence and establish waiver or modification of contractual term inconsistent with course of performance).

Example 6. Henning owns a 200-unit apartment building subject to a recorded mortgage in favor of Bank. Each tenant lease limits use of the unit to residential purposes only. Following default by Henning, Bank obtains the appointment of Smith as a receiver for the building. Under subsection (h)(1), Smith may not reject the lease of any tenant occupying a unit as the tenant's primary residence.

Subsection (h) merely constrains the receiver's ability to reject an unexpired lease. It does not affect the receiver's ability to enforce an unexpired lease according to its terms and thus to terminate the lease of a tenant who defaults. Thus, in Example 6, while Smith could not reject a tenant's lease, Smith could institute summary proceedings against any tenant who fails to pay the required monthly rent and terminate the tenant's rights under the lease for nonpayment (subject to the protections available to the tenant under applicable law other than this Act).

SECTION 18. DEFENSES AND IMMUNITIES OF RECEIVER.

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

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

Comment

1. As an officer of the court, a receiver is shielded by judicial immunity for actions performed under the lawful authority of the appointment order. As the leading treatise explains:

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

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

Consistent with this approach, the Act provides the receiver with immunity for acts or omissions within the scope of the order appointing the receiver.

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

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

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

If the appointing court does grant the would-be plaintiff permission to sue the receiver, nothing in this Act mandates the appointing court as the venue for the lawsuit. The Act leaves questions regarding jurisdiction and venue over such a suit to other applicable law.

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

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

(2) receipts and disbursements, including a payment made or proposed to be made to a professional engaged by the receiver;

(3) receipts and dispositions of receivership property;

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

(5) any other information required by the court.

Comment

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

SECTION 20. NOTICE OF APPOINTMENT; CLAIM AGAINST RECEIVERSHIP; DISTRIBUTION TO CREDITORS.

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

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

(2) publication as directed by the court.

(b) Except as otherwise provided in subsection (f), the notice required by subsection (a) must specify the date by which each creditor holding a claim against the owner which arose before appointment of the receiver must submit the claim to the receiver. The date specified must be at least [90] days after the later of notice under subsection (a)(1) or last publication under subsection (a)(2). The court may extend the period for submitting the claim. Unless the

court orders otherwise, a claim that is not submitted timely is not entitled to a distribution from the receivership.

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

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

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

(3) identify any property securing the claim;

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

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

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

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

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

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

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

(g) Subject to Section 21:

(1) a distribution of receivership property to a creditor holding a perfected lien on the property must be made in accordance with the creditor's priority under law of this state other than this [act]; and

(2) a distribution of receivership property to a creditor with an allowed unsecured claim must be made as the court directs according to law of this state other than this [act].

Comment

1. This Act provides a claims process that is substantially simpler and more flexible than the comprehensive provisions found in the receivership codes enacted in Minnesota and Washington. The Act provides a claims process that the court can adapt to either a custodial receivership (in which the receiver acts to preserve the property pending the completion of a foreclosure or some other legal proceeding) or a general receivership (in which the receiver manages all or substantially all of the assets and financial affairs of the owner).

In a general receivership, a receiver may gather and liquidate all or substantially all of the assets of the owner. If there is an expectation that the receiver's conduct will generate sums in excess of the amount of any secured claims and thus produce proceeds for distribution to general creditors, the Act provides a process for the receiver to give notice to all creditors, so those creditors can submit claims against the receivership estate.

By contrast, it might be that the receivership property in a general receivership is not likely to generate sums greater than the amount of valid liens on the property. Similarly, in a custodial receivership, the sums generated by the receiver's actions, often in the form of net rents, might be far less than the amount of applicable liens, thus leaving no proceeds for distribution to general creditors. In such cases, notice to all unsecured creditors might not be useful, and Section 20 allows the court to limit formal notice to those creditors whose interests may be affected by the receivership.

2. Subsection (a) provides that unless the court orders otherwise, the receiver must give notice of appointment to creditors by first class mailing to the last known address of each creditor and by publication as directed by the court. Subsection (b) then directs any creditors holding claims that arose before appointment to file a proof of that claim with the receiver within 90 days unless the court extends that deadline. Creditors submitting untimely claims may not receive a distribution from the receivership unless the court orders otherwise. This permits the court the flexibility to allow the untimely claim of a creditor in appropriate circumstances (e.g., the creditor did not receive mailed notice and only gained knowledge of the receivership after the bar date had passed).

If the court concludes that the receivership property is likely not sufficient to satisfy the claims of creditors holding liens on that property, subsection (f) permits the court to direct the receiver to notify only those creditors required by the court, and to forgo the filing of claims by unsecured creditors.

Subsection (a) requires publication to facilitate the ability of the receiver to give notice to any creditors unknown to the receiver at the time. By requiring publication "as directed by the court," the Act provides the court with the flexibility as to the manner of publication in light of technological evolution and changing economics in the publishing industry. In many situations, a

court may direct the receiver to publish notice in a newspaper of general circulation in the county where the receivership real property is located, but in some counties today (and increasingly so in the future), it might be the case that the only "newspapers" of circulation in a county are ones that publish only in electronic form. Subsection (a) permits a court to permit electronic publication in that context.

