ARIZONA'S NEW RECEIVERSHIP STATUTE:

REVIEWED, INTERPRETED AND APPLIED©

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I. **Existing Law in Arizona**.

The existing legal authorities in Arizona for receiverships are sparse and do not provide much guidance to lawyers, receivers, other professionals, lenders and clients. Although the paucity of law provided flexibility to practitioners in receivership proceedings, the consequence was a lack of certainty for judges and attorneys and a lack of uniformity in application of the law. That necessarily resulted in a perception of risk for lenders, borrowers and practitioners.

A.R.S. §12-1242 and Rule 66 of the Arizona Rules of Civil Procedure govern the procedure for appointment of receivers and require the applicant to file an application accompanied by a separate affidavit in support of the application. The standard for appointment is set forth in A.R.S. §12-1241, which provides that the court "may appoint a receiver to protect and preserve property or the rights of parties therein, even if the action includes no other claim for relief." Both this rule and statute remain in force and effect.

A plain reading of A.R.S. § 12-1241 requires that a party seeking appointment of a receiver to demonstrate **either** a need to protect and preserve property ***or*** the rights of parties therein. *Gravel Resources of Arizona v. Hills,* 217 Ariz. 33, 37, ¶ 11, 170 P.3d, 282, 286 (App. 2007) ("The statute simply requires the trial court to determine that the property or the rights of the parties need protection."); *see also Gordon v. Washington,* 295 U.S. 30, 39, 55 S. Ct. 584, 79 L.Ed. 1282 (1935) ("[R]eceivership ... should be resorted to only on a plain showing of some threatened loss or injury to the property, which the receivership would avoid.").

In *Gravel*, the Court of Appeals reviewed the trial court's appointment of a receiver based on a finding that co-partners in a partnership had "diametrically opposed interests" in the dissolution and winding up of the partnership's affairs. *Id.* at ¶ 13. The Court affirmed the trial court's determination that "such opposing interests were unmanageable, thereby requiring a receiver to wind down the partnership's affairs." *Id.*

Although Arizona courts have not expressed an opinion on the issue, courts within other jurisdictions have appointed receivers in circumstances where there is a risk that the defendant will transfer assets to the detriment of the interests of creditors even where the moving party did not hold a judgment or lien upon the proposed receivership property. *See, e.g., Brown v. Cuba-American Jockey & Auto Club*, 2 F.2d 612 (S.D. Fla. 1924) (Simple contract creditor of insolvent corporation may sue for appointment of receiver.); *Emmett State Bank v. Emmett Farmers' Union Co-op. Elevator & Mercantile Co.*, 116 Kan. 550, 227 P. 257 (1924) (Appointment of a receiver in an action on notes where a verified application therefor alleged that defendant was insolvent and that there was imminent danger of plaintiff's claim being lost "was proper to preserve the assets of the defendant for the benefit of all the creditors."); *Hurley v. Boston R. Holding Co.*, 315 Mass. 591, 54 N.E.2d 183 (1944) (A receiver may be appointed for a corporation on petition of a simple contract creditor to prevent waste and loss of property which should be available for payment of debts and which cannot otherwise be satisfactorily conserved.); and *In re Mader's Store for Men, Inc.*, 77 Wis. 2d 578, 254 N.W.2d 171 (1977) (Appointment of

receiver at the instance of a simple contract creditor upheld, recognizing a potential need for immediate action to prevent dissipation of assets of insolvent corporate debtor.)

Furthermore, district courts have broad discretion in appointing a receiver and may consider a host of relevant factors, none of which is dispositive:

> [F]ederal courts consider a variety of factors in making this determination, including, for example: (1) "whether [the party] seeking the appointment has a valid claim"; (2) "whether there is fraudulent conduct or the probability of fraudulent conduct," by the defendant; (3) whether the property is in imminent danger of "being lost, concealed, injured, diminished in value, or squandered"; (4) whether legal remedies are inadequate; (5) whether the harm to plaintiff by denial of the appointment would outweigh injury to the party opposing appointment; (6) "the plaintiff's probable success in the action and the possibility of irreparable injury to plaintiff's interest in the property"; and, (7) "whether [the] plaintiff's interests sought to be protected will in fact be well-served by receivership."

Canada Life Assur. Co. v. LaPeter, 563 F.3d 837, 845 (9th Cir. 2009) (citing *Moore's Federal Practice*, § 66.07[3] (3d ed. 2008); and *New York Life Ins. Co.*, 755 F.Supp. 287, 292 (E.D. Cal. 1991)).

None of these authorities have been abrogated by the new Arizona Receivership Statute, A.R.S. §33-2601, *et seq*. This means that A.R.S. §12-1241 & 12-1242, Rule 66 and applicable case law should be consulted by and guide lawyers, other practitioners and parties in future Arizona receivership proceedings even on matters proceedings under the new law. However, the new statute provides detailed direction for receiverships of entities which own a specific type of asset: commercial real property.

II. **The New Statute – A.R.S. §33-2601, *et seq.***

A. **Origin**.

The National Conference of Commissioners on Uniform State Laws also known as Uniform Law Commission passed the Uniform Commercial Real Estate Receivership Act ("UCRERA") in July of 2015. The Arizona legislature adopted the vast majority of UCRERA with only a few modifications and it was subsequently signed by the governor and became effective on August 27, 2019. It can be found at A.R.S. §33-2601 through 33-2626 (the "Act"). Because there is no useful legislative history on the Act, it is appropriate to consult the substantial commentary to UCRERA by its authors as legislative history.

