



OREGON LAW COMMISSION

Oregon Receivership Code

Report of the Receivership Work Group on Senate Bill 899 -A1 (2017)

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I. INTRODUCTION & STATEMENT OF THE PROBLEM:

Courts may appoint a receiver to manage the real and/or personal property of a person or business in a variety of contexts. For purposes of the proposed Oregon Receivership Code (the “Code”), the most notable context for appointment of a receiver is at the behest of the property owner’s creditors, for the purpose of administering, collecting, liquidating and distributing the property when the owner is insolvent or there is a deadlock among owners. The powers of a receiver are broad and are rooted in equity, but it is important for lenders, debtors, receivers and courts to have guidance on the manner in which receivership proceedings may be conducted, and on the permissible scope and consequences of the court’s orders and the receiver’s actions.

Oregon currently has a little guidance on these matters, with the result that receivership proceedings have an ad hoc nature that may vary from court to court or from county to county. Existing law is limited to ORCP 80-82 and sparse case law stretching from the 1880’s to an attorney disciplinary opinion in 1985, with little relevance to current commercial practices or statutory enactments. A survey of the Oregon Revised Statutes yields reference to “receivers” or “receiverships” of over 248 statutory references. Yet there is virtually no statutory or rule guidance to the Courts, attorneys or receivers. Good sources of possible statutory guidelines have, however been developed elsewhere, and Oregon is in a position to benefit from these sources, as well as from a knowledgeable cadre of lawyers, judges and others who are experienced in the field.

II. HISTORY OF THE PROJECT:

The process leading to the proposed Oregon Receivership Code has its indirect roots in the work of the Uniform Law Commission (“ULC”). The ULC’s Joint Editorial Board for Uniform Real Property Acts proposed in 2011 that the ULC study the feasibility of codifying procedures and other matters affecting the receivership of commercial real estate. This study was undertaken, and a drafting committee was subsequently appointed, which led to the ULC’s adoption in 2015 of the Uniform Commercial Real Estate Receivership Act (UCRERA).

During this process it also became clear to Oregon Law Commission personnel that there was substantial interest among members of the Oregon State Bar in legislation that would amplify upon the existing Oregon receivership provisions. It was noted at this time that Washington State had a distinctively well-developed set of receivership statutes that had, in fact, been one important source for UCRERA. It was also noted that UCRERA’s limitation to commercial real estate might be less than ideal for an Oregon project, given the importance of receiverships affecting other assets as well.

The Oregon Law Commission Work Group for this project was first convened in March, 2016, for the purpose of evaluating the suitability for Oregon of a substantial set of receivership statutes and, if suitable, preparing a draft bill for legislative introduction. Members of the Work Group were as follows:

John Albert of Sherman Sherman Johnnie & Hoyt, LLP; Michael B. Batlan, a receiver and bankruptcy trustee; the Hon. Stephen Bushong, Circuit Judge (The Commission replaced Judge Bushong early on in the process in order to allow him availability to Chair another Work Group.); the Hon. Frank R. Alley of the U.S. Bankruptcy Court for the District of Oregon; Barry P. Caplan of Sussman Shank LLP; David W. Hercher of Miller Nash Graham & Dunn LLP; Edward Hostmann of Edward Hostmann, Inc., a state and federal receiver; Jeffrey C. Mисley of Sussman Shank LLP; Erich M. Paetsch of Saalfeld Griggs PC; Douglas R. Pahl of Perkins Coie LLP; Teresa H. Pearson of Miller Nash Graham & Dunn LLP; James Ray Streinz of Streinz Law Office; and Patrick W. Wade of Hershner Hunter LLP. Statutory drafting was carried out primarily by David Fang-Yen, Deputy Legislative Counsel, but also by Sean Brennan, Deputy Legislative Counsel. Oregon Law Commission support was provided by Laura H. Handzel, Deputy Director; Nita Kumar, Law Clerk; Tyler Skidmore, Extern; and Jenna Jones, Legal Assistant. The Work Group’s Chair was Mark B. Comstock of Garrett Hemann Robertson P.C. and a member of the Commission. The Work Group’s Reporter was Andrea Coles-Bjerre, Associate Professor and Director of the Business Law Program at the University of Oregon School of Law.

The Work Group considered adopting UCRERA more or less as a whole; adopting the Washington statutes more or less as a whole; and various possibilities for tailoring an Oregon-specific set of statutes. Ultimately the Work Group took the last and most ambitious of these routes. The proposed Oregon Receivership Code brings together important provisions from UCRERA, from the Washington Act, and from the Work Group’s own discussions carried out over the course of 16 meetings.

III. SECTION-BY-SECTION ANALYSIS OF SB 899 -1 AMENDMENT:

Sections 1 through 3. Short title; Receivership described; Definitions:

The -1 amendment completely replaces the current placeholder contents of SB 899.

Section 1 formally entitles Sections 2 through 41 of the Code as the Oregon Receivership Code.

Section 2 briefly describes “receivership” as the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct. This section is drawn substantially from ORCP 80A.

Some of the more noteworthy definitions include the following:

The term “residential property” is defined as “real property upon which are situated four or fewer residential units, one of which is occupied as a principal residence by the owner, the owner’s spouse, or a dependent of the owner; and (b) Where residential use

is the primary activity occurring on the real property.” This definition is relevant in Section 13 on “turnover of property” and Section 25 on “use of transfer of estate property outside of the ordinary course of business” described below.