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

4. Subsection (d) makes clear that while the Act does not prohibit the assignment of claims against the receivership, an assignment is effective against the receiver only if the assignee gives the receiver timely notice of the assignment. The amount of notice that is "timely" might differ depending on the circumstances. For example, for notice of an assignment to be effective to protect the assignee's right to a distribution from the receivership, timely notice requires the assignee to give notice before distributions were made. By contrast, suppose that the receiver proposes to sell receivership property, and seeks to give notice of a proposed sale and a hearing to approve the sale terms. In this context, an assignment of a claim would be effective against the receiver so as to obligate the receiver to give notice of the proposed sale and hearing if the assignee gave notice of the claim assignment before the receiver gave notice of the proposed sale.

> ***Example***. On April 1, the receiver gives Creditor X notice of a proposed sale of receivership property to be held on April 20. On April 8, Creditor X assigns its claim to Creditor Y. On April 12, Creditor Y notifies the receiver of the claim assignment. On April 20, the receiver sells the property to Purchaser, who pays value in good faith. Even though the sale had not occurred at the time of Creditor X's assignment, the validity of the sale should not be called into question because Creditor Y did not receive notice of the proposed sale. However, for purposes of any distribution to creditors, the assignment of the claim to Creditor Y is effective against the receiver.

5. The Act makes clear in Section 12(b)(6) that (if the court so orders) the receiver has the power to recommend the allowance and disallowance of claims. Subsection (e) makes clear that the court may disallow a timely-filed claim to the extent that the claim is not enforceable under other applicable law.

6. As described in Comments 1 and 2, subsection (f) permits the court to streamline the claims process if the court concludes that the expected net proceeds from the receivership will be insufficient to satisfy the claims of creditors holding secured claims against receivership property. In such a case, the court may order that the receiver notify only those creditors directed by the court and that unsecured creditors need not submit claims. In any event, however, any creditor holding a secured claim against receivership property must file a proof of claim with the receiver, so that the receiver can have the information necessary to facilitate the receiver's ability to make recommendations regarding the appropriate distribution of receivership property or the proceeds of such property.

A court might order the receiver to forgo the process for unsecured claims under subsection (f), only to discover later that the receivership in fact generated receipts in excess of

the amount needed to satisfy secured claims. In this case, Section 5 preserves to the court the authority to order the receiver to re-institute the default notice and claims process provided in Section 20, and the receiver would be obliged to carry out that order under Section 12(c)(5).

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

Subsection (g) also provides that allowed unsecured claims shall receive distribution from the residue of the receivership property as the court directs in accordance with law of this state other than this Act (including the state's choice of law rules). Subsection (g) makes clear that the court should respect any rules of administrative priority for certain unsecured claims that might exist under other applicable law of the state. Absent applicable law requiring a higher priority to certain unsecured claims, creditors holding unsecured claims would typically share in any distributions on a pro rata basis.

SECTION 21. FEES AND EXPENSES.

(a) The court may award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver.

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

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

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

Comment

1. Under subsection (a), the court may allow the receiver to recover the reasonable and necessary fees and expenses of carrying out its duties and exercising its powers before distribution to secured creditors. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) ("A sale by the receiver free from liens is for most practical purposes equivalent to a foreclosure sale and if and when the property is realized under such circumstances and if and when the mortgagees or lienholders avail themselves of the advantage of the receivership to

effect the sale of the mortgaged premises, this means they have saved themselves similar expenses in a foreclosure suit or otherwise and, therefore, should pay for the advantage they have received.").

2. Subsection (b)(1) provides that if a person seeks appointment of a receiver and the resulting receivership receipts were insufficient to pay the costs of the receivership, the court may assess the person who sought the receivership for the shortfall.

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

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

SECTION 22. REMOVAL OF RECEIVER; REPLACEMENT; TERMINATION OF RECEIVERSHIP.

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

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

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

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

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

(2) actual damages caused by the appointment, including reasonable attorney's fees and costs.

Comment

1. Subsection (a) permits the removal of the receiver for cause. The Act does not define "cause," but leaves the determination of whether "cause" exists to judicial determination on a case-by-case basis. This approach reflects sound policy, as the facts and circumstances might vary substantially from one receivership to another. Certainly, "cause" would include the receiver's refusal or failure to carry out its duties. 3 Clark on Receivers, § 692, at 1272 (3d ed. 1959).

2. Under subsection (c), once a removed receiver (or a representative, in the case of a deceased receiver) has provided a full accounting for all receivership property and a full report of all receipts and disbursements during its tenure, 3 Clark on Receivers, § 699.1, at 1285 (3d ed. 1959), the replaced receiver is discharged from further duties as receiver.

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

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

SECTION 23. FINAL REPORT OF RECEIVER; DISCHARGE.

(a) On completion of a receiver's duties, the receiver shall file a final report including:

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

(2) a list of receivership property at the commencement of the receivership and any receivership property received during the receivership;

(3) a list of disbursements, including payments to professionals engaged by the receiver;

(4) a list of dispositions of receivership property;

(5) a list of distributions made or proposed to be made from the receivership for creditor claims;

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

(7) any other information required by the court.