B. **Material Provisions**.

I have organized the sections of the Act into three categories or groups in the discussion below based on my view of the general commonalities of the subject matter of those provisions: (1) Procedure; (2) The Receivership Estate, The Rights, Powers & Duties of Receivers and The Receiver's Professionals; and (3) Miscellaneous. This is my methodology of organization only and it will not be found in the Act.

1. Procedure.

a. Scope: To What Does the Act Apply?

The Act only relates to persons who have an "interest in" most types of commercial real estate. A receivership under the Act will, of course, also cover personal property located on or used in the operation of that real property. A.R.S. §33-2603(A).

The Act, however, does not apply to certain types of real estate which may otherwise be considered commercial in common parlance. If the land has four or fewer homes, it is not subject to a receivership proceeding under the Act if: (1) the owner lives on the property as her primary residence and any agricultural, mineral extraction, industrial or other commercial activity on the property is "merely incidental"; (2) the owner lives on the property and the property is collateral for a loan obtained at a time the property was not used for any agricultural, mineral extraction, industrial or other commercial activity on the property"; (3) the owner did not and does not plan to develop the property to have one or more homes to be sold in the ordinary course of the owner's business; and (4) the owner is not collecting rent and does not have the right to collect rent or other income from the property from a person who is not an affiliate (a term defined by A.R.S. §33-2601(1)). *See* A.R.S. §33-2603(B).

A few illustrations are useful. The Act is applicable if the owner lives in a home on a farm on which he grows crops for sale but not if the owner lives in a house with a garden in which she grows fruits and vegetables for her family's consumption. It will be applicable to a person who lives in a house built by him as a spec home for sale as part of his business as a builder. The Act would not, however, apply to an owner who leases her

pool home or back yard cottage to her 21 year-old son who just got his first post-college job. Finally, even if the owner does not live in a house located on the parcel, it will not be covered by the Act and the court may not appoint a receiver so long as she is not using the property for commercial activity.

It is unclear whether the Act is applicable to a borrower who leases, but does not own, commercial real estate. A literal reading of Section 33-2603(A) supports an argument that the Act may govern the receivership of a lessee because the key phrase in that subsection is "receivership for an interest in" commercial real estate. A leasehold is "an interest in" the property. The term "receivership property", used throughout the Act, is defined at Section 33-2601(16) to be "the property of an owner that is described in the order appointing a receiver or a subsequent order." An "owner" is "the person for whose property a receiver is appointed" pursuant to A.R.S. §33-2601(1). Thus, a lender would have a good argument that there is nothing in the Act that prohibits a lease of commercial real estate from being receivership property to which the Act is applicable.

b. Appointment of Receiver.

The party seeking the appointment of a receiver may nominate a person to serve in that position. A.R.S. §33-2606(D). Interestingly, the Arizona legislature eliminated a clause from ARECRA §7(d) which provides that "but the court is not bound by the nomination." The author has found nothing in the legislative history regarding the rationale for not adopting this clause. Given the fact that a court has discretion whether or not to grant the appointment of a receiver under Section 33-2605(A) & (B) and the use of the

word "nominate", which generally means "to propose for appointment", an argument that the legislature's failure to adopt that clause from Section 7(d) of ACRECRA means that a court is required to appoint the movant's candidate as the receiver seems meritless.

The candidate must submit a declaration consistent with the requirements of Section 33-2606(A) & (B).

In connection with a foreclosure or other mortgage enforcement action, a Court may appoint a receiver for seven identified reasons under the Act. A.R.S. §33-2605(B). A court also may appoint a receiver in one of four other identified circumstances under the Act. A.R.S. §33-2605(A).

(1) Foreclosure or Enforcement.

A court **may** obtain the appointment of a receiver over property covered by the Act as part of the foreclosure process or other action to enforce a lender's rights under the deed of trust or mortgage if:

1. A receiver is necessary to prevent waste, loss, transfer or other damage to the property;

2. There is a provision in the deed of trust, mortgage or other agreement allowing for the appointment of a receiver after a default;

3. After a default, the owner agreed to the appointment of a receiver in a "signed record"[1];

[1] The term "record" is defined very obliquely at Section 33-2601(17). An agreement which either is in writing or stored electronically is a record.

4. The value of all the lender's collateral is less than the aggregate amount owed to the lender;

5. The owner fails to turnover rents or other cash collateral to the lender;

6. A junior lender obtains the appointment of a receiver for the property; or

7. The property or the rights of the parties need to be protected and preserved.

See A.R.S. §33-2605(B).

Significantly, even if there is a breach of a promissory note or other default under the terms of a deed of trust and there is a contractual right to the appointment of a receiver, a judge still has the discretion not to grant the appointment. The Arizona legislature made the decision to reject an option provided by the Commissioners in the analog to Section 33-2605(B) in UCRERA that a lender "is entitled to appointment of a receiver" after one of the enumerated events has occurred. Unfortunately, there is nothing in the Act to guide the exercise of the judge's discretion.

(2) <u>Other Circumstances</u>.

There are numerous circumstances that may justify the appointment of a receiver over an owner of real estate beyond the enforcement of a lender's rights under a deed of trust. The Act attempts to quantify those into the four circumstances: (1) Before entry of a judgment; (2) After entry of a judgment; (3) On equitable grounds; and (4) To protect the real property and secure rents during the "time permitted for redemption". A.R.S. §33-2605(A).

(i) Prior to Entry of a Judgment.

A person may obtain the appointment of a receiver if she proves that (1) she has an "apparent" right or interest in the real property that is the subject matter of the lawsuit; and (2) that property or its potential to generate revenue: (a) has been or there is a "danger" that it will be subjected to "waste", "loss", "dissipation" or "impairment"; OR (b) has been or is about to be "the subject of a voidable transaction"; OR (c) needs to be "protected and preserved" or the parties' rights need to be "protected or preserved". *See* A.R.S. §33-2605(A)(1).