The term “executory contract” is defined as: (a) A contract, including an unexpired lease, under which the obligations 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; or (b) A contract, including an unexpired lease, under which a party has an unexercised option to require its counterparty to perform. The intent was to adopt the broadly recognized definition of the executory nature of such contracts promulgated by Professor Vern Countryman. *See, e.g., Countryman, Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973). While recognizing the benefits of the Countryman definition, the Work Group also was mindful of its limitations, namely that certain contracts, like option contracts, do not fit neatly into the narrow confines of the definition (and yet we would want option contracts to be executory so that the receiver could assume beneficial ones and reject burdensome ones). So, the definition also includes option contracts. This definition is relevant chiefly in Section 24 on executory contracts, described below, but is also referenced in Section 11 on the powers of a receiver; Section 18 on when a court order is required;” and Section 35 on submission of claims by creditors.

The term “foreign action” is used to define an action in a federal or state court outside of Oregon. The definition has relevance in Section 6 (appointment of receiver) described below.

The definition of “insolvency” includes both: (i) balance sheet insolvency – the sum of a person’s debts exceeds a fair valuation of all of that person’s property (excluding property transferred with fraudulent intent and exempt property); and (ii) generally not paying debts as they come due. This definition is relevant in Section 6 on appointment of receiver, described below.

To clarify that a receiver may be an entity, “person” is defined to include an individual, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity, or other entity of any kind or nature.

The term “affiliate” is defined with respect to an individual and with respect to any other person. The definition of affiliate has particular relevance in Section 8 governing required disclosures of conflicts of interest by the person seeking appointment as a receiver. The term “party” is defined in two ways. When used in relation to an action, it means a person named in the caption of the action, and in this way, like the definition of “affiliate”, the definition of “party” has particular relevance in Section 8. It is also defined, when used in relation to a contract, to mean the signatory to the contract.

The term “owner” is defined as the person over whose property a receiver is appointed.

Section 4. Applicability

This section provides that this Code will apply in all receiverships commenced in a court of this state except for federal receiverships and receiverships commenced by a state agency pursuant to statutory authority. For receiverships commenced by a state agency, the Code explicitly permits the state agency to opt in – that is, to elect for the receivership to be governed by this Code. To the extent that the provisions of ORCP 80 conflict with this Code, the provisions of this Code will control.

The Code will be applicable to receiverships in which the receiver is appointed after January 1, 2018.

Section 5. Property not subject to receivership:

This section lists the types of property with respect to which a receiver may not be appointed. The effect of the section is generally to exclude the types of property which creditors generally would not otherwise have access to, and so, as a creditor remedy, a receivership should not give creditors any greater access.

Section 6. Appointment of a receiver:

This section is drawn from existing provisions of ORCP 80B, and other statutory models and delineates, as more fully described below, the bases for appointment of a receiver; the procedure for appointing a person who, in a foreign action, has been appointed receiver over property in Oregon and providing the rules for determining the venue for such an appointment; sets out the extent of the appointment that may be provided for in the receivership order (though Section 11 more explicitly addresses the powers of the receiver); and permits the court to condition the appointment on the giving of security by the person seeking the receiver's appointment.

The bases for appointment generally speak to the very purpose of a receivership – to protect and preserve value. To that end, subsections (a) through (i) include the circumstances or reasons that would warrant the appointment of a receiver. And subsection (i) grants the court broad discretion to appoint a receiver in any situation where appointment is necessary to secure ample justice to the parties. And while it is not determinative, a court, in making its determination whether to appoint a receiver, may consider the existence of a contractual provision providing for the appointment.

Section 7. Eligibility to serve as receiver:

This section closely dovetails with Section 8 (described below) requiring disclosure of certain conflicts of interest which would trigger ineligibility.

This section itself provides that any person, whether or not a resident of Oregon, may serve as a receiver except: (a) an entity that is not authorized to conduct business in Oregon; (b) a person who has been convicted of a crime involving moral turpitude, or is controlled by a person convicted of such a crime; and (c) a sheriff of any county, unless as expressly permitted by statute.

The court may also require a specific individual to appear on behalf of the entity appointed.

Section 8. Required disclosures relating to conflicts of interest:

This section is something of an adjunct to Section 7 (eligibility to serve as receiver) because it requires the disclosure of certain conflicts of interest which would render a person ineligible to serve as receiver. Specifically, a person must disclose, and affirm under oath, whether the person is an affiliate of a party to the receivership; has an interest materially adverse to an interest of a party to the receivership; has a material financial interest in the outcome of the action (other than compensation); has a debtor-creditor relationship with the owner; or holds an equity interest in a party to the receivership.

Section 9. Receiver's bond, alternative security, or insurance:

This section retains the basis of the protections of ORCP 82A (2) and existing case law but clarifies that a court may waive or use alternative methods to address the purpose of this protection. The purpose of a 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 in Receivers §119, at 172(3d ed. 1959). Thus, the bond provides a source of recovery for persons harmed by the receiver's malfeasance, such as the wrongful disbursement of receivership property.

This section permits the court to require, at any time during the service of the receiver, that the receiver post a bond, some alternative form of security such as a letter of credit, or to carry insurance to secure the receiver's faithful performance of the receiver's duties. The section also permits the receiver to charge the cost of such bond, alternative form of security or insurance against the estate.

