

Utah Becomes First State to Enact the Uniform Commercial Real Estate Receivership Act

by David E. Leta

Introduction

On March 25, 2017, Utah became the first state to enact the Uniform Commercial Real Estate Receivership Act (UCRERA), which was drafted by the National Conference of Commissioners on Uniform State Laws (the Conference) and adopted by the Conference at its annual meeting in July 2015. The Utah Uniform Commercial Real Estate Receivership Act (the Utah Act) mirrors UCRERA and applies to all commercial real property receiverships that are filed in the Utah district courts on and after May 9, 2017. The Utah Act is found at Utah Code Section 78B-21-101, *et seq.*

Background

Prior to the Utah Act, all state court receivership proceedings were governed by Utah Rule of Civil Procedure 66. Rule 66 is very short, and there are only a smattering of cases interpreting it. Several important questions governing receivers and receivership proceedings are not addressed in either Rule 66 or in the underlying cases. For instance, the rule states that, absent consent of all parties, a receiver cannot be “a party or attorney to the action” and must be “impartial and disinterested as to all parties and the subject matter of the action.” Does this mean that a proposed receiver is disqualified because he or she also is serving as a receiver in another pending case involving one of the parties, even if the other pending case involves different assets and different counter-parties? Is a receiver disqualified if he or she owns a bank account at a financial institution that is a party to the action? Can a receiver appointed under Rule 66 be an entity? The Rule implies that the receiver must be a “person,” but that word is undefined. What bond, if any, must be posted by a receiver? The rule makes a bond discretionary with the court and, if the court does require a bond, Rule 66 incorporates Utah Rule of Civil Procedure 64 in setting the amount. Rule 64, however, also is discretionary and is designed for situations where one of the parties is seeking to stay implementation of a provisional remedy under Rules 64A–E and 69A–C. In fact, Rule 64 does not even mention Rule 66. Can a receiver sell receivership property, and,

if so, is such a sale free and clear of liens? Rule 66 allows a receiver to “make transfers” and to “take other action as the court may authorize,” but it does not address the impact of such transfers on affected constituents. Under the rule, a receiver can act, under the direction of the court, to “bring and defend actions. . . , seize property, to collect, pay and compromise debts. . . [and] invest funds,” but does this grant allow the receiver, even with court authority, to adopt or reject executory contracts? What type of notice regarding the receivership, the appointment of the receiver, or the proposed actions of the receiver must be given to parties-in-interest? Rule 66 is silent on this question. How, if at all, can parties-in-interest file claims against the receivership and participate in distributions? Again, Rule 66 is silent. Can a receiver hire professionals to assist him or her in performing duties, and, if so, how is the professional’s compensation determined? Not surprisingly, Rule 66 again is silent.

As a result of the uncertainties with Rule 66, courts and moving parties in receivership cases typically have drafted expansive receiver appointment orders that speak like operating agreements. Even here, however, there was no consistency from one case to another, from one court to another, or even between judges in the same court. In essence, prior to the Utah Act, every receivership case was an island in an archipelago, with each island governed by its own, unique receivership order. And, in every such case, there were lingering questions about whether such broad appointment orders could override other state laws governing lien rights, debt collection remedies, and foreclosure procedures.

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The situation in Utah was not unique. As the Conference recognized when it appointed a special committee to draft UCRERA,

[u]nfortunately, 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. . . . 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. . . . 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.

Uniform Commercial Real Estate Receivership Act, Prefatory Note at 2 (2015), *available at* <http://www.leg.state.nv.us/Session/79th2017/Exhibits/Assembly/CPP/ACPP371F.pdf>.

Accordingly, the Conference embarked on a four-year effort to craft a uniform statute, UCRERA. UCRERA has now been adopted by Utah. It also is being considered by other state legislative bodies, including those in Nevada, Oklahoma, and Maryland.

Summary of Key Statutory Provisions in the Utah Act

What follows is a summary of the Utah Act's key provisions. Practitioners are urged to read the statute carefully for a more comprehensive understanding of the legislation.

