

A Publication of the  
California Receivers Forum

RECEIVERSHIP

NEWS 

Fall 2015 • Issue 56, page 12

## Uniform Law Commission: The New Commercial Real Estate Receivership Act Observers' Observations

By McFarland, Beverly, Dunfee, Gordon & Weissman, Richard\*

"Receivership is an equitable remedy allowing a court to oversee the orderly management and disposition of property subject to a lawsuit. Although the remedy is not new, there is no standard set of receivership rules and the courts of different states have applied widely varying standards. This Uniform Commercial Real Estate Receivership Act [Receivership Act] applies to receiverships involving commercial real estate, and provides a standard set of rules for courts to apply. It will result in greater predictability for litigants, lenders, and other parties doing business with a company subject to receivership."

Uniform Law Commission (ULC). The complete Commercial Real Estate Receivership Act can be viewed at <http://uniformlaws.org/Act.aspx?title=Commercial%20Real%20Estate%20Receivership%20Act>.

The ULC, also known as the National Conference of Commissioners on Uniform State Laws, which was established in 1892, recites its mission as providing "states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." In the realm of commercial real estate receiverships, the ULC has recently done just that.

The ULC members and commissioners, consisting of practicing lawyers, judges, legislators and legislative staff and law professors, worked hard on the Receivership Act, but invited individuals with special expertise – whom they called "Observers"- to participate in the ULC committee meetings on commercial real estate receiverships (the "Committee"). The authors of this article were the three Observers sent by the California Receivers Forum ("CRF") to provide practical, experienced business recommendations to the Committee during the drafting process of the Receivership Act. Here is their story.

### The Observers' Perspective

We are happy to say that many of the items stated within the final Act were recommended by us either in writing or verbally at the meetings, adopted in concept by the Committee and drafted into law.

We traveled to Salt Lake City, Minneapolis, Chicago and Washington, DC to participate in the round table discussions with the cast of markedly different and opinionated legal professionals to discuss, debate and fight to form a consensus on what should be the foundation for a uniform Receivership Act for all State legislatures to consider adopting. The opinions and comments presented during these two day (all day) long meetings ranged from fascinating to brilliant to mind-blowingly naïve on all receivership matters. Hailing from California and flying the CRF flag, we, rightly or wrongly, felt that we had more knowledge and experience in receiverships than the rest of the group. In case you wondered, we did not keep our opinions to ourselves. They will certainly all remember our spirit and contributions. In the end, we are all proud of our work on this historic draft Receivership Act.

We believe that our contribution was important because California has more receiverships than any other state in the USA. We were appointed to serve as "Observers" on the Committee by CRF. The Committee members have a good deal of respect for our association as it is the largest one in the country serving the receivership community through the education of its members.

### The Impact of Special Interests

The process of drafting the Receivership Act was monitored by the chair of the Committee and the Recorder in charge of the drafting. Both people had substantial respect, skill and patience with the Committee members who at times labored on about the special interests of the parties in their state. The drafting process led to interesting provisions in the Act, including:

- Article 9 and bankruptcy procedural and substantive provisions were proffered to expand the grounds for the appointment of a receiver over both personal and real property, and to expand or limit the powers of a receiver to protect lenders' interests.
- Section 9 gives priority lien creditor status to receivers (as a creditor) over unperfected senior creditors and all subsequent lien creditors with respect to the real and personal property over which they are appointed.
- Section 12 enumerates and codifies basic receiver's powers which California receivers generally have in their orders, but they are not exhaustive or exclusive, and enables a receiver to act pursuant to other state laws and exercise powers conferred by a court.
- Section 13 creates minimum statutory duties on an "owner" of receivership property to assist the receiver, which would be helpful to a receiver to enforce his/her order.
- Section 4 sets forth exclusions that reflect the views of Committee members representing the Midwest farming and mining communities. By way of example, Section 4 provides:

**SECTION 4. SCOPE; SUMMARY OF EXCLUSIONS.**

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

**SECTION 4. SCOPE; SUMMARY OF EXCLUSIONS.**

- b. This [act] does not apply to 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 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.
- c. 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. This [act] does not limit the authority of a court to appoint a receiver under law of this state other than this [act].
- e. Unless displaced by a particular provision of this [act], the principles of law and equity supplement this [act].

- Section 16 deals with sales of property. CRF has collected many opinions and ideas over the years whether or not sales of receivership property by a rents receiver should be allowed by the courts, and whether a state court can order a sale "free and clear" of liens, among other important matters pertaining to a sale of real property. Section 16 makes no distinction on what legal grounds the receiver has taken possession of the property in respect to the receiver's right to sell a property pursuant to a court order, subject to certain conditions precedent. The court is also given the right/power to effect a transfer of the property free and clear of all liens to a transferee. However, such now extinguished liens on the property attach to the proceeds of sale in the order of priority of record as they were prior to the sale, even if there are insufficient proceeds to pay all of the lien holders. Section 16 provides as follows:

**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 16 commercial standards of fair dealing.
- 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. Unless the agreement of sale provides otherwise, a sale under this section is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any right of redemption but is subject to a senior lien.
- 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 as 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.

**Will it Be Adopted?**

When drafting of an act is completed, each commissioner must work to advocate the acceptance of the act in their state. They will meet with resistance to change, but the result can be "workable modern state law that helps keep the federal system alive" in the courts. The Observers understand that once an Act has been fully debated over a period of time by the Committee, and subsequently approved by the Commission, the probability of success in regards to acceptance in State legislatures nationwide of that Uniform Act is very high, with little room for the individual States legislatures to modify the language and still have it entitled "Uniform."

As the ULC website states: "The work of the ULC simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. Representing both state government and the legal profession, it has sought to bring uniformity to the divergent legal traditions of more than 50 sovereign jurisdictions, and has done so with significant success."

The Observers to the Receivership Act are proud to have been a part of the process of drafting the Act and hope it benefits the receivership community throughout the USA.

*\*Beverly N. McFarland is an RN Associate Publisher, a chapter 11 trustee and receiver and CEO of The Beverly Group, Inc., an asset management company that has successfully resolved in excess of \$8 billion dollars of estimated assets since 1983. Ms. McFarland is a former chair and current member of the California Receivers Forum BOD, the Turnaround Managers Association BOD and has enjoyed presenting at the Loyola Law School seminars through the years as well as many other associations on receiverships and chapter 11 bankruptcy matters.*

*\*Gordon Dunfee, Law Office of Gordon Dunfee, is a member of the CRF San Diego Board of Directors and the Acting President of the California Receivers Forum State Board of Directors. He is a receiver and counsel to receivers.*

*\*Richard Weissman serves full time as a receiver, partition referee, Provisional Director and Special Master for the State and Federal Courts.*