Section 10. Exclusive jurisdiction of appointing court:

Subject to the federal Constitution Supremacy Clause and its jurisprudence in relation to federal courts, this section grants the appointing court exclusive jurisdiction over the receiver, exclusive jurisdiction over and right to control all property constituting the estate, wherever located, to the full extent of the court's jurisdiction, and exclusive jurisdiction to determine all controversies relating to the collection, preservation,

application and distribution of the estate and all claims against the receiver arising out of the receiver's exercise of powers or performance of duties as receiver.

The only exception to this grant of exclusive jurisdiction is for any part of the estate subject to the jurisdiction of another court under ORS 107.105.

Section 11. Powers of receiver:

This section, more than any other, provides direction to the court, makes explicit the basis of authority and somewhat broadens the provisions of ORCP 80D by setting forth a menu of powers from which a court may choose to confer upon the receiver. It includes, among other things, such powers as collecting, controlling and managing estate property; operating a business constituting estate property; engaging and compensating professionals; making improvements to estate property; using or transferring estate property outside of the ordinary course of business – a power more fully set out in Section 25 of the Code; assuming an executory contract; and allowing or disallowing claims of creditors. But the section makes explicit that the receiver may take any other action authorized under the Code and has powers conferred by the court under this section and by statute. And the court is granted the discretion to empower the receiver to take any other action that the court deems reasonably necessary to avoid injustice. Though this menu will most often be used to create the receivership order at the beginning of a proceeding, the statute makes clear that the court may at any time limit, expand or modify the powers conferred upon the receiver.

Section 12. Duties of receiver:

This section governs the receiver's duties, and provides that the court may limit, expand or modify the receiver's duties at any time. The section requires the receiver to notify all state and federal taxing authorities and relevant regulatory agencies of the receiver's appointment in accordance with any applicable laws imposing this duty (such as 26 U.S.C. 6036), comply with applicable law, and if appointed with respect to real property, to file a certified copy of the appointment order with the recorder of the county in which the real property is located.

Sections 13 & 14. Turnover of property; Collection by receiver of debts owed to owner:

To enable the receiver to carry out the receiver's duties, this section requires, upon the demand of the receiver, the turnover of estate property, with two exceptions. The receiver may not demand the turnover of residential real property without specific judicial approval, which the court may grant in the case of waste, destruction, obstruction of marketing of the property, enforcement of a domestic relations order, or other good cause shown. The other exception is for a creditor who has possession or

control of estate property and the validity, perfection or priority of whose lien depends on that creditor's continued possession or control – that creditor may retain possession or control unless and until the court orders adequate protection of the creditor's lien. The section derives from UCRERA Section 11(c), the comments to which refer to Bankruptcy Code notions of adequate protection.

The section also provides that any bona fide disputes over whether property is estate property, will be resolved by the court in which the receivership is pending.

Just as Section 13 provides for the turnover of property that is estate property upon the receiver's demand, Section 14 provides for the payment of debts owing to the owner to be paid to the receiver upon the receiver's demand (except to the extent that the debt is subject to setoff or recoupment). Strengthening this requirement, the section also provides that a person who has notice of the appointment of a receiver may not satisfy the debt by payment to the owner.

Section 15. Duties of owner:

This section describes the duties of the owner and derives from Wash. Rev. Code Ann. §7.60.080. Subsection (1)(a) requires the owner to generally assist and cooperate fully with the receiver in the administration of the receivership and the receiver's performance of its duties.

Subsection (1)(c) requires the owner to deliver to the receiver all of the estate property in the person's possession, custody, or control, including accounts, books and records, including any passwords or authorizations needed to facilitate the receiver's access to this information.

To facilitate the receiver's ability to carry out its duties, subsection (1)(d) requires the owner to submit to examination under by the receiver, under oath regarding the owner's financial condition, the owner's acts, conduct, liabilities or any matter relating to the receiver's administration of the estate.

Subsection (2) makes clear that when the owner is an entity, the owner's duties under this Code extend to each officer, director, manager, member, partner, or other individual exercising or having the power to exercise control over the affairs of the entity.

Sections 16, 17 & 18. Mailing lists to be maintained by the receiver; Notices; When court order required:

All of these sections relate to the nature and process of notice.

Section 16 requires the receiver to keep two mailing lists: (i) a master mailing list of all parties to the receivership, all known creditors and interested persons who have filed a

notice of appearance; and (ii) a special mailing list of all persons who request to be placed on the list. The request to be placed on the special mailing list can be accompanied with a request for a preferred form of notice, like, for example, email.

Section 17 provides that whenever a person is required to give notice under a provision of the Code, the person must notice all persons specified in the provision and all persons on the special mailing list, and file notice and proof of service with the court. And if the provision does not specify to whom notice must be given, all persons whose property interests would be affected must also be noticed. This section also provides for: (i) the amount of notice – at least as much time as the statutory provision requires, or 14 days if no time is specified; and (ii) the means of notice – by first class mail to persons not on the special notice list (or as otherwise directed by the court) and by whatever means may have been specified by those on the special notice list to those persons (or as otherwise directed by the court). The court may also shorten any notice periods for good cause shown.