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

Comment

Section 23 provides for the termination of the receivership and discharge of the receiver once the receiver has filed a final report complying with subsection (a), the court has approved that report following notice and opportunity for hearing as required in Section 3, and the receiver has distributed all receivership property in the manner directed by the court and this Act. The receiver's final report is based on the same general template as any interim reports filed by the receiver.

Section 23 directs the receiver to prepare its final report on "completion" of its duties. Absent an explicit direction from the court, the receiver should prepare its final report when it believes that it has carried out all of its duties under this Act, and when the receiver is prepared to make a final distribution of receivership property. If the court thereafter orders the receiver to carry out further duties, the receiver may update its final report accordingly following their completion.

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

SECTION 24. RECEIVERSHIP IN ANOTHER STATE; ANCILLARY PROCEEDING.

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

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

and

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

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

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

Comment

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

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

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

2. Section 24 is based in significant part on the provisions of the Minnesota receivership statute, Minn. Stat. Ann. § 576.41. Subsection (a) addresses the appointment in this state of an ancillary receivership to a primary receivership already granted in another state. It provides that the foreign receiver (or that receiver's nominee) may be appointed as an ancillary receiver for property in this state, as long as the receiver or nominee would be eligible for appointment under this Act and appointment would further the purposes of the foreign receivership. A person appointed as an ancillary receiver has all of the powers, rights and duties of a receiver under this Act, unless the court orders otherwise.

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

having to obtain the appointment of an ancillary receiver in this state).

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

SECTION 25. EFFECT OF ENFORCEMENT BY MORTGAGEE.

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

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

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

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

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

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

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

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

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

Legislative Note: *If state law does not prohibit or otherwise limit the ability of a lienholder to obtain a deficiency judgment following the enforcement of a lien, the state should enact this section without subsections (a)(7) and (b).*

A state that does not have a "one action" statute should omit subsection (a)(6).

Comment

1. Section 25 is an adaptation of Section 11 of the Uniform Assignment of Rents Act (UARA), which provides that certain actions taken by an assignee of rents to enforce its security interest in rents (such as direct collection of rents after notification to tenants or through appointment of a receiver) does not itself make the assignee a "mortgagee in possession," constitute an election of remedies, waive other security held by the assignee, violate a state's "one-action" rule, or constitute a foreclosure sale for purposes of triggering a state's anti-deficiency rule. Section 25 assures that this Act does not conflict with UARA by making clear that the decision of a mortgagee or an assignee of rents to pursue its appointment of a receiver under the Act should not trigger a state's one-action rule or bar the mortgagee or assignee of rents from an action to enforce the debt. See, e.g., Cal. Code Civ. Proc. § 564(d) ("Any action by a secured lender to appoint a receiver pursuant to this section shall not constitute an action within the meaning of [California's one-action rule].").

2. Subsection (b) is appropriate in states that have enacted legislation prohibiting an action for a deficiency judgment following the foreclosure of some or all liens. Under Section 16(c), a sale of receivership property by the receiver could have the effect of extinguishing one or more liens on the property. Such a receivership sale is not a foreclosure sale under this Act, but could have an effect similar to the title-clearing effect of a foreclosure sale. See, e.g., 2 Clark on Receivers, § 640.1(b), at 1082 (3d ed. 1959) ("A sale by the receiver free from liens is for most practical purposes equivalent to a foreclosure sale ….). In those situations, the obligor should be protected by a state's prohibition on deficiency judgments to the same extent as the obligor would have been protected following a foreclosure sale, and subsection (b) accomplishes this result.

Subsection (b) is also appropriate in states that place a "fair value" limit on the ability of a foreclosing creditor to obtain a deficiency judgment following a foreclosure sale. In such states, the foreclosing creditor's deficiency judgment is calculated by reference to the difference between the outstanding balance of the debt and the appraised "fair market value" of the property (rather than the difference between the outstanding balance of the debt and the foreclosure sale price). If a receiver sells receivership property free and clear of a lien under Section 16(c), Section 25(b) would provide the obligor with the benefit of the state's "fair value" rule in a subsequent action on the debt by the holder of the extinguished lien.

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

SECTION 27. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not

modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

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

SECTION 29. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

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

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The Act does not dictate a particular time period for the conduct of a hearing following notice, but leaves such procedural matters to the state's existing court rules and procedures.

2. Section 3 recognizes the possibility that in some circumstances, a court might enter an order appointing or directing a receiver on an *ex parte* basis (without prior notice). The Act does not list all of the circumstances in which an interested party can obtain *ex parte* relief, and any attempt to provide a comprehensive list would undoubtedly fail to foresee some circumstance in which ex parte relief would be justified. Instead, Section 3 makes clear that an *ex parte* order is appropriate only if the circumstances require that the court issue an order before notice can be given or a hearing held. As a matter of best practices, the order appointing the receiver should specify the particular circumstances justifying *ex parte* relief.