This subsection clearly contemplates the classic situation where a creditor files a fraudulent transfer action and he can prove that there has been or there is an imminent risk of a fraudulent transfer. The type of "right" or "interest" the creditor would have to possess in order to trigger relief under this subsection is unclear. For example, the holder of a recorded judgment in the county in which the property is located clearly would possess such a right. The plaintiff in a breach of contract action against the owner of real property arguably does not hold an "apparent" interest in that property even though a judgment may be relatively certain. Finally, a large shareholder of a closely held corporation arguably would hold a "right" or "interest" in real estate with substantial equity owned by the corporation sufficient to justify the appointment of a receiver under this section where she learns that the other major shareholder has caused the fraudulent transfer of that asset.

(ii) After the Entry of a Judgment.

Unsurprisingly, a judgment creditor will be able to obtain a receiver more easily and in a broader range of circumstances. A person holding a judgment against the owner of real property may obtain appointment of a receiver in order to "carry the judgment into effect" or to "preserve" any nonexempt property or where the judgment has not been satisfied and the owner refuses to permit the property to be used to satisfy the judgment. A.R.S. §33-2605(A)(2).

(iii) On Equitable Grounds.

Courts in Arizona and elsewhere have appointed receivers where fairness so requires in appropriate circumstances. Section 33-2605(A)(3) is a catchall provision allowing for appointment of a receiver having all the powers, rights and responsibilities under the Act in all of the situations set forth in Arizona's decisional authorities or from other jurisdictions as long as the case involves real estate. The Commissioners specifically observed in their Comment to Section 6 of UCRERA that:

> the power of appointment "is a delicate one … to be exercised with great circumspection" by the court, which had to be "satisfied by affidavit or other suitable evidence that a receiver is necessary to preserve the property, or in exceptional cases administer the property, having in mind the rights and interests of all parties."

UCRERA, at p. 26, citing to 1 Clark on Receivers, §49, at 53 (3d ed. 1959)

(iv) During Redemption Periods.

A judge may appoint a receiver if it is necessary to preserve the real property or protect cash collateral during any applicable redemption period following a judicial

foreclosure or judgment execution. Section 33-2605(A)(4). Such procedures are relatively rare in Arizona.

c. Power of the Court.

Section 33-2604 provides that a court appointing a receiver "has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property." Vesting one court with the sole authority to handle all matters relating to the proceeding and property owned by the receivership estate arising or located in Arizona certainly makes sense from judicial efficiency perspective, ensuring the elimination of potentially conflicting rulings and minimizing the time and expense of the parties. However, it is clear that an Arizona Court cannot exercise jurisdiction over properties located in other states or persons and events having no or limited nexus to Arizona. A plaintiff or receiver in an Arizona proceeding is not without a remedy, however.

He or they will need to initiate a receivership action in the other state in which that property or those persons are present or those events transpired. If that other state has adopted the UCRERA, they would be able to initiate an "ancillary proceeding" in that other state. *See* 33-2611(A)(8) & UCRERA, §24.

d. Notice & Hearing and Bonds for *Ex Parte* Receivership Appointment.

A court may only issue an order under the Act after notice and a hearing, pursuant to Section 33-2602, except:

(1) That it may issue an order without notice if the circumstances so require;

(2) That it may issue an order after notice but without a hearing if the circumstances so require;

(3) That it may issue an order without notice and hearing if no objection has been filed by an "interested party".

The Court has broad discretion in determining if circumstances exist which justify the entry of an order on any issue in a proceeding under the Act without notice or without a hearing. Of course, that discretion is bounded by the requirements of due process as imposed by the United States Constitution and the Arizona Constitution. *See Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971) (holding that "due process [ordinarily] requires, at a minimum, that . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").

Nothing in the Act abrogates the applicability of Rule 66 to proceedings brought under the Act. Accordingly, the requirements in that rule[2] as to *ex parte* applications for the appointment of a receiver necessarily govern requests seeking such relief under Section 33-2603[3]. That means that a court may only appoint a receiver under Section 33-2605

[2] The requirements in A.R.S. §12-1242 and Rule 66(a) that the moving party file an application supported by an affidavit necessarily apply to a proceeding under the Act.

[3] The Arizona legislature elected not to include Section 6(c) of UCRERA which has a bonding requirement similar to Rule 66(c) & (d) except that the imposition of a bond is left to the discretion of the court under UCRERA while it is mandatory under Rule 66. The author has located nothing

without notice if it sets a hearing on the application within 10 days after the entry of the order appointing the receiver and it requires the moving party to post a bond in an amount sufficient to cover the possible damages and costs that may be suffered by the defendant as a result of the receivership prior to a hearing on the matter. *See* Rule 66(a)(3) & (4).

e. Disqualification from Serving as Receiver.

A person proposed to be the receiver must file an affidavit which demonstrates that he or she is not disqualified from serving in that position. A.R.S. §33-2606(A). A person may not serve as a receiver in a particular action under the Act if she:

(1) Is an "affiliate" of a party. The term "affiliate" is defined by Section 33-2601(1) as to individuals and entities;

(2) Holds an interest which is materially adverse to the interests of a party;

(3) Has a material financial interest in the outcome of the proceeding other than being paid as the receiver;

(4) Is a creditor of or owes money to a party;

(5) Holds an equity interest in a party other than a non-controlling interest in a public company.

A.R.S. §33-2606(B).

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in the legislative history explaining the reasons for not adopting this provision. There is a minor difference between Rule 66 and UCRERA §6/Section 33-2603. The rule requires a hearing on the receivership application even if no objection is filed. However, Section 33-2602(B)(3) does not require the court to hold a hearing on an unopposed motion.

