

NCCUSL Approves Uniform Commercial Real Estate Receivership Act

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The appointment of a receiver of real property is a common equitable judicial remedy available in all states. It is often sought by a foreclosing mortgagee or others 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—case law provides primary guidance.

As a result, states' approaches to the appointment of receivers for commercial real estate vary greatly, not only from state to state, but even within states. Thus, the resolution of central issues, such as the standards for receiver appointment and the scope of a receiver's authority, range wildly from jurisdiction to jurisdiction. Many aspects of a receivership are left to the court's discretion. The inconsistencies among the states are particularly problematic because real estate mortgage loans are frequently secured by properties located in multiple states.

To remedy this, the National Conference of Commissioners on Uniform State Laws (NCCUSL) recently approved the Uniform Commercial Real Estate Receivership Act, and recommended it for enactment in all states.

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).

Appointment Standards

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, or preserve non-exempt 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 a receiver's appointment 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 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.

Appointment = 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 preappointment 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 non-monetary 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 Act's most important features concerns the receiver's powers. **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 as 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. 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 conduits (REMICs) in commercial mortgage-backed securities transactions, as such sales can be structured to include an assumption and modification of the REMIC-held mortgage.

Receivers are also permitted to adopt or reject executor contracts, including unexpired leases, of the owner of the receivership property. 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. The Act recognizes the enforceability of non-disturbance agreements, and prescribes the rights and claims that a party to an executory contract may assert due to a 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 a receiver's defenses and immunities, the receiver's periodic (and final) reporting obligations, and standards with respect to 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.

A copy of the Act, including the Prefatory Note and Comments, may be found at uniformlaws.org.