In cases of *ex parte* appointment, principles of due process require that notice be given after the order is entered and that prompt opportunity for a post-order hearing be provided. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Thus, for example, if the court orders the appointment of a receiver for mortgaged property on an *ex parte* basis, without prior notice to the mortgagor or the opportunity for a hearing prior to appointment, the court's order should identify the particular circumstances justifying *ex parte* relief, and the court should conduct a hearing within a reasonable time to determine whether appointment of the receiver was justified.

In the context of requests for *ex parte* appointment of a receiver, the court must consider Section 3 in conjunction with Section 6. First, Sections 6(a) and (b) set forth the standards justifying the appointment of a receiver, including the effect of a contractual agreement in a mortgage under which the mortgagor consented to the appointment of a receiver following default. Second, Section 6(c) permits the court to require a party seeking *ex parte* appointment of a receiver to post a bond in an amount specified by the court to protect the owner against damage suffered by the owner if the court determines following a post-appointment hearing that appointment of the receiver was improvident.

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the interest is used for agricultural, commercial, industrial, or mineral- extraction purposes, other than incidental uses by an owner occupying the property as the owner's primary residence

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the interest secures an obligation incurred at a time when the property was used or planned for use for agricultural, commercial, industrial, or mineral-extraction purposes

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

(d)

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MEMORANDUM

TO: BANKRUPTCY/UCC COMMITEE

FROM: SUBCOMMITTEE TO CLARIFY THE JUDGMENT LIEN STATUTE

Jeff Davis & Jodi Dubose

Date: MAY 24, 2019

In 2005, five years after our judgment lien statute, F.S. 55.200 *et sec*., was enacted, the used car dealers succeeded in amending Section 319.27 regarding notation of liens on certificates of title. The amendments made clear that the section limits the effect of judgment liens on titled motor vehicles and mobile homes.

Amended s. 319.27 states:

"(2) No…nonpossessory lien…upon a motor vehicle or mobile home upon which a Florida certificate of tile has been issued shall be enforceable in any of the courts of this state against creditors or subsequent purchasers for valuable consideration and without notice, unless a sworn notice of such lien has been filed in the department and such lien has been noted upon the certificate of title of the motor vehicle or mobile home…"

The result is that the car can be sold free of the judgment lien. The current judgment lien statute is misleading because it does not cross-reference the certificate statute. Countless lawyers and judgment creditors have been surprised to discover that their judgment liens on motor vehicles and mobile homes are limited in effect by amended s.319.27. Accordingly, for clarity, we recommend amending the judgment lien statute explicitly to cross-reference the limiting effect of that section.

It is significant that s. 319.27 does not say that a nonpossessory lien is *invalid* if not noted on the certificate of title. All it says is that such a lien is not enforceable against creditors and subsequent purchasers for value without notice. Clearly, the lien is otherwise enforceable, meaning it is enforceable against the judgment debtor. So, just as any judgment creditor, with or without a judgment lien, can execute on a motor vehicle or mobile home, so can a judgment creditor holding a nonpossessory judgment lien.

I. Amendment

We recommend the addition of the following subparagraph to s. 55.205:

55.205 Effect of judgment lien.—

...

(5) Motor vehicles and motor homes. If the personal property of the judgment debtor includes a motor vehicle or mobile home for which a Florida certificate of title has been issued, a judgment lien on such property is enforceable against the debtor, but a judgment lien is not enforceable against creditors or subsequent purchasers of such property for valuable consideration and without notice as provided in s.319.27.

II. Possible further discussion.

Numerous judgment lien holders, on discovering the effect of s. 319.27, have brought suit asking a court to order the Department of Motor Vehicles to note the creditor's judgment lien on the judgment debtor's certificate of title. They seek a court order because the statute does not authorize judgment lien holders to apply to the Department to have their liens noted on the debtor's title, and when notation is requested, the Department refuses to do so. It occurs to us that the Bankruptcy/UCC Committee might want to consider amending s. 319.27 to authorize notation of judgment liens on certificates of title.

This subcommittee, Jeff Davis and Jodi Dubose, have mixed feelings about the advisability of such an amendment. At first blush, it is attractive because it would streamline the mechanism for effectuating the statute and eliminate the need to obtain a court order. On the other hand, we wonder what is the point of noting a judgment lien on the debtor's title? Once the motor vehicle or vehicles are found, which must occur before notation could be requested, why not just levy? If the debtor begs for more time, the creditor can take a security interest and perfect it by notation on the title. Another concern is that if a judgment lien is noted on the title, what happens when the lien lapses? Can the debtor request a clean title from the Department? What if the creditor files a second judgment lien certificate? What happens if the creditor requests notation on a paper title in the debtor's possesson? How would the DMV note the interest on the title then? Does the DMV or the creditor have to chase the debtor down, and what if the debtor refuses to relinquish it? Additional complications can be imagined.

Because of these concerns, we make no recommendation here. The Committee might want to discuss it at the June meeting, or it might want to appoint a subcommittee to look into the issue, or it might want to discard the idea and leave well enough alone.

We seek the Committee's guidance.

I

116TH CONGRESS
1ST SESSION

H. R. 2938

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2019

Mrs. MCBATH (for herself and Mr. STEUBE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Honoring American Veterans in Extreme Need Act of 2019'' or the ''HAVEN Act''.