Definitions: Utah Code Section 78B-21-102

For the most part, the definitions in the Utah Act are helpful but not remarkable. In general, these definitions are *similar* to the

definitions for like terms in the Bankruptcy Code, 11 U.S.C. § 101, and in the Utah Uniform Commercial Code, Utah Code sections 70A-1a-201, 70A-2-103 through -106, & 70-9a-102. There are some differences, however. For instance, the definition of “affiliate” is much broader than that found in 11 U.S.C § 101(2). Some defined terms, such as “companion,” “executory contract,” “owner,” “proceeds” and “rents,” have no corresponding definitions in the Bankruptcy Code. On the other hand, some terms in the statute are not defined, such as the term “dwelling unit,” which is used to *exclude* certain real property from the scope of the law. *See* Utah Code Ann. § 78B-21-104(2) & discussion below. In this regard, practitioners will find the comments and examples in UCRERA to be instructive in interpreting the statute. *See, e.g.*, UCRERA, cmt. 2 to § 4 (mirroring Utah Code section 78B-21-104).

Notice and Opportunity for Hearing: Section 78B-21-103

Under the Utah Act, the court may enter orders only after such notice and opportunity for a hearing as is appropriate under the circumstances. The court, however, may issue an order without an actual hearing if no interested party timely requests a hearing or if the particular circumstances require an order before a hearing can be held. This is a significant improvement over Rule 66, which does not contain any requirements for notice of the receivership case, with the exception that a receiver must file a certified copy of the appointment order in the office of the county recorder where receivership real property is located before the receiver can be vested with an interest in the property. *See* Rule 66(g). This type of limited “record notice” is only effective for those searching the title records of the subject property. The notice provisions of Utah Code section 78B-21-103, on the other hand, are designed around the principles of due process and fairness in judicial administration. They require that persons affected by the particular receivership order be given actual notice and an opportunity to be heard before a final determination of their legal rights and responsibilities is made by the court. At the same time, section 78B-21-103 is flexible in allowing the court to fashion notice that is “appropriate” in the particular circumstances.

Scope and Exclusions: Section 78B-21-104

The Utah Act applies to all receiverships for *real property*, as well as *related* personal property, *except* where the real property is improved by one to four “dwelling units,” *unless* (a) the dwelling units are used for agricultural, commercial, industrial, or mineral extraction purposes that are not incidental uses by an owner occupying the property as a primary residence; (b) the dwelling units secure an obligation incurred when the property

was used or planned for use for such commercial purposes; (c) 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 (d) the owner collects rents or other income from an unrelated tenant or other occupier. The Utah Act also does *not* apply to a receivership authorized by the laws of Utah in which the receiver is a governmental unit or an individual acting in an official capacity on behalf of the governmental unit. Furthermore, the Utah Act does *not* apply to receiverships that do not primarily involve *real property*. Finally, unless there is a specific provision of the Utah Act that provides otherwise, the statute can be supplemented by general principles of law and equity.

Power of the Court: Section 78B-21-105

The district courts of the state of Utah have *exclusive* jurisdiction of receivership proceedings brought under the statute. The Utah Act, however, does not contain any special venue provisions. So, with regard to the venue of a receivership case, the provisions of section 78B-3-301 will govern.

Appointment: Section 78B-21-106

The Utah Act establishes standards under which a court may appoint a receiver in the exercise of its equitable discretion. These standards include circumstances both before and after judgment. Before judgment a receiver may be appointed to protect a party that demonstrates an apparent right, title, or interest in the subject real estate, if that property, or its revenue-producing potential, is subject to, or in danger of, waste, loss, dissipation, or impairment or is the subject of a voidable transaction. After judgment, a receiver may be appointed to carry the judgment into effect, preserve nonexempt property pending appeal, or where the owner refuses to apply the property in satisfaction of the judgment. In addition, the statute contains broad authority to appoint a receiver "on equitable grounds." *Id.* It also allows for appointment "during the time allowed for redemption to preserve a property sold in an execution or foreclosure sale" and to secure the rents during such time. The Utah Act 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, in connection with a foreclosure. In particular, the

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statute expressly recognizes the right of a mortgagee to have a receiver appointed (a) if necessary to protect the property; (b) if, before default, the mortgagor agreed in a signed record to such an appointment on default; (c) if, after default, the mortgagor so agreed in writing; (d) if the collateral is insufficient to satisfy the debt; or (e) if the owner fails to turn over the proceeds or rents that the mortgagee is entitled to collect. 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 fees, and costs incurred by a person injured if the appointment is later determined to have been unjustified.