A person may serve as a receiver even if she:

(1) Either was (a) appointed as a receiver in an unrelated proceeding regarding a party; or (b) is owed money in an unrelated proceeding regarding a party; or (c) was engaged in an unrelated proceeding by a party;

(2) Owes money to a party on a consumer debt which is not in default;

(3) Is the owner of a bank account held at a party.

A.R.S. §33-2606(C).

f. Receiver's Bond. The requirements for a bond or other security to be posted by the receiver are set forth in A.R.S. §33-2607. This provision differs in a significant way from Rule 66. The rule requires that the receiver file his bond for court approval "before performing" any duties as a receiver. Section 33-2607(c) permits the court to allow the receiver "to act" before she posts a bond. Thus, a receiver appointed under the Act may take possession of property, operate it and collect rents even before he files his bond if the order appointing the receiver provides for that relief. The author has not been able to find an explanation for allowing receivers for commercial real estate to act before posting a bond in the legislative history. The UCRERA sheds no light on this issue in its comments to this section.

2. The Receivership Estate, The Rights, Powers & Duties of a Receiver and The Receiver's Professionals.

a. Receiver's Powers & Duties.

A receiver may, pursuant A.R.S. §33-3611(A), do the following without a separate court order authorizing the specific act:

(1) Manage, protect and collect receivership property;

(2) Operate a business that is receivership property, including use, sell or lease such property, in the ordinary course of business;

(3) Incur unsecured debt and pay expenses of the business in the ordinary course of business;

(4) File and prosecute a cause of action or claim related to the receivership property;

(5) Seek instructions from the court on matters relating to the receivership;

(6) Issue subpoenas for the production of documents and the appearance of witnesses regarding receivership property or any matter that may affect "administration of the receivership";

(7) Hire professionals pursuant to Section 33-2614;

(8) Apply to a court in another state for appointment as an ancillary receiver over receivership property located in that state; and

(9) Exercise any other power granted by the court or any other applicable law.

The court may authorize the receiver to do any of the following after notice and opportunity for a hearing:

(1) Borrow money other than in the ordinary course of business. The comment to UCRERA §12 makes clear, citing to *Clark on Receivers*, that this provision

> is not intended, however, to give the court a "blank check" to authorize the receiver to borrow funds and grant the lender of those funds priority over pre-existing liens on receivership property. Under the weight of existing authority, such "priming loans" are not appropriate in cases involving the operation of a private business, without the consent of the pre-existing lienholders, except as necessary to preserve the property.

UCRERA, at p. 40. Therefore, it is questionable that a court may authorize a receiver to obtain a loan secured by a lien senior to any existing liens even if that creditor's interest could be "adequately protected" as a debtor or trustee do in certain circumstances under Section 364(d) of the Bankruptcy Code.

(2) Make improvements to receivership property;

(3) Pay herself or her professionals, pursuant to A.R.S. §33-2614;

(4) Use or sell property outside of the ordinary course of business, pursuant to Section 33-2615;

(5) "Adopt or reject" a lease or other executory contract, pursuant to Section 33-2616

b. <u>Owner's Duties</u>.

The Act imposes certain obligations on owners and on officers and other persons in control of an owner that is an entity to co-operate with and not to interfere with the receiver. A.R.S. §33-2612(A) & (B). A court may (1) award actual damages, attorneys' fees and costs in favor of a receiver against any person who "knowingly" fails to perform a duty

imposed by this section; and (2) impose penalties for civil contempt against any such person. A.R.S. §33-2612(C). The comments to UCRERA make clear that courts are not limited to the remedies set forth in this provision.

> In appropriate circumstances, a court may use other equitable remedies, such as the imposition of an injunction or a constructive trust, to address an owner's failure to comply with its duties under the Act. If the receiver seeks and obtains a recovery under subsection (c), that recovery is receivership property and not the proceeds of the receiver's personal cause of action.

UCRERA, §13, at p. 43.

c. Automatic Stay.

A significant innovation of UCRERA adopted in the Act is an automatic stay of any actions to obtain possession of or control over receivership property or to enforce a judgment or a prereceivership lien on such property with only five exceptions. *See* A.R.S. §33-2613(A). Accordingly, a lender, other than the person who filed the receivership action, is stayed from foreclosing on its collateral or enforcing any other of its rights, even if it is a property different from the real property which is collateral for the creditor who brought the receivership action. A lessor of personalty that is receivership property also is stayed from repossessing its assets.

This Section raises a couple of troubling constitutional issues. First, the due process clause of the Fifth Amendment would appear to be violated by the stay of an act of a lender who has not even been served with a complaint and summons. Second, the State of Arizona has no power to pass laws affecting or exercising jurisdiction over property or persons located in different states. *International Shoe v. Pinkus*, 278 U.S. 261, 263 - 64,

49 S.Ct. 108, 73 L.Ed. 318 (1929); *World-Wide Volkswagon v. Woodson*, 444 U.S. 286, 291 – 92, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)(Observing that "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

Accordingly, despite the explicit language in Section 33-2613(A), the attempted imposition of a stay by the simple entry of an order appointing a receiver would be unconstitutional as to nonparties and persons not subject to the jurisdiction of the court and property not located in Arizona. A plaintiff should, therefore, name any person he believes asserts a lien or interest in receivership property as a defendant in the complaint and serve her with a summons and complaint and the receivership order as soon as possible. She must be prepared to demonstrate the reasons that the Arizona court may exercise personal jurisdiction over any nonresident defendant in order to effectively assert the application of this statutory stay to that person.