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

"(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay ex-

cluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.''.

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116TH CONGRESS
1ST SESSION

S. 679

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

IN THE SENATE OF THE UNITED STATES

MARCH 6, 2019

Ms. BALDWIN (for herself, Mr. CORNYN, Mr. TESTER, Mr. ISAKSON, Mr. JONES, Mr. TILLIS, Mrs. FEINSTEIN, Ms. ERNST, Mr. LEAHY, Mr. GRASSLEY, Ms. SMITH, Mr. CRAMER, Mr. DURBIN, Mr. MORAN, Ms. KLOBUCHAR, Mr. COTTON, Ms. DUCKWORTH, Mr. RUBIO, Mrs. SHAHEEN, and Mr. ROUNDS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

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ability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.''.

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LLC and Partnership Transfer Restrictions Excluded From UCC Article 9 Overrides

20 Min Read **By: Carl S. Bjerre, Daniel S. Kleinberger, Edwin E. Smith, Steven O. Weise**
Feb 7, 2019

The organizational law of limited liability companies (LLCs) and partnerships has always fundamentally embraced an idea known as the "pick-your-partner principle," under which transfers of a member's or partner's ownership interest are restricted by statute, and those restrictions may be tightened or loosened by agreement. In recent years the pick-your-partner principle has interacted in complex and not always practical ways with Article 9 of the Uniform Commercial Code (UCC). Since 2001, UCC §§ 9-406 and 9-408 have overridden a broad range of statutory and agreement-based anti-assignment provisions, subject to complex exceptions that have tended to protect the pick-your-partner principle in many significant respects, while also proving analytically very difficult to handle. Recently, however, in an important step forward, Article 9's overrides of anti-assignment provisions have recently been amended to make them simply inapplicable to LLC and partnership interests.

One hopes that these amendments to Article 9's overrides (hereinafter the "2018 amendments" because they were approved last year) will soon be enacted by the states, but in the meantime, the current overrides will remain on the books in various jurisdictions with all of their existing complexities. Accordingly, this article focuses not only on the 2018 amendments, but also on an analysis of the overrides as they now stand, as applied to LLC and partnership interests. The amendments themselves are quite simple, but the article discusses them only after analyzing the overrides because the amendments are more easily understood against that background.

I. Background on Unincorporated Organization Law and UCC Article 9

Any co-owner of a privately held business organization may have a substantial stake in determining who the other co-owners are. If a second co-owner has the power to transfer its interest to a stranger, then the second co-owner can, in effect, force the first co-owner into a venture with the stranger/transferee without the first co-owner's consent. The policy and effect of the pick-your-partner principle under LLC and partnership law is to prevent such an outcome.

UCC Article 9, by contrast, has the very different policy orientation of facilitating voluntary transfers of personal property. Article 9's most familiar application is to transfers of property as security for the repayment of loans, but Article 9 also applies to outright sales of certain types of personal property. Some of these transfers and outright sales are precisely those that the pick-your-partner principle seeks to prevent, and as a result, for personal property consisting of LLC or partnership interests, the interaction of the pick-your-partner principle with Article 9 has been complex and thorny. Some have even called it recondite.

Ownership interests in a business organization, particularly one that is unincorporated, can be formally or informally bifurcated into governance rights and economic (or financial) rights. Governance rights consist of the owner's right to vote on, consent to, or otherwise make decisions about the organization's activities, and the right to receive information about the organization. Economic rights consist of the owner's entitlement to receive monetary distributions from the organization, whether from its profits or from an eventual dissolution and winding up. A complete ownership interest typically comprises both governance rights and economic rights. A good example of purely economic rights is a transferable interest in an LLC or limited partnership. See, e.g., Uniform Limited Liability Company Act (ULLCA) § 102(24) (2013).

Article 9 broadly covers ordinary security interests in both of the above aspects of ownership rights as well as in virtually all other personal property, plus the outright sales of some types of personal property, to be explained below. In light of this vast coverage, and in order to provide appropriately tailored rules for particular patterns of transaction, Article 9 subdivides personal property into an array of statutorily defined "types," or classifications. The most important classification for purposes of this article is general intangibles, which is Article 9's residual or catch-all classification, meaning that it includes any personal property that does not fall within the other Article 9 classifications. Hence, an asset is a general intangible only if it is not, for example, inventory or other goods, accounts, instruments, chattel paper, or securities or other investment property. See UCC § 9-102(a)(42). Examples of general intangibles range from trademarks to taxicab medallions, and centrally for purposes of this article, the category includes most LLC and partnership interests. (LLC or partnership interests may alternatively be classified as securities, using an opt-in process discussed in Part II.C.)