Identity and Independence of Receiver: Section 78B-21-107

The Utah Act requires that the receiver provide sworn evidence of the receiver's independence. With respect to disinterestedness, the statute contains broad prohibitions against appointment of persons who are affiliates of a party, have a material interest in the property, have a financial interest in the outcome of the proceeding, are a debtor or creditor of a party, or hold an equity interest in a party, other than a non-controlling interest in a publicly-traded company. Certain types of relationships are excluded from these broad categories, however, such as being

appointed as a receiver, or being owed money in connection with another unrelated receivership case involving a party, being obligated to pay a debt that is not in default and is for personal, family, or household purposes, or maintaining a deposit account with a party. Furthermore, while a party seeking appointment of a receiver may nominate someone, the court is not bound by any such nomination.

Receiver's Bond: Section 78B-21-108

Every receiver *must* post a bond that is conditioned on the faithful discharge of the receiver's duties, is in an amount specified by the court, and is effective upon appointment. Where required by the circumstances, the court may authorize the receiver to act before the bond is posted. The statute does not authorize the court to waive the bond requirement, however. The court also may approve alternative forms of security, such as letters of credit or deposit of funds, but receivership property may not be used as security. Interest earned on any deposited funds posted for the bond must be paid to the receiver upon the receiver's discharge. And, any claim against the receiver's bond must be made not later than one year after the date the receiver is discharged.

Effect of Appointment; Receiver as Lien Creditor:

Section 78B-21-109

On appointment, and with respect to personal property, a receiver has the status and priority of a lien creditor under Chapter 9a of the Utah Uniform Commercial Code. With respect to real property, a receiver has a similar status under Chapter 9 of the Marketable Record Title statute.

Effect on After-Acquired Property: Section 78B-21-110

Appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property. Any property acquired by the receiver after appointment is subject to any pre-receivership security agreement to the same extent as if no receiver had been appointed.

Collection and Turnover of Receivership Property:

Section 78B-21-111

On appointment, persons having possession, custody, or control of receivership property must turn over the property to the receiver, and persons owing debts that constitute receivership property must pay those debts to the receiver. A person with notice of the receivership and who owes a debt that is receivership property may not satisfy the debt by paying the owner. Doing so exposes such a person to the possibility of paying the debt twice. The

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court also may sanction as civil contempt a person's failure to turn over property when required, unless there is a bona fide dispute about the receiver's right to possession, custody, or control of the property. The only exception to this broad turnover principle is if a debt is subject to setoff or recoupment or if continued possession, custody, or control of the receivership property is necessary for the person to maintain a lien against the property. In such cases, the person can retain possession until the court orders adequate protection.

Powers and Duties of Receiver: Section 78B-21-112

The Utah Act grants a receiver very broad presumptive powers, unless limited by court order or other applicable state law. These powers include the right to (a) collect, manage, control, conserve, and protect the receivership property; (b) operate a business constituting receivership property in the ordinary course; (c) incur debt and pay expenses in the ordinary course of business; (d) bring lawsuits and assert claims; and (e) issue subpoenas for examinations and documents. In addition, the statute specifies certain powers that the receiver may exercise *only with court approval*, such as (a) incurring debt outside the ordinary course of business; (b) making improvements to the property; (c) transferring property outside the ordinary course of business; (d) adopting or rejecting executory contracts made by the owner; (e) paying compensation to himself or herself or to retained professionals; (f) recommending allowance or disallowance of claims; and (g) distributing receivership property. The Utah Act also sets

forth the performance and reporting duties of the receiver. The court may expand, modify, or limit all of these powers and duties.

Duties of Owner: Section 78B-21-113

The statute places duties of cooperation and turnover on owners of receivership property. If the owner is not an "individual," then these duties apply 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. The owner must assist and cooperate with the receiver, preserve and turn over property, identify and provide access to records and other information, and submit to examination, under subpoena. A knowing failure of *a person* to perform these duties can subject the person to payment of the receiver's resulting actual damages, reasonable attorney fees and costs, together with possible civil contempt sanctions.