The court also may enjoin an action or proceeding against receivership property or relating to such property if an injunction "is necessary to protect the [receivership] property or facilitate administration of the receivership." Section 33-2613(B). Therefore, a lawsuit against receivership property or the owner of receivership property is **not** automatically stayed. Rather, either the receiver or the person who obtained the receiver must seek an injunction under Rule 65, Ariz.R.Civ.P. The comments to UCRERA note that a court would not be authorized by this section "to stay an action against a guarantor or co-obligor." UCRERA, at §14, p. 45.

Pursuant to Section 33-2613(C), a person has the right to seek relief from either the stay or an injunction imposed by Section 33-2613(B). The comments to this section in UCRERA provide the following useful guidance to courts and parties regarding the grounds for granting such relief.

> Nevertheless, "cause" under subsection (c) certainly includes the right of a senior lienholder to obtain the appointment of a receiver under this Act or to proceed with a foreclosure after default. Under traditional law, rents collected by a receiver appointed at the request of a junior lienholder could be applied to the reduction of the junior lienholder's debt until the senior lienholder took appropriate steps to enforce its right to collect rents. See, e.g., Restatement (Third) of Property: Mortgages § 4.5(b). If a junior lienholder obtains the appointment of a receiver for mortgaged property, the court must allow a senior lienholder to enforce its right to collect rents. Cf. Section 6(b)(6) (appointment of receiver at request of junior lienholder justifies appointment of receiver at request of senior creditor).

UCRERA, §14, at pp. 45 – 6 (emphasis supplied).

The lesson for senior lenders from these comments is to seek immediate relief from the automatic stay if a junior lender files a receivership action. That may deprive the receivership of any cash to fund ongoing operations. As a result, a receiver in that situation may need to obtain a loan from either of the lenders or a third party in order pay employees, utilities, taxes and the receiver's fees.

There is no clear authority in the Act similar to 11 U.S.C. §363(e) which would provide authority for a court permit a receiver to use a senior lender's rents conditioned upon a finding of "adequate protection" of that creditor's interest in this cash collateral. A receiver may be able to get to the same place under the Act, however, in a somewhat elliptical manner.

A receiver has the right to seek permission use rents which are receivership property under Section 33-2615(a). Although there is nothing in that section conditioning use on providing a creditor with adequate protection, a receiver also has the right to obtain an order that a senior lender must surrender "control" of receivership property, for this analysis, the senior lender's cash collateral – the rents, if she is able to prove that creditors is "adequately protected", pursuant to A.R.S. §33-2610(c). A portion of the commentary to UCRERA §11 (the analog to this section of the Act) is particularly useful.

> The Act does not specifically define "adequate protection" or specify what constitutes adequate protection under subsection (c), but leaves this determination to the discretion of the court based on the circumstances of the case. In general, however, any form of payment or security that would constitute adequate protection under the Bankruptcy Code, 11 U.S.C. § 361, would suffice to constitute adequate protection under this Act.

UCRERA §11, at p. 37. As a result, judges and lawyers may look to and use the substantial case law on the issue of adequate protection of cash collateral under the Bankruptcy Code in deciding whether and under what circumstances a receiver may use a senior lender's rents in a proceeding under the Act.

The Act provides that a foreclosure or other mortgage enforcement proceeding by the person who brought the receivership action, any action to continue the perfection of a lien and certain actions by a governmental entity are not subject to the stay under the Action. *See* Section 33-2613(D).

An act in violation of the statutory stay is voidable by the court. It is not automatically void. A.R.S. §33-2613(E). As a result, the receiver must obtain a court order setting aside any action violative of Section 33-2613(A). There is nothing in the Act

or the comments to UCRERA to guide a court in deciding whether to void an act taken in violation of the stay.

A court, pursuant to A.R.S. §33-2613(F), may impose civil contempt sanctions or award actual damages, fees and costs against a person who knowingly violates a stay or injunction imposed under this section. The court also may grant other equitable relief for any violation. Any money awarded is receivership property. *See* comments to UCRERA §14, at p. 47.

d. Receiver's Professionals and Compensation to Receiver and Her Professionals.

A receiver has the power to retain professionals to assist him during the case, but, must make certain specified disclosures. A.R.S. §33-2614(A). A person may be hired by a receiver even though she has been previously employed by or represented the receiver or has another "relationship with the receiver, a creditor or a party." The receiver may serve as a lawyer, accountant, broker or auctioneer for the receivership if authorized by law. A.R.S. §33-2614(B).

As a result, a receiver may hire himself or his own firm as one of the enumerated types of professionals. Of course that raises the question of should she hire her own firm to provide such services. It also raises for officers of the lender who obtained the appointment the question: do we want our receiver to also be his own lawyer or broker.

A lender very well may view a receiver hiring his own firm as a lawyer or broker to create a possible conflict of interest. The lender will want the property marketed in a reasonable manner and the property sold promptly for a reasonable price. If the receiver

is also the broker, there may be a perception that he will have a financial incentive to market the property for a longer period of time holding out as the *de facto* owner for a higher price in order to try to obtain a larger commission. The receiver has no disincentive from keeping the property because she is not the actual owner with a risk of loss and is not funding operating losses from her own funds. The receiver's apparent conflict is compounded if he is being paid for work as the receiver on an hourly basis. A receiver also may have a disincentive to promptly sell the property if he is earning fees for ongoing legal work performed in the receivership. None of those concerns will be manifest if the receiver hires a separate professional.