Section 17 (3) provides for a form of notice that could be described as “negative notice” – that is, wherever the Code authorizes a person to take an action after giving notice (except for the actions listed in Section 18), the person may take the action without obtaining specific court authorization if the person gives notice that describes the action the person will take unless an objection is filed (and describes the procedure for objecting) and no objections are filed. If an objection is filed, the court will hear the objection and rule on it. The court may choose on its own motion to hold a hearing, and a person who otherwise would be authorized to take an action pursuant to this section may nonetheless move the court for an order authorizing the action if so desired. And the court is also permitted to consider motions and grant or deny relief without notice or a hearing, if it appears that no party to the receivership or interested person would be harmed by the relief requested.

Section 18. When court order required:

The “negative notice” procedure provided for in Section 17 may not be used by a receiver to obtain authorization to take any of the actions listed in Section 18. Rather, a receiver must, after giving notice, obtain a court order authorizing the following: sale or other disposition of real property; use or transfer of property outside of the ordinary course of business; sale of a co-owner’s interest in jointly owned property; assumption of an executory contract; obtaining credit or incurring debt outside of the ordinary course of business; compromise or settlement of a controversy that might affect distribution to creditors; disallowance of all or part of a claim; and termination of the receivership. But, if the court finds that for any of these actions (except for the allowance or disallowance of claims and the termination of the receivership) the burden of seeking a court order is greater than the materiality of the action, then the court may establish conditions under which the receiver may take those actions without first obtaining a court order.

Section 19. Creditor list and inventory:

This section governs the receiver's obligation to file an inventory of estate property and a list of creditors, and provides that if the court concludes that it is unlikely that the estate is sufficient to make material distributions to creditors, then the receiver need not file list of creditors. The section requires an initial inventory report within 60 days of appointment, and explicitly grants the Court authority to modify the timeframes.

Section 20. Receiver's periodic reports:

The section requires the receiver to file monthly reports of the receiver's operations and financial affairs including such things as beginning and ending cash balances, a statement of cash receipts and disbursements, a statement of non-cash receipts and payments, a tax disclosure statement and any other information required by the court.

Section 21. Claims bar date:

To facilitate the administration of the estate, this section permits the receiver to set a deadline for submitting claims, and, upon court order, to disallow claims submitted after the deadline.

Section 22. Automatic stay of certain proceedings:

To prevent interference with the receiver's possession and management of estate property or the performance of the receiver's duties, Section 22 provides for a stay which becomes effective upon entry of the order appointing the receiver. Subsection (1) sets out the actions which are stayed: the commencement or continuation of a proceeding that was or could have been commenced before the receivership or to recover a claim against the owner that arose before the receivership; the enforcement of judgments against the owner or any estate property; any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over estate property; any act to create, perfect, or enforce any lien against estate property, to the extent the lien secures a claim against the owner that arose before the receivership; any act to collect, assess or recover a claim that arose before the receivership; and the exercise of a right of setoff against the owner.

Subsection (5) provides a list of exceptions to the stay created by subsection (1). Subsection (5)(a) permits the creditor who sought appointment of the receiver to continue a pending foreclosure proceeding, unless the court orders otherwise. Subsection (5)(b) excepts from the stay the commencement or continuation of a criminal action against the owner and subsection (5)(c) excepts the commencement or continuation of certain domestic relations actions, including actions to establish paternity or to modify an order for spousal or child support. Subsection (5)(d) excepts any act to perfect, or to maintain or continue the perfection of, a security interest in

estate property which would have a super-priority over a preexisting non-purchase money security interest under ORS chapter 79, or a lien by attachment, levy or the like, including liens under ORS chapter 87. Purchase money security interests are an example of the type of lien that could be perfected after the appointment order.

Subsection (5)(e) excepts from the stay the commencement or continuation of an action by a governmental unit to enforce its police or regulatory power, and if the governmental unit obtains a judgment in that police or regulatory action, subsection (5)(f) permits the enforcement of that judgment, other than a money judgment. Subsection (5)(g) permits a governmental unit to establish a tax liability or any appeal of one.

A person whose action is stayed by subsection (1), and not excepted by subsection (5), may seek relief from the stay, which the court may grant for good cause shown.

Actions in violation of the stay are voidable by the court per subsection (6), and if a person knowingly violates the stay, the court may award actual damages caused by the violation, and may sanction the violation as civil contempt per subsection (7).

The stay terminates upon the termination of the receivership.

Section 23. Utility service:

This section prohibits a utility providing service to estate property from altering, refusing, or discontinuing service without giving the receiver 14 days' notice of any default or intention to alter, refuse, or discontinue service. This section provides a mechanism for a receiver to furnish a deposit or some other form of adequate assurance of payment, upon which the court may prohibit the alteration or cessation of service.

Section 24. Executory contracts:

At the time of appointment of a receiver, the owner is often party to a number of existing contracts to buy or sell goods or services as part of its ongoing business. The receiver will need to assess the value of these contracts, some of which may be beneficial and worth honoring, but others may be burdensome and more of a liability than an asset and the receiver will choose to reject them.

To that end, subsection (1) of Section 24 permits the receiver to evaluate these executory contracts and to assume the beneficial ones (upon order of the court) and reject the burdensome ones (after giving notice). To provide the counterparty with assurance of the receiver's ability to perform, the court may condition the assumption or rejection upon terms that the court deems just and proper like, for example, a curing of defaults (other than an *ipso facto* default described below). Until a formal assumption is approved by court order, the receiver's performance of a contract does not constitute assumption, nor does it preclude rejection of it.

