

Bringing Unity To Commercial Real Estate Receivership

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The National Conference of Commissioners on Uniform State Laws (NCCUSL) recently approved and has recommended for enactment in all states the Uniform Commercial Real Estate Receivership Act. The appointment of a receiver of real property is a common equitable judicial remedy available in all states and is often sought by a foreclosing mortgagee or other parties who have or claim an interest in the real property. However, few states have comprehensive legislation regarding the appointment and powers of receivers for commercial real estate, with case law providing primary guidance. As a result, the states' approaches to the appointment of receivers for commercial real estate vary greatly, not only from state to state, but even within states. For example, the standards for appointment range from the mere prior consent of the real property's owner, to the moving party having to demonstrate fraud, waste or abandonment by the owner. Similarly, the powers of a receiver range from being a mere custodian of the property, to having powers to operate and even, in appropriate circumstances, sell the receivership property. Many other aspects of a receivership are left to the discretion of the court. With real estate mortgage loans frequently being secured by properties located in multiple states, the disparity among the states is particularly problematic. The act is intended to provide a uniform detailed template for the appointment of commercial real estate receivers, which should lead to more consistent and predictable receivership proceedings. The act's major provisions are as follows: **Scope**

The act applies to the receivership for an interest in real property and any personal property related to or used in operating the real property, except that, with certain exceptions, it does not apply to property improved with one-to-four dwelling units. Also, it does not preempt other state laws that already provide for the appointment of a receiver or laws providing for the appointment of a governmental unit or its representative as a receiver (such as an insurance commissioner).

Standards of Appointment

The act provides that a court MAY appoint a receiver, before a judgment in favor of the moving party, if the party has an apparent interest in the property and demonstrates that the property is in danger of waste, loss or similar impairment or may be subject to a voidable transaction. After judgment, the court MAY appoint a receiver to enforce the judgment, preserve nonexempt property pending

appeal or during the post-foreclosure redemption period (for those states with such a right in favor of the mortgagor). In addition, the act contains alternative provisions regarding the appointment of a receiver in conjunction with a foreclosure when the mortgagor has consented — either before or after a default — in writing to such an appointment, or where the mortgagee demonstrates waste, loss or similar impairment. One alternative provides that such appointment is a matter of right, while the other alternative makes such appointment permissive. Note that the Uniform Assignment of Rents Act, promulgated in 2005 by NCCUSL, provides that if the mortgagor has consented to the appointment of a receiver, either before or after default, a mortgagee is entitled to the appointment of a receiver as a matter of right. **Stay**

The act provides that, similar to a bankruptcy filing, the appointment of a receiver operates as a stay of any action or proceeding to obtain possession or control over receivership property, or enforce a lien securing a pre-appointment claim against the property owner. Certain exceptions are provided, including enforcement of a mortgage by the person seeking the receiver's appointment, commencement or continuation of criminal proceedings, enforcement of nonmonetary judgments by a governmental unit in furtherance of its police or regulatory powers and actions to perfect or maintain the perfection of a security interest in the receivership property. Sanctions may be imposed for violating the stay, including civil contempt, an award of damages and voiding of the prohibited action. **Powers of Receiver**

One of the most important features of the act concerns the powers of the receiver. Unless ordered otherwise, the receiver may operate the business of the receivership property in the ordinary course, including incurring unsecured debt, paying expenses and asserting claims and other rights with respect to receivership property. With court approval, the receiver may incur debt and operate the receivership property out of the ordinary course and make improvements to receivership property. Also with court approval, the receiver may sell, license, lease or otherwise dispose of receivership property out of the ordinary course, and in the case of a sale, the receivership property is sold free and clear of the lien of the party that obtained the receiver, any subordinate liens and any right of redemption, unless the sale agreement provides otherwise (liens senior to the lien of the moving party remain in place). The liens on the receivership property that are extinguished attach to the proceeds of the sale with the same priority they had on the sold property. This provides a viable alternative to foreclosure for the mortgagee that sought the receivership and is intended to achieve a greater sales price than is usually produced by a distressed foreclosure sale. It also provides greater flexibility for real estate mortgage investment conduit's in commercial mortgage backed securities transactions, as such sales can be structured to include an assumption and modification of the REMIC-held mortgage (permitted under the REMIC rules, as opposed to the prohibition of a REMIC foreclosing upon a property and subsequently extending purchase money financing to a later buyer). Receivers are also permitted to adopt or reject executory contracts of the owner of the receivership property. Executory contracts include unexpired leases. Certain types of executory contracts are excluded, however. For example, a lease under which the tenant occupies the leased premises as its primary residence may not be rejected. Similarly, where the receiver was appointed at the request of a mortgagee, a lease to which the mortgagee consented (for example, the lease fell

within the preapproved lease parameters in the loan documents) cannot be rejected. The act recognizes the enforceability of nondisturbance agreements. The act prescribes the rights and claims that a party to an executory contract may assert as a consequence of rejection. **Other**

Provisions

The act also addresses such issues as the powers of the court, commencement of ancillary receivership proceedings in another jurisdiction, disqualification of a potential receiver, the posting of the receiver's bond, the receiver's engagement and compensation of professionals and the obligation of parties to turn over receivership property and cooperate with the receiver. It sets forth the defenses and immunities of a receiver, the receiver's periodic (and final) reporting obligations, the removal and replacement of a receiver and the termination of the receivership and receiver discharge. The act also expressly provides that seeking a receivership is not an election of remedies by the mortgagee, a receivership does not make the mortgagee a mortgagee in possession and the appointment of the receiver is not an "action" for purposes of a state's "one-action" laws. **Summary**

The act not only provides more objective standards for when a receiver for commercial real estate may be appointed, it provides clearer guidance for the scope of a receiver's powers and the receiver's obligations. These powers include the right to sell receivership property, even out of the ordinary course, and to reject certain executory contracts (including leases), thus making a receivership a comprehensive remedy and attractive alternative to foreclosure for a mortgagee with a defaulted loan. A receivership can alleviate a lender's concerns about its borrower "milking the property" or the decline of a property due to the owner's benign neglect, in each case in the face of an imminent foreclosure, while also presenting an opportunity to maximize the realization of a property's value through a less distressed liquidation than by foreclosure sale. A copy of the act, including the prefatory note and comments, may be found [here](#). ___ Republished with permission by [Law360](#)

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