The best practice is for the lender to require the receiver to provide a plan for the property before retention and require the receiver to hire third party professionals who are able to provide objective brokerage, legal or accounting advice. That will ensure the receiver's independence and that her decisions are based on an objective disinterested analysis of the realities of the property and its operations. It will also permit the lender to know that the marginal benefit of maintaining the receivership exceeds the marginal costs. Critical to this analysis is for the lender to understand whether the receiver proposes that he be paid fees at an hourly rate for all or most services or on a flat monthly rate for most identified regular work and perhaps an hourly rate for limited services requiring extraordinary professional judgment, skill or analysis[4]. Lenders and other creditors almost

[4] For example, negotiating with potential purchasers, dealing with owners regarding the turnover of money or other assets that are receivership property and responding to demands or inquiries by junior lenders or other creditors appear to be matters for which paying on an hourly basis is justified. Routine management issues such as directing, responding to or dealing with employees,

always will be better off limiting a receiver to fixed monthly fees for the majority of services in the vast range of cases brought under the Act which probably will be the fairly routine "rents and profits" receiverships. Such a defined flat fee structure also will make the process of obtaining approval of those fees by the court, pursuant to Section 33-2619(A), easier for the receiver.

This is important because every dollar paid to the receiver and his professionals very well may reduce the amount paid to the lender unless there is equity in excess of the amount of the lender's lien. At a bare minimum, the lender should ask a receiver who wants to hire her own firm: (1) why is your firm the best qualified to provide those services; and (2) what have you done to determine that there are no comparable firms who can provide those services for less. For example, has the receiver gotten bids from other brokerage firms regarding a reduced sales or leasing commission? The test should be, has the receiver established that retaining his own firm will "put more money in the lender's pocket".

In hiring a broker, whether his own firm or an independent broker, the receiver should insist that the lender with the senior deed of trust and any junior lenders are identified as exclusions in the listing agreement unless the sale price exceeds the amount owed to those creditors. There is no reasoned basis for paying a commission to a broker if a lender holding a lien against the property is the ultimate buyer of the property for an

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addressing routine matters regarding the property, talking with a broker and employees of the lenders, preparing reports for the lender or to be filed with the court and working with tenants should be covered by a monthly fee.

amount less than the aggregate indebtedness against the property. The lender would not have to do so at a trustee's sale so it should not have to pay a premium if the receiver and her broker fail to bring a buyer who returns a better result. A simple illustration will suffice: First Arizona Bank is owed $9.5 million secured in first position on an apartment building. Last Bank of Arizona is owed $1,000,000 and is in second position. The receiver hires Big Deal Brokers ("BDB") to sell the property on a 5% commission. BDB brings a buyer who agrees to pay $10 million. Last Bank refuses to permit the short sale and acquires the building at a sale in the receivership court for $10.5 million. Certainly, Last Bank should not be required to pay BDB a commission of $525,000.00 (5% of $10,500,000), which would only compound Last Bank's loss.

Lenders and the receiver also should consider limiting a broker's compensation to a percentage of the sale proceeds in excess of what the lender reasonably believes it will receive if it forecloses. If a lender will receive less through a receiver's sale due to the payment of a broker's commission, there will be little reason to allow that transaction to close. As a result, a prudent lender will obtain a valuation of the property, this need not be a full blown appraisal, before commencement of the receivership action and determine the amount of any tax liens or other senior encumbrances. That will allow the lender and the receiver to know the purchase price a receiver will need to obtain to provide a net benefit to the lender.

For example, take the hypothetical above with the following changes. Last Bank's valuation of the property shows that the property is worth $10,000,000.00. If the commission is simply 5% of the purchase price, Last Bank would receive nothing if it

allows the sale with a price of $10,500,000.00 to a third party to close after payment BDB's $525,000 commission. On the other hand, it would be fair to pay BDB a commission substantially higher than 5% on every dollar in excess of Last Bank's $10,000,000.00 valuation. For example, a commission of 25% on the amount by which the price exceeds Last Bank's valuation would yield $125,000 to BDB. Such a commission structure would align the incentives of the banks, the receiver and the broker to allow a receiver's sale under the Act to close.

A lender also should require the receiver to demonstrate periodically that the benefits of the receivership continue to exceed the costs. If at any time, the receiver is unable to establish that the additional costs from continuing the proceeding are outweighed by the probable additional return, the lender should proceed with foreclosure unless there is a significant reason it does not want the property on its books.

In order to receive compensation, the receiver and her professionals must file an "itemized statement" of the work done, the amount of time spent on each task, the hourly rate of each person who performed services and an itemized list of expenses. Payment is subject to court approval. A.R.S. §33-2614(C). If the court finds that the receiver's fees and costs are "reasonable and necessary", it "may," but is not required to, award compensation to her, pursuant to A.R.S. §33-2619(A).

Although Section 33-2614 does not subject the fees of the receiver's professionals to the same test of reasonableness and necessity, the standard for award of fees and costs by a court in other proceedings provides a similar standard and, no doubt, will be used by a judge in evaluating such fees under the Act. In Arizona, the prevailing party is generally,

"entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful [claim or defense]." *Schweiger v. China Doll Rest. Inc*., 138 Ariz. 183, 188, 673 P.2d 927, 932 (1983) (*quoting Twin City Sportservice v. Charles O. Finley & Co*., 676 F.2d 1291, 1313 (9th Cir. 1982)). A court may also consider, "the difficulty and intricacy of the work performed when determining the reasonableness of the attorney fees sought." *Schwartz v. Schwerin*, 336 P.2d 144, 146 (Ariz.1959).

Any junior lender deciding whether to obtain a receiver must bear in mind that it very well may need to pay the receiver's fees and costs, including those of his professionals, if the senior lender ends up foreclosing or the proceeds from the sale of the property are not sufficient to pay the senior lender in full. *See* A.R.S. §33-2619(B)(1). Therefore, a junior lender must carefully analyze whether there is substantial equity in the property in excess of the amount owed to the senior lender plus any real estate tax liens and closing costs, including real estate commissions before initiating a receivership action. Getting stuck paying the receiver and her professionals' bills will add substantial insult to the sizeable injury which an out of the money junior lender will sustain.