It was the intent of the Work Group to adopt the bankruptcy principle that if an executory contract is assumed, it is assumed *cum onere* – that is, with all the benefits and burdens of the contract. To that end, subsection (2) requires that if a receiver assumes a contract, the receiver must assume the contract in its entirety. It was also understood that what constitutes “the contract” is a matter of state law other than this act.

Even beneficial executory contracts that the receiver assumes are both assets and liabilities in that they require some performance on the part of the receiver. Subsection (3) provides that any obligation or liability incurred by a receiver due to assumption of a contract is an expense of the receivership.

Rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver’s appointment, and the counterparty to the contract may take any necessary steps to terminate the contract and may submit a claim for damages from rejection of the contract. Unlike in bankruptcy, the receivership does not discharge the liability of the owner to the counterparty.

Contracts often contain clauses under which the appointment of a receiver constitute a default which permits the counterparty to terminate the contract. These so-called *ipso facto* defaults, were they permitted to be effective in a receivership, would prevent the receiver from assuming a valuable contract for the benefit of the creditor collective. Or they enable the counterparty to extract a ransom price from a receiver who chooses to assume. Neither result makes sense in a collective proceeding, and so just as these types of defaults are invalidated in bankruptcy (and in UA 17(d)), subsection (4) of this act permits a receiver to assume a contract despite the existence of an *ipso facto* default.

Subsection (5) provides three instances in which the receiver may not assume an executory contract without the consent of the counterparty. Subsection (5)(c) prohibits such assumption if the contract has prior to being assumed by the receiver. Subsection (5)(a) and (5)(b) are similar to the provisions in Bankruptcy Code Section 365(c)(1) and (2). Subsection (5)(a) requires the counterparty’s consent for assumption essentially if applicable law would excuse the counterparty from accepting performance from anyone other than the owner (even if the contract itself does not restrict assignment). Subsection (5)(b) requires the counterparty’s consent for the assumption of a contract to make a loan or extend credit or financial accommodations to the owner.

Subsection (6) provides that a receiver may not assign a contract without first assuming it, unless the counterparty consents to the assignment. Further regarding assignability, subsection (9) provides that nothing in this Code affects the enforceability of anti-assignment provisions in the contract or in applicable law. This is contrary to section 365(f) the bankruptcy code, which invalidates such anti-assignment provisions under certain circumstances.

Subsection (7) protects the property interests of certain counterparties in the event of rejection and, in that way, is similar to the protections afforded counterparties in Bankruptcy Code Sections 365(h)(i) and (h)(ii), 365(i), and 365(n). Generally, the

protected parties are given the choice of accepting the rejection and asserting their claim for rejection damages against the estate, or remaining in possession of the property under the terms of the contract. The protected parties are a purchaser in possession under a contract for the sale of real property of the owner; the purchaser of a real property time share interest; the licensee of intellectual property rights; and the lessee of real property.

The receiver is given 180 days from appointment to seek authorization from the court to assume an executory contract. Any contracts that the receiver does not assume during that time will be deemed rejected, but the court may shorten to lengthen that 180-day period for good cause shown.

Section 25. Use or transfer of estate property outside ordinary course of business:

This section permits the receiver to use and/or transfer estate property, outside the ordinary course of the owner's business, and provides substantial guidance on the carrying out and results of the transfer.

Using the estate property outside the ordinary course of the owner's business may be a fruitful source of income for the receivership; for example, the receiver of a vineyard and winery operation might decide to permit the occasional rental of the property for weddings or receptions.

The power of a receiver to sell estate property outside the ordinary course of the owner's business has not always been clear, particularly when the receivership applied only to certain assets of the owner (for example, one parcel of land among many), in which case the receiver has sometimes been viewed as having only a custodial role. The recent real estate crisis, however, has spotlighted the idea that receivership sales may help to realize better value for all concerned as compared to foreclosure sales. 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.

Analogous to a foreclosure sale, the sale by the receiver under subsection (2) is free of the lien of the person that obtained appointment of the receiver, and of subordinate liens, but not free of liens having priority. This is because the nature of subordinate property interests is that they get extinguished by those having priority, and the nature of property interests having priority is that they ride through the process. (Under subsection (3), the subordinate liens attach to the proceeds of the transfer by the receiver.)

The transfer may be by public auction; or the transfer may be by other methods such as a privately negotiated agreement. Public auction procedures are generally thought to

ensure a fair price more or less as a matter of course, because unduly low bidders will not prevail. Although privately negotiated agreements do not carry the same matter-of-course safeguard, the fact that the sale is only “upon court order” and is also subject to court-prescribed “standards or procedures calculated to maximize the proceeds of the transfer” under subsection (2) should provide similar assurances. In fact, because private negotiations provide buyers with the flexibility to investigate the property before buying or bidding, they may often result in higher proceeds for the benefit of all concerned.

Under subsection (4), a creditor who wishes to purchase may “credit-bid,” i.e. buy by setoff. Because the debtor owes the creditor, the creditor may in effect pay the purchase price by forgiving the debt owed by the debtor (in whole or in part, depending on the amount the creditor wishes to bid and/or ultimately pay). However, if this credit-bidding creditor is junior to another creditor, though, the credit-bidding creditor must tender in cash the amount owed to the senior creditor. This is because forgiveness of the debt owed by the debtor does not benefit the senior creditor.