Automatic Stay; Injunctions: Section 78B-21-114

Entry of the order of appointment effects a stay, applicable to all persons, of any act to obtain possession of, exercise control over, or enforce a judgment against receivership property. It also stays any act to enforce a lien against receivership property. In appropriate situations, the court can expand the scope of the stay and also grant relief from the stay. For policy reasons, certain actions are excluded from this stay, including actions to foreclose or enforce a mortgage by the person seeking appointment of the receiver, an act to perfect, or maintain



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perfection of, an interest in receivership property, a criminal proceeding, and actions by governmental units to enforce police or regulatory powers, including assessment of taxes. The court may void an act that violates this stay suggesting that such violations are not void *ab initio*. The statute also addresses the consequences of a violation of the stay, and allows the court to award actual damages caused by the violation, including reasonable attorney fees, costs, and civil contempt sanctions.

Engagement and Compensation of Professionals:

Section 78B-21-115

The Utah Act authorizes the receiver to engage and pay professionals to assist in the administration of the receivership. A professional is not disqualified from being hired solely because of the person's engagement by, representation of, or other relationship with the receiver, a creditor, or a party. This is a much less rigorous qualification standard than the "disinterestedness" test typically applied in cases under the Bankruptcy Code. In addition, the statute does not prevent the receiver from serving in the receivership as an attorney, accountant, auctioneer, or broker "when authorized by law." Both receivers and their retained professionals must file itemized statements of their time spent, work performed, billing rates,

and expenses incurred and can only be paid upon court approval.

Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in Ordinary Course: Section 78B-21-116

With court approval, the Utah Act permits the receiver to use, sell, lease, license, exchange, or otherwise transfer receivership property, other than in the ordinary course of business. Unless the agreement of transfer provides otherwise, the transfer is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate lien, and any rights of redemption, but such a sale is subject to liens that are senior to the lien of the person who obtained the receiver's appointment. 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, even if the proceeds are not sufficient to satisfy all obligations secured by the liens. The sale may be conducted as either a public auction or a private sale. Creditors with valid secured claims may credit bid in connection with any proposed sale, but only if the creditor tenders funds sufficient to satisfy, in full, the reasonable expenses of transfer and the obligations secured by any senior liens extinguished by the transfer. The Utah Act also provides a safe harbor for good faith purchasers in case a party objects to the sale but fails to obtain a stay of the sale order.

Executory Contracts and Unexpired Leases:

Section 78B-21-117

With court approval, a receiver may adopt or reject an executory contract of the owner relating to the receivership property. If, under applicable Utah law, the owner could assign the contract, then the receiver also may assign the contract with court approval. Performance of a contract by a receiver prior to adoption is not an implied adoption of the contract, nor does it preclude a subsequent rejection. The Utah Act specifies the mechanics for adoption, assignment, or rejection of executory contracts and the resulting consequences. For instance, the court may condition the receiver's adoption and continued performance of the contract. Importantly, if the receiver does not request approval to adopt or reject an executory contract "within a reasonable time after the receiver's appointment," then the receiver is "deemed to have rejected the executory contract." There is no definition of "reasonable time" in the statute. Furthermore, a provision in a contract that 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 to adopt the executory contract. The Utah Act

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also contains protections for purchasers in possession of real property or real property timeshare interests that are analogous to those contained in the Bankruptcy Code. Finally, the Utah Act limits the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations.

Immunity of Receiver: Section 78B-21-118

Consistent with the receiver's status as an officer of the court, the statute provides the receiver with immunity for acts or omissions within the scope of the receiver's appointment. As such, the Utah Act incorporates the *Barton* doctrine, *see Barton v. Barbour*, 104 U.S. 126, 129 (1881), 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.

Claims: Section 78B-21-120

The Utah Act requires the receiver to notify "creditors of the owner" of the appointment of the receiver unless the court orders otherwise and prescribes the content of the notice and the manner in which it must be given. The notice must advise creditors of their rights to file a claim and must specify the date by which such claims are to be filed. Unless the court orders

otherwise, a claim that is not submitted timely is not entitled to a distribution from the receivership. The Utah Act specifies the information that must be included with a claim and permits the receiver to recommend disallowance of claims. The statute 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.