The requirements of A.R.S. §§33-2614 & 33-2619 are a significant change from the practice pre-UCRERA in which receivers routinely paid themselves and their professionals

without oversight by creditors and the court[5]. Before the Act there were several examples of receivers in Arizona incurring an excessive amount of fees for their own services and the work of their professionals leaving lenders and other creditors with little recourse. The result in those situations was a reduction in the amount available to pay any junior lender and even the lender in first position. Indeed, concerns over the relative costs and benefits of receiverships is one of the reasons that the United States Small Business Administration has been so loathe to approve receiverships for defaulted 7A and 504 loans.

Sections 33-2614(C) and 33-3619(A) provide a necessary level of transparency to and recourse for senior lenders and junior creditors to prevent that type of abuse and should create greater confidence in the receivership process. Receivers and their professionals who focus carefully on the benefits and costs to all creditors and their ability to demonstrate a positive net return from their actions will do well under this new structure.

e. Payment of Debts & Turnover of Property.

As a general matter, a person who owes money or is in the possession of property that is receivership property is required to pay that debt or turnover that asset to the receiver. If that person has notice of the receivership, but, pays the owner instead of the receiver, the debt will not be satisfied. A.R.S. §33-2610(A) & (B). This principle derives from Uniform Commercial Code Section 9-406(a).

[5] Although this section does not state that the "statement" must be served on creditors subject to possible objection, it clearly is a matter for which notice and opportunity for hearing must be provided, pursuant to Section 33-2602, because the court must grant its approval.

The receiver, accordingly, should send a copy of the Receivership Order and a letter to all persons who owe money to the owner, as soon as practicable, demanding that all future payments be made to her. That letter, obviously, should go to any tenants and account debtors, but, also to any persons holding deposits, such as utilities and even professionals holding retainers, previously paid by the owner.

Any creditor who possesses receivership property and the perfection of a security interest in that asset depends on continued possession will not be required to turnover that property unless and until the court issues an order providing adequately protection to that creditor's interest. A.R.S. §33-2610(C). For example, a creditor with a lien on a bank or brokerage account will not be required to give up possession until the court crafts a means for adequately protecting the creditor such as granting a replacement lien on other property having an equal amount of equity.

Subsection (D) of this section explicitly grants the court the power to hold a person who fails to turnover property to a receiver in civil contempt unless there is a *bonafide* dispute over that asset.

f. Receiver As Lien Creditor.

A significant right vested in receivers under the Act is the status of a lien creditor having priority over unperfected security interests in personal property and priority over unrecorded liens on real property. A.R.S. §33-2608. This section does not give the receiver the power to void unperfected liens as the authors of the UCRERA observed in their comment to Section 9. "Section 9 does not create (and is not intended to create) an

'avoiding power' in the receiver analogous to the strong-arm power exercisable by a bankruptcy trustee under Bankruptcy Code § 544(a)." UCRERA, §9 at p. 33.

This means that the receiver would receive proceeds in excess of a perfected security interest or unrecorded deed of trust before anything is paid to the holder of the unperfected lien in the same property. This is true even as to real estate in Arizona because the holder of a judgment lien on real property would be senior to the holder of an unrecorded deed of trust, pursuant to A.R.S. §33-812(A)(listing the order of payment to creditors of proceeds at a trustee's sale).

Unanswered is the amount of a receiver's lien under Section 33-2608. Will the aggregate amount owed to all unsecured creditors plus the fees and costs of the receiver be subject to the receiver's lien with priority over the unperfected lien of a lender? Or is it only the amount owed to the receiver for her fees and costs entitled to the priority accorded by this provision? There is nothing in the Act or the comments to UCRERA which answers these questions or provides any guidance to practitioners or judges.

g. Sale & Use of Receivership Property.

The ability of receivers to sell property and the power of courts to authorize sales, especially sales free and clear of liens, was an issue of doubt in Arizona for years. Section 33-2615(B) explicitly authorizes the "transfer", including sales and leases, of receivership property, including sales free and clear of liens, with court approval. Any lien on the property attaches to the sale proceeds and has the same validity and priority it had on the transferred asset. A.R.S. §33-2615(C).

Accordingly, a court may permit the sale of an asset free and clear of any liens, even if there is a legitimate dispute over the validity or priority of the liens with those disputes to be resolved by the court at a future time. The sale proceeds must be held, presumably by the receiver in a separate, segregated interest bearing account, until the court resolves that dispute.

There is no requirement for the transfer to be done through a public auction. Although a court may, therefore, permit a sale of receivership property through a private sale, the actual terms and conditions of that transfer still must be noticed out to all creditors with an opportunity for a hearing pursuant to the requirements of Section 33-2602. Any creditor holding a "valid lien" on the property is entitled to a credit in the amount owed to it if it decides to purchase the property as long as it pays cash in an amount necessary to pay in full "the reasonable costs of the transfer." *See* A.R.S. §33-2615(D).

The property transferred will be subject to the lien of a senior lender unless that lien is extinguished by that transfer. *Id.* This means that the buyer at the receiver's sale need not pay off the liens of the lenders. Obviously, however, any buyer will need to reach agreement on how each of those lenders will be paid or one of them will foreclose and wipe out the interest of the buyer.

The validity of any transfer to a person who receives the property in "good faith" will not be affected and any lien extinguished by the transfer will not be "revive[d]" by the reversal or modification of an order approving the transfer unless the court stayed the order approving the transfer. The term "good faith" is defined to mean "honesty in fact and the

observance of reasonable commercial standard of fair dealing". A.R.S. §33-2615(E) & (F).