The other key type of property for purposes of this article is payment intangibles, which is a subset of general intangibles. The distinction between a general intangible that is also a payment intangible on one hand, and a general intangible that is not a payment intangible on the other, is that the former includes only general intangibles under which the "principal obligation" of the "account debtor" is "a monetary obligation." § 9-102(a)(62). In this article, the important term "account debtor" may be understood simply as the entity that is obligated on a payment intangible or other general intangible, i.e., the LLC or partnership itself as opposed to its members or partners. To determine whether the "principal obligation" is "monetary," one must weigh the relative importance of a member's or partner's governance and economic rights: if the LLC's or partnership's principal obligation in respect of the ownership interest is economic and thus "monetary," then the ownership interest is a general intangible that is also a payment intangible (or simply "payment intangible" for short). Otherwise, the ownership interest is a general intangible that is not a payment intangible. In general, if a member or partner has governance rights that the LLC or partnership is obligated to respect, the ownership interest is likely a general intangible that is not a payment intangible.

This distinction between payment intangibles and other general intangibles affects Article 9's scope, which is crucial to understanding the overrides because of course the overrides apply only within that scope. Article 9's scope includes two principal types of transactions relevant to this article: interests in either payment intangibles or other general intangibles that secure a loan or another obligation (referred to in this article as ordinary security interests), and outright sales of

payment intangibles. In fact, outright sales of payment intangibles are statutorily defined in Article 9 as "security interests," purely as a matter of terminological convenience, because many (though not all) of Article 9's rules for ordinary security interests also apply directly to sales of payment intangibles. By contrast, Article 9's scope does not include outright sales of general intangibles that are not payment intangibles, because most of such sales have little enough in common with ordinary security interests that inclusion would not be sensible. (The boundary between an outright sale of property and an ordinary security interest in the property is not always self-evident, but that topic is beyond the scope of this article. See, e.g., § 9-109 cmt. 4.) One final note on Article 9's scope is that transfers by gift or, generally, transfers by operation of law are not covered.

Bringing these strands together, Article 9 typically does not apply at all to the most common kind of transfer in this area—namely, outright sales of a member's or partner's complete ownership interest—because such a transaction is typically the sale of a general intangible that is not a payment intangible. By the same token, Article 9 does not apply to outright sales of a member's or partner's governance rights alone. But Article 9 does apply, and hence its overrides discussed below might apply, to ordinary security interests in complete ownership interests; to ordinary security interests in economic rights alone; and to outright sales of economic rights alone.

The fact that Article 9 applies to a particular transaction, though, does not necessarily mean that there is a practical conflict between an Article 9 override and the pick-your-partner principle. Whether a practical conflict exists depends on three elements. First, do the applicable statutes governing the organization directly restrict transfers? Such restrictions are universal or nearly so in the case of governance rights and complete ownership interests (e.g., ULLCA § 407(b)(2) (2013)), but they are nonexistent or nearly so in the case of economic rights (e.g., *id.* § 502(a)). Second, do the LLC's or partnership's own organic documents alter (or perhaps track) the statutory law just mentioned, for example by restricting transfers of economic rights? Organizations may indeed adopt restrictions on the transfer of economic rights, in order to ensure that all owners retain their economic stake in the organization and, as a result, have reasonably well-aligned governance incentives. And finally, if a restriction on transfer is imposed by either of the foregoing sources, does one of the Article 9 overrides invalidate or limit the restriction?

II. Navigating Unamended §§ 9-406 and 9-408

Part of what makes Article 9's overrides of anti-assignment provisions difficult is that they appear in two separate sections that are phrased quite similarly, but have subtle distinctions, and do not overlap. The first override, in § 9-406, is relatively strong and simple in its effects, but it applies to only a narrow set of transactions. The second override, in § 9-408, applies more broadly and is more complex in its provisions that apply to LLC and partnership interests, but it has only relatively weak effects on the transactions to which it applies. Taking into account the narrowness of the first and the weakness of the second, plus the availability of the opt-in process discussed in Part II.C, the overrides have generally not posed substantial problems for those who seek the protection of the pick-your-partner principle. On the other hand, general conclusions only take one so far in particular transactions.

A. Section 9-406

Article 9's first override, beginning at § 9-406(d), invalidates any "term in an agreement between an account debtor and an assignor" to the extent that that term "prohibits, restricts, or requires the consent of . . . the account debtor" to "the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in . . . the payment intangible." The simplicity of this provision is evident from its shortness, and the strength of this provision is that it overrides restrictions on all aspects of security interests, including "enforcement," as further discussed below.

The § 9-406 override is narrow, however, in three important ways. First, it applies only to payment intangibles (leaving aside its application to other types of property not relevant to this article), and only to ordinary security interests in them. See § 9-406(e). In other words, the override does not apply to transfers of governance rights, in either an outright sale or an ordinary security interest; and it does not apply to transfers of a complete ownership interest in either an outright sale or an ordinary security interest, assuming that the complete ownership interest is a general intangible that is not a payment intangible. Nor does the override apply to an outright sale of a payment intangible (other than a foreclosure sale or a secured party's acceptance of the payment intangible in satisfaction of the obligation it secures). See the discussion of § 9-408 in Part II.B. The narrowness of the § 9-406 override is important as a practical matter because when an LLC's or partnership's organic documents impose restrictions on transfer, the restrictions sometimes apply by their own terms only to governance rights or complete ownership interests, not to purely economic rights (classified as payment intangibles) in the first place.