There are two provisions designed to provide finality to the purchaser and thereby help enable the securing of a workable purchase price. First, the sale is free of any right of redemption that the owner may have (just as it is free of certain liens as noted above), so that the purchaser does not risk an upset of the transaction. And second, under subsection (5) the transfer to the purchaser remains valid (and the liens noted above remain extinguished) even if, after the transfer, the order authorizing the transfer is reversed or modified for some sufficient reason, such as the demonstration that the order was procured through fraud on the court. This second protection is subject to a requirement that the purchaser have been acting in good faith, which is defined in subsection (9) as having both a subjective component (“honesty in fact”) and an objective one (“the observance of reasonable commercial standards of fair dealing”).

The rights of co-owners of property are protected in a balancing test that takes into account the need for receivers to carry out a transfer of the property. The interest of a co-owner that is not estate property may be transferred (along with the interest that is estate property) if the court makes a three-part determination: that partition is impracticable; that the sale without the co-owner’s interest would realize significantly less for the estate; and that the benefit to the estate of the sale outweighs the detriment to the co-owner. Though not expressly stated in the statute, of course the portion of the proceeds that is attributable to the interest of the co-owner that is not estate property would go to that co-owner.

The ordinary course of an owner’s business is a fact-sensitive inquiry not defined in this Code and is accordingly left to judicial development in particular cases.

Regarding the transfer of intellectual property under this section, the Work Group adopted Comment 4 of Section 16 of the UCRERA, which provides:

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 90408 of the Uniform Commercial Code.

Section 26. Receivership financing:

It may be necessary for a receiver to operate the business of the owner for a period of time and in doing so, the receiver may need to obtain credit or incur debt. Section 26 permits the receiver who is authorized to operate the business to obtain credit and incur debt in the ordinary course of business and expenses related to such debt are allowable as administrative expenses.

The receiver may also obtain credit, including secured credit, other than in the ordinary course of business but only with court approval.

Section 27. Recovery of costs related to secured property:

The ability to “surcharge” a secured creditor’s collateral is an important resource available to receivers (and to trustees in bankruptcy), particularly in cases where there is little or no equity to pay even administrative expenses. For this reason, Section 27 permits a receiver to recover from property securing a secured claim the necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of the secured claim.

Section 28. Abandonment:

The ability to abandon property that is burdensome or of inconsequential value is often necessary to help conclude the administration of the estate. To that end, Section 28, gives the receiver that power to abandon such property after giving notice. Abandoned property is no longer estate property.

The receiver is explicitly prohibited from abandoning estate property in contravention of a state statute or rule designed to protect the public health or safety from identified hazards.

Section 29. Actions by & against the receiver or affecting estate property:

Section 29 provides that a person may not sue a receiver personally for an act or omission in administering estate property, unless permitted by the court that appointed the receiver. This section incorporates into the Code the *Barton* doctrine, which derives from the decision of the U.S. Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129 26 L.Ed. 672 (1881). In *Barton*, the Supreme Court held that in order to sue a court-

appointed receiver, the plaintiff must first seek approval of the appointing court.

A person may not commence or continue an action to dispossess the receiver of any estate property or otherwise interfere with the receiver's management, unless permitted by the court.

This section also allows for the receiver to be joined or substituted as party in an action pending before the appointment in which the owner was a party.

The section also addresses the role of successor receivers in actions by or against the receiver in the event of the death, removal or resignation of the original receiver.

Section 30. Personal Liability of the receiver:

It is well established law that as an officer of the court, a receiver is shielded by judicial immunity for actions performed under the lawful authority of the appointment order. Consistent with that established law, this section provides that the receiver has no personal liability for acts or omissions consistent with the scope of the appointing order or any order of the court. And the receiver is entitled to all defenses and immunities provided by law for an act or omission within the scope of the receiver's appointment.

While it is often possible for a receiver to determine before accepting an appointment whether any estate property is environmentally hazardous, it is possible that such information does not come to light until after the appointment. In order to protect the receiver, subsection (5) specifically provides that nothing in this section may be construed to expand any obligation or liability of a receiver under state law, common law, or federal law for remediation of environmental damages or hazards.

On the other hand, a receiver may be personally liable if the receiver has caused the loss or diminution of value to estate property through a failure to comply with a court order or performing acts or omissions of the kind for which liability is not limited for a director (like intentional misconduct or a knowing violation of law).

Section 31. Employment & compensation of professionals:

Sound management of estate property may require the employment of professionals to assist the receiver, including but not limited to attorneys, accountants, appraisers, brokers, real estate licensees, and auctioneers. Retention and compensation of such professionals is accordingly expressly permitted. Notice of the proposed employment must be given beforehand to the parties specified in Section 17, and under subsection (2) of this Section 31. The notice must include key facts including the rate of compensation and any potential conflicts of interest. In the event of an objection to the employment, the employment may continue until such time as the court sustains the objection.