Receiver's Reports; Discharge: Section 78B-21-119 & -123

The receiver may file and, if ordered by the court, must file, interim reports that contain certain specified information. On completion of the receiver's duties, the receiver also must file a final report that, again, contains certain prescribed information. Once the court approves the receiver's final report, and the receiver has distributed all of the receivership property, the receiver is discharged.

Receiver's Fees and Expenses: Section 78B-21-121

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. In addition, the court may order the person that requested the

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appointment to pay such fees and expenses if the receivership does not produce sufficient funds to pay the same. The court also may order payment of the receiver's fees and expenses from a person whose conduct justified or would have justified the appointment under Subsection 106(1)(a) (i.e., a situation involving waste, loss, dissipation, or impairment of receivership property or a voidable transaction).

Removal or Replacement of Receiver; Termination:

Section 78B-21-122

The court may remove a receiver “for cause” and may replace a receiver that dies, resigns, or is removed. The statute does not define “cause” but leaves the determination of whether “cause” exists to the courts on a case-by-case basis. Certainly, cause would include the receiver's refusal or failure to carry out duties. If the prior receiver fully and faithfully accounts and turns over property to the successor receiver, then the prior receiver, or his or her estate, is discharged. The court also may discharge a receiver and terminate administration of receivership property if it finds that the appointment was “improvident” or that the circumstances no longer warrant continuation of the receivership. Utah Code Ann. § 78B-21-122(4)(a). Moreover, if the court finds that the appointment was sought “wrongfully or in bad faith,” the court may assess fees, expenses, and actual damages, including reasonable attorney fees and costs, against the person that sought the appointment. *Id.* § 78B-21-122(4)(b).

Ancillary Receivership: Section 78B-21-124

Where a receiver has been appointed by another state, the Utah 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 Utah. The statute also permits the Utah court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. Once an ancillary receiver is appointed by the Utah court, that receiver has all of the rights, powers and duties of an original receiver appointed under the statute, unless the court orders otherwise.

Receivership in Context of Mortgage Enforcement; Anti-deficiency Rules: Section 78B-21-125

The Utah Act makes clear that the appointment of a receiver on request of a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee a

“mortgagee in possession,” do not constitute an election of remedies, do not make the secured obligation unenforceable, and do not constitute an “action” within the meaning of Utah’s “one-action” rule. *See* Utah Code Ann. § 78B-6-901. Importantly, where a Utah receiver conducts a sale of receivership property free and clear of a lien, Utah’s anti-deficiency rules will apply to any person who held a lien extinguished by the sale to the same extent that those rules would have applied after a foreclosure sale not governed by the Utah Act. It will be left to the courts to determine if such a receivership sale is more like a judicial foreclosure, where the deficiency is determined by the difference between the debt and the sale price, or by a trust deed sale, where the deficiency is determined by the difference between the debt and the greater of the sale price or the fair market value of the property. This issue, however, would not involve the receivership court but, instead, would be an issue for a separate court to decide in a separate collection action brought by the creditor against the owner or guarantor. In any event, the sale by the receiver would be free and clear of any rights of redemption (*see* subsection 116) and, in this regard, would be more like a trust deed sale under section 57-1-19, *et seq.*

Finality of Receivership Orders: Section 78B-21-129

Prior to the Utah Act, there was uncertainty about when an order entered by a court in a receivership proceeding was “final” for purposes of appeal. The statute now eliminates that ambiguity by expressly providing that an order is final for purposes of Utah Rule of Civil Procedure 54(a), if it resolves a discrete factual dispute or legal issue, unless the court expressly states otherwise in the order. This section of the Utah Act is unique to Utah and is not contained in UCRERA.

Conclusion

The Utah Act vastly improves the administration of commercial real estate receiverships in Utah by providing judges, practitioners, and participants with more procedural structure and predictability than previously existed for such cases under Rule 66. While the statute is not a replacement for liquidations or reorganizations of commercial real estate properties under Chapters 7 and 11 of the Bankruptcy Code, it is likely to provide secured creditors with a more efficient, less costly, and quicker alternative for managing and liquidating distressed collateral.