Second, the § 9-406 override has no effect on an anti-assignment clause in an agreement among the organization's members or partners *inter se*, as opposed to terms in an agreement with the organization itself. This is because the override applies only to terms in an agreement with "an account debtor" and the assignor/transferor, and as noted in Part I, the LLC or partnership itself, rather than the other members or partners, is the account debtor in this context. Moreover, there may be substantial grounds to question whether the override applies even to an anti-assignment clause that is set forth directly in the organization's operating agreement, partnership agreement or other organic documents, because as a formal matter, an LLC or partnership is usually not a party to these agreements. On the other hand, substance-over-form arguments should be borne in mind on this point.

Third and relatedly, if the term of the agreement imposes a consent requirement, the override applies only if the consent required is that of the LLC or partnership itself, as opposed to one or more members or partners. For example, if an LLC is member-managed, the agreement will almost certainly require the consent of the members, and accordingly, the override will not apply to that requirement.

B. Section 9-408

Article 9's other override, beginning at § 9-408(a), invalidates any term in "an agreement between an account debtor and a debtor which relates to . . . a general intangible" that "prohibits, restricts, or requires the consent of . . . the account debtor" to "the assignment or transfer of, or

creation, attachment, or perfection of a security interest in . . . the . . . general intangible." It also invalidates any provision of a statute or other rule of law that similarly "prohibits, restricts, or requires the consent of . . . [an] account debtor" to "the assignment or transfer of, or creation of a security interest in, a . . . general intangible." Thus § 9-408 is more complex than § 9-406 as applied to LLC and partnership interests, because it overrides not only terms of agreements, but also statutes or other rules of law. (Although § 9-406 also overrides some statutes or other rules of law, it does so only for classifications of collateral that are not relevant to this article.)

Section 9-408 is also broader than § 9-406 in two additional ways. First, it applies to a broader range of transactions, namely outright sales of payment intangibles (statutorily included in Article 9's term "security interest," as noted in Part I) and ordinary security interests in general intangibles that are not payment intangibles. Outright sales of economic rights, covered here, perhaps are more common than ordinary security interests in them, covered in §9-406; and certainly general intangibles that are not payment intangibles is the most common classification of an LLC or partnership interest.

Second, the statutes that § 9-408 overrides are of broad applicability because they are restrictions on the transfer of general intangibles that are not payment intangibles, i.e., virtually all complete ownership interests, plus all governance rights taken alone. As a practical matter, such statutory restrictions are nearly universal in this area, though a particular organization's organic documents may sometimes alter the statutory default rules.

On the other hand, just as for § 9-406 above, § 9-408 does not apply to an anti-assignment clause in an agreement among the organization's members or partners *inter se*, as opposed to an agreement with the organization itself. Similarly, and again just as for § 9-406, if the term of the agreement imposes a consent requirement, § 9-408 applies only if the consent required is that of the organization itself, as opposed to one or more members or partners. This override of consent requirements, in § 9-408 unlike § 9-406, extends to statutes as well as terms in an agreement, but nonetheless only if the consent required is that of the organization itself as opposed to one or more members or partners—but this is not how the LLC and partnership statutes work. Instead, the statutes place the power to give or withhold consent in the hands of the members or partners themselves.

The feature of this override that makes its effects relatively weak, and thereby substantially accommodates parties seeking the protection of the pick-your-partner principle, is that § 9-408 invalidates restrictions only on the "creation, attachment, or perfection" of security interests. It does not, unlike § 9-406, invalidate restrictions on "enforcement" of security interests. Subsection 9-408(d) amplifies on this point by specifying among other things that, even giving effect to the § 9-408 override, a security interest that is subject to an otherwise enforceable restriction is "not enforceable" against the "account debtor" (i.e., the LLC or partnership itself), and "does not entitle the secured party to enforce the security interest." In other words, under § 9-408, a security interest (including an outright sale of a payment intangible) may go forward as between the transferor and transferee, but not as between the transferee and the LLC or partnership. The secured party acquires property rights (an ordinary security interest or an ownership interest) to the transferring member's or partner's ownership interest, and the value of these rights would be respected, for example in a bankruptcy of the transferor, or as applied to

proceeds from a transfer not affected by a restriction. See UCC § 9-408 cmt. 7. But the secured party is nonetheless without power of its own to step into the transferor's shoes and exercise the transferor's governance or economic rights.

Summarizing the substance of the two overrides, it is useful to think in terms of four permutations, based on the two classifications of collateral and the two forms of transaction. First, an outright sale of a general intangible that is not a payment intangible is not within the scope of Article 9, so neither override applies. Second, with an ordinary security interest in a general intangible that is not a payment intangible, the relatively weak override in § 9-408 applies, so that the secured party cannot enforce the transferred governance or economic rights against the organization. Third, with an outright sale of a payment intangible, again the relatively weak override in § 9-408 applies, so that the secured party cannot enforce the transferred rights against the organization. And fourth, with an ordinary security interest in a payment intangible, the relatively strong override in § 9-406 applies, so that the secured party can enforce the transferred rights against the organization. The Permanent Editorial Board for the Uniform Commercial Code (P.E.B.) is considering issuing a report that would further detail the application of both overrides to LLC and partnership interests.