Certain relationships that might be construed as presenting a possible conflict of interest – such as the professional’s having relationship with a creditor or other interested person – do not in themselves disqualify the professional from employment under this section. However, if by reason of such a relationship or otherwise the professional holds or represents an interest adverse to the estate, the professional may not be employed except by order of the court. For example, if an attorney represents an owner of land adjoining estate property with respect to an active dispute over the boundaries of the estate property, the attorney is disqualified from employment under this section except by order of the court.

Subsection (5) provides that the receiver him- or herself may act as attorney or accountant, but other professional roles such as appraiser are not similarly provided for and, by negative implication, the receiver is prohibited from acting in those other capacities, on the theory that the inherent potential for conflict is too great. Even for the roles of attorney or accountant, the receiver may employ him- or herself only if this is in the best interests of the estate. Circumstances such as the receiver’s high familiarity with complex facts may satisfy this standard, but an unrestricted right of the receiver to retain him- or herself in these capacities presents too great a potential conflict of interest.

Section 32. Participation of creditors & other interested persons in receivership; effect of receivership on nonparties:

This section provides broad rules on who is bound by the acts of the receiver and the orders of the court. (To be bound by an act or order under this section is to be barred from bringing a motion or proceeding to contest the act or order.) Generally, the status of having been joined as a party to the proceeding is immaterial.

Persons are bound by the acts of the receiver so long as they have actual or constructive notice of the pendency of a receivership. Constructive notice would presumably be found from publication in a newspaper of general circulation in the applicable counties, once a week for two consecutive weeks as required by Section 33(3). It could also presumably be found from information made widely available in appropriately directed social or other media. The particular reference to newspaper publication is attributable in part to the fact that sales of real property are often publicized by that medium.

Persons having a claim against estate property, or an interest in it, are bound by sales of estate property free and clear of liens, and by other orders of the court, if they have actual knowledge of the receivership. The actual knowledge standard may depend on proof of notice and a receiver’s compliance with the notice provision of the Code or court order.

Section 33. Initial notice to creditors & other interested persons:

The receiver will give notice of the receivership to all known creditors and any interested persons within 30 days of the receiver's appointment. Subsections (a) through (h) set out the essential initial information for creditors that this notice must contain, such as the appointment of the receiver, the name of the court and the case number of the receivership, a claims bar date if one has been set, and a statement that the person may not receive further notices unless the person requests to join the special mailing list.

Unless otherwise ordered by the court, the receiver will give this notice by first class mail and by publication in a newspaper of general circulation in the applicable counties at least once a week for two consecutive weeks.

Section 34. Claims process:

If the receiver determines there are insufficient assets to make distributions to creditors, then there is no reason to have a claims process and the receiver will simply give notice of that determination. But, if the receiver determines that there are sufficient assets for distributions, then the receiver will send out notice announcing and describing the claims process, the relevant bar dates, and the forms or other information necessary for submitting claims.

Section 35. Submission of claims by creditors:

Once a claims process has been established, but not before that time, claims may be submitted by delivering them to the receiver rather than by filing them with the court. Subsection (5) requires the court to forward to the receiver any claims mistakenly filed with the court.

All unsecured claims that arose before the appointment date, whether contingent, liquidated, unliquidated or disputed, must be submitted in order to receive a distribution. Unless otherwise ordered by the court, claims must be submitted within 30 days after the claims process is established, but there are different deadlines for claims for damages arising from rejection of executory contracts and for claims by state agencies. The receiver may prescribe the claim form, but if none is prescribed, the claim must be in writing and satisfy the minimal requirements for the proof of claim in subsection 4(a) through (d). A claim submitted in accordance with these requirements constitutes prima facie evidence of the validity and amount of the claim.

Section 36. Objection to allowance of claims:

This section sets forth the procedures for disallowance of claims. At any time before entry of an order approving the receiver's final report, a claim may be disallowed by the

receiver (upon court order after 21 days' notice), or by the court (after a hearing on an objection by an interested person held after 21 days' notice).

Any objection to a claim may be subject to mediation before adjudication by the court (except for claims held by the state, unless the state consents) upon a request by a creditor, the receiver, the objector, or upon court order.

Because the fixing of contingent or unliquidated claims may unduly delay the administration of the estate, this section permits the estimation of these claims for purposes of allowance. Similarly, it permits the estimation of any right to payment arising from breach of an equitable remedy. Claims estimated under this section are allowed in the estimated amount. Allowance of estimated claims are subject to payment by order of the court.

Section 37. Priorities:

Claims in a receivership will receive distributions in a set priority.

Secured creditors are to be paid from the proceeds of their collateral after payment of any "surcharge" (described in Section 27 *infra*) for the necessary costs and expenses of preserving, or disposing of, the collateral to the extent of any benefit to the holder of the secured claim.

The actual, necessary administrative expenses of the estate are a third priority, ahead of the secured claim of any creditor who sought the appointment of the receiver.

The claims of the U.S. government pursuant to 31 U.S.C. §3713 are a fourth priority.

Creditors with liens on estate property that do not have to be perfected under applicable law are a fifth priority. These creditors actually just receive the proceeds of the disposition of their collateral.

Secured creditors with unperfected liens are a sixth priority, and receive the proceeds of the disposition of their collateral if and to the extent that applicable law makes unsecured creditors subject to those liens.

The holder of wage, salary and commission claims earned within 180 days of the earlier of the receiver's appointment and the cessation of the business have a dollar-capped claim which is a seventh priority. This priority is based on Bankruptcy Code §507(a)(4), which, along with the other dollar-capped provisions of the Bankruptcy Code, are increased at three-year intervals to reflect changes in the Consumer Price Index for All Urban Consumers, published by the Department of Labor. While the Work Group was cognizant of its limitations in drafting this periodic increase into this Code, the Work Group nonetheless recommends to the Legislature that it enact such periodic adjustments.

The holders of lay-away claims – claims arising from the deposit of money with the owner before the receivership in connection with the purchase, lease or rental of property or personal services for personal, family or household use – are an eighth priority. Like the seventh priority for wage claims above, this priority also has a dollar cap, and the Work Group makes the same recommendation to the Legislature to enact periodic adjustments.

Claims for spousal or child support are a ninth priority, except to the extent that the debt is assigned to another entity, voluntarily or by operation of law, or includes an obligation that is not actually in the nature of a support obligation (even if labeled as such).

Tax claims of state governmental units accrued before the receivership are a tenth priority.

Unsecured claims are an eleventh priority, followed only by the interests of the owner. So, only if all of the claims have been paid in this section may the receiver pay any residue to the owner.

To the extent any secured creditors are undersecured, they hold unsecured claims for the deficiency.

Except for the first priority “surcharge claims and the fourth priority U.S. government claims, all of the other claimants receive distributions on a pro rata basis within their priority.

Section 38. Secured claims against after-acquired property:

State law other than this Code provides that the collateral available to a secured creditor may, under certain circumstances, include property acquired by the debtor after the making of the loan. Section 38 of this Code provides that an allowed secured claim benefits, to that same extent, by property acquired by the estate or the owner after the appointment of the receiver.

The applicable circumstances most frequently include an express provision in a loan document. In addition, when a loan transaction involves collateral that naturally turns over, such as inventory or accounts receivable, but the documentation does not include an express after-acquired property provision, courts will sometimes construe such a provision as being tacitly implied.

SECTION 39. Ancillary receiverships:

An owner may have property located in more than one state, but the jurisdictional limitations of an Oregon court may cause an Oregon receiver to lack appropriate power over non-Oregon estate property. Section 39 addresses this problem in subsection (1) by

providing that the Oregon receiver may, by order of the Oregon court, apply to the court of another state for appointment as receiver with respect to estate property located in that state. In seeking the order of the Oregon court the receiver may move ex parte for an expedited hearing.

Subsection (2) addresses the converse problem in other states. It provides that a person appointed as receiver by another jurisdiction may move (more likely petition) an Oregon court for appointment as receiver with respect to property of the other jurisdiction's receivership that is located in Oregon. Section 6(3)(a) of this Code provides that upon such a motion (or petition), the Oregon court shall so appoint the person, if the person is eligible under Section (7) of this Code. Section 6(3)(b) provides that the Oregon court shall, with limited exceptions for manifest injustice, give effect to orders of the other jurisdiction's court affecting the Oregon property. For example, under Section (6)(3)(b), the Oregon court could enter an order authorizing a foreign receiver to repossess personal property collateral in Oregon, rather than requiring the petitioning receiver to incur the cost of having to obtain the appointment of an ancillary receiver in Oregon.

Section 40. Removal of receiver:

Subsection (1) permits the court to remove a receiver for "cause", including the receiver's resignation or refusal to serve. The Code does not define "cause" but instead leaves it to the discretion of the court. This Work Group chose to give the court flexibility because the facts and circumstances often vary substantially from one receivership to another.

If further administration of the estate is required after removal, resignation or death of the receiver, the court may appoint a successor who immediately takes possession of the estate and assumes the duties of receiver.

Under subsection (3), once a replaced receiver has provided a full accounting for all receivership property and full report of all receipts and disbursements during its tenure, the replaced receiver is discharged from further duties and responsibilities as receiver.

Section 41. Termination of receivership:

This section provides for the termination of the receivership and the discharge of the receiver once the receiver has filed a final report and accounting complying with subsection (2), the court has approved that report after notice and an opportunity for a hearing as required in Section 18, and the receiver has distributed or disposed of all receivership property in the manner directed by the court and this Code. The final report is based on the same general template as any of the periodic reports filed by the receiver pursuant to Section 20 of this Code.

If, upon termination for any reason, the court determines that the receiver was wrongfully procured or procured in bad faith, the court may impose on the person who

procured the receiver's appointment all of the receiver's fees and other costs, and any other sanctions the court finds appropriate.

Section 42. Applicability:

This Code will apply to receiverships in which the receiver is appointed on or after January 1, 2018.

Section 43.

In accordance with Section 4 of this Code, ORCP 80 is amended to provide that this Code controls over conflicting provisions of ORCP 80 with respect to receivership governed by this Code.

Section 44.

This section provides that, similar to the existing exemptions of fiduciaries and trustees, ORS 465.255(3) shall be amended to provide that "a receiver appointed under" this Code shall not be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, or for damages for injury to or destruction of any natural resources caused by a release.

Sections 45-58.

These sections consists of necessary conforming amendments as well as miscellaneous provisions.

IV. Conclusion:

The Oregon Receivership Code should be adopted because it draws upon the state's own expertise as well as respected Uniform Law Commission and Washington State statutes in order to provide well-tailored solutions to practical questions that have long afflicted the conduct of receivership proceedings in Oregon.