C. Opting into Article 8

Neither of the Article 9 overrides applies to property that is a security as defined in UCC Article 8. This is because securities are classified by Article 9 as "investment property" rather than as general intangibles or, *a fortiori*, payment intangibles.

The term "security" generally does not include ownership interests in LLCs and partnerships, but it does include them if the "terms" of the ownership interest "expressly provide that it is a security" governed by Article 8. See §§ 8-102(a)(15), 8-103(c). Hence, one established way for transactional lawyers to avoid the overrides altogether is to have the organization "opt in" to Article 8 by adopting appropriate provisions in its organic documents. Related measures include providing for the security to be certificated or uncertificated, and preventing the organization from opting back out of Article 8 without the consent of the parties concerned.

III. The 2018 Amendments, Non-Uniform Amendments, and Choice of Law

Compared to the complex analysis in Part II, enactment of the 2018 amendments will markedly simplify the law in this area, eliminating the possible conflicts with the pick-your-partner principle that can remain despite the exceptions in §§ 9-406 and 9-408, and without the need for an Article 8 opt-in.

The 2018 amendments statutorily provide that Article 9's overrides do not apply to "a security interest in an ownership interest in a general partnership, limited partnership, or limited liability company." (In § 9-406, this language appears in a new subsection (k), which explicitly applies to subsections (d), (f), and (j). In § 9-408, the same language appears in a new subsection (f), which explicitly applies to the entire section.) A new comment to § 9-408 reads:

This section does not apply to an ownership interest in a limited liability company, limited partnership, or general partnership, regardless of the name of the interest and whether the interest: (i) pertains to economic rights, governance rights, or both; (ii) arises under: (a) an operating agreement, the applicable limited liability company act, or both; or (b) a partnership agreement, the applicable partnership act, or both; or (iii) is owned by: (a) a member of a company or transferee or assignee of a member; or (b) a partner or a transferee or assignee of a partner; or (iv) comprises contractual, property, other rights, or some combination thereof.

A new comment to § 9-406 provides that the § 9-408 comment applies to § 9-406 as well.

By excluding from the overrides "a security interest" in an ownership interest, the 2018 amendments permit outright sales of payment intangibles to go forward, as well as ordinary security interests in payment intangibles, and ordinary security interests in general intangibles that are not payment intangibles. The overrides remain in effect for general intangibles that are not LLC or partnership interests and for other classifications of personal property that are not relevant to this article.

The 2018 amendments were initially recommended by the P.E.B. in conjunction with representatives from the Joint Editorial Board on Uniform Unincorporated Organization Acts. They were then approved in accordance with the respective procedures of the UCC's two sponsoring organizations, the American Law Institute and the Uniform Law Commission. As a result, they are now a part of the UCC's official text.

At the time of this writing, it is too early for the 2018 amendments to have been enacted in any jurisdiction. On the other hand, in recent years a number of states, led by Delaware, have enacted non-uniform provisions having the same thrust. Some of the non-uniform provisions appear in the enacting states' UCC; others appear in their LLC and partnership organizational statutes; and others appear in both spots, as belt and suspenders and to ensure they will be found.

An important conflict-of-laws question can arise if a transaction involves elements from more than one jurisdiction, one of which has the unamended Article 9 overrides, and another of which has an eventual enactment of the 2018 amendments (or an existing, comparable non-uniform provision). Article 9's conflicts rule for perfection and priority of security interests in general intangibles does not apply to the treatment of transfer restrictions, because this issue is neither "perfection," "the effect of perfection or nonperfection," nor "priority." See § 9-301(1). Article 1's main catch-all conflicts rule, which leaves some conflicts questions to the agreement of the parties, would also generally be inappropriate here because transfer restrictions inherently present a three-party question that is not amenable to treatment by two-party agreement. See § 1-301(a). Accordingly, a choice-of-law clause in the security agreement or other agreement between transferor and transferee does not control, as Comment 3 to § 9-401 makes clear. Instead, one would hope that a court would apply the version of the overrides enacted by the jurisdiction in which the entity is organized, as the same Comment assumes. (The "internal affairs" doctrine in business entity law would also be consistent with such an outcome, although of course, restrictions on transfers to nonmembers or nonpartners are not strictly internal affairs issues.) In any case, the bottom line is that real certainty in this area will most promisingly have

to come from broad enactment of the 2018 amendments. The members of each state's Uniform Law Commission delegation can often be of direct help in those enactment efforts.

IV. Conclusion

The 2018 amendments will protect the pick-your-partner principle while also greatly simplifying and clarifying its interactions with Article 9. By the same token, as is often true of simple rules, the 2018 amendments may also sometimes reach more broadly than really needed, for example by preventing simple attachment and perfection, without enforcement, of a security interest in a complete ownership interest. However, those transactions can continue to go forward despite the 2018 amendments by means of, for example, the Article 8 opt-in, or other amendment or waiver of the organization's organic documents. On balance, the gains in this area from simplicity and clarity should clearly outweigh the losses from the occasional extra burden to an Article 9 transaction.