The Commissioners who drafted UCRERA provided a succinct and convincing rationale for a lender to seek a sale of property through a receivership rather than foreclosing on the asset.

> . . . public 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. Further, a sale subject to judicial review and confirmation could produce greater finality regarding the title acquired by the buyer at the sale. Thus, there is adequate justification to expect that in many cases, a receiver sale of mortgaged commercial real estate would produce a higher sale price than a public foreclosure sale would produce.

UCRERA, §16, at p. 50. Those are substantial possible benefits which a lender should carefully consider in evaluating foreclosure vs. receivership regarding a defaulted loan.

h. Leases and Executory Contracts.

The Act also vests receivers with significant new powers relating to existing leases and executory contracts which provides another possible benefit for lenders from a receivership. A receiver may "adopt or reject an executory contract," which includes leases under the definition of "executory contract" in Section 33-2601(4), with court approval. The court may require the receiver to agree to "terms appropriate under the circumstances" with the counterparty to the contract as a condition to the adoption of the agreement. A.R.S. §33-2616(A).

Ipso facto provisions (terms that purport to terminate or void the contract upon the appointment of a receiver or the insolvency of the owner) do not affect the receiver's ability to adopt the agreement. A.R.S. §33-2616(C).

Significantly, the Arizona legislature did not incorporate a provision in UCRERA §17(b) that requires a receiver to seek court approval to adopt or reject a contract "within a reasonable time". Therefore, there is no statutory time frame in which the receiver must decide to adopt a contract in the Act. Any lender which requests the receiver's appointment certainly will want to see contracts adopted or rejected prior to any sale so it is able to ensure any potential buyers what they will be receiving and, thereby, maximize the potential sale price.

A receiver may assign a contract if the owner had a right to assign it on the date the receiver was appointed. A.R.S. §33-2616(E). Contracts such as a personal services agreement, for example an agreement to paint a portrait, are not assignable under prevailing law and, thus, may not be assigned by a receiver.

If a receiver rejects a contract, it constitutes a breach of the agreement as of the time of the receiver's appointment and she is no longer entitled to possession or use of any property covered by that agreement and the counterparty has a claim for damages. A.R.S. §33-2616(C).

Of great significance are the limitations on the right of a receiver to reject leases where the owner is a landlord of real property and the tenants occupy the property as their primary residences. A receiver may not reject a tenant's lease of a residence if:

(1) The receiver was appointed by a person other than the holder of a deed of trust on that property; OR

(2) The receiver was appointed by a lender holding a deed of trust on the property and either:

a. ALL of the following are true:

i. The lease is superior to the lender's lien;

ii. The tenant has an enforceable non disturbance agreement with the lender;

iii. The lender has consented to the lease; OR

b. On the date the owner entered into the lease its terms were commercially reasonable and the tenant did not actually know or have reason to know that the lease violated the terms of the deed of trust.

A.R.S. §33-2616(G).

Therefore, a receiver may reject leases in an apartment building or other residential property under Section 33-2616(G)(2)(b) only if the terms of those leases were significantly below market on the date they were signed or the tenants had constructive knowledge that the leases violated the terms of the deed of trust.

Significantly, similar limitations do not exist on a receiver's power to reject leases of commercial real estate. Accordingly, a receiver over a strip mall or office building may reject any leases of spaces in such a property which are under market rent on the date of the proceeding even if the leases were commercially reasonable on the date they were signed. This promises be a substantial benefit to a lender where the commercial property

is encumbered by long term below market leases. Tenants who believe they have locked in the benefits of long term commercial leases may be forced to renegotiate with the receiver or make plans to move.

Any person looking to the comments to UCRERA §17 for guidance in interpreting its analog in the Act must do so with great care. The actual language in subsection (G) of Section 33-2616 differs significantly from the terms of §17(h) of UCRERA which appears to provide far broader restrictions on the rejection power than exist in the Act. The author has not been able to find any explanation in the legislative history for these difference.

i. Lien on After-Acquired Property

Any asset the receiver or owner acquires after the date of the receiver's appointment is subject to any security agreement entered into between the owner and the creditor before appointment. A.R.S. §33-2609. This is markedly different from Section 552(a) of the Bankruptcy Code which provides that an after-acquired property provision generally is terminated by the filing of the bankruptcy petition. The comment to UCRERA §10 points out that this provision "is limited to property in which the owner has some interest (i.e., property that is receivership property)". It does not apply to "property that a receiver acquires in which the owner has no interest (i.e., property that is not receivership property)". UCRERA at p. 34.

j. Receiver's Reports & Discharge.

Section 33-2618 provides a nonexclusive list of the types of things that a receiver may include in an interim report filed with the court. Any such report should include any fees paid or proposed to be paid to a professional and the receiver's own fees and expenses.

A final report must be filed with the court, pursuant to Section §33-2621(A), which must include seven identified areas of information. The receiver will be discharged after she distributes all receivership property and the court approves the final report. A.R.S. §33-2621(B).

k. Receiver's Immunities & Procedure for Suing Receivers.

A receiver, as an agent of the court, has historically been entitled to certain immunities and protections. Section 33-2617(A) provides that a receiver appointed under the act is entitled to all of the defenses and immunities "provided by law" for any act or omission which is "within the scope" of his appointment. Note that this immunity will not insulate the receiver from liability for actions which exceed or violate the terms of the order appointing her as the receiver. This statutory protection is consistent with well-reasoned recent Arizona case law. *See Mashni v. Foster, ex rel. County of Maricopa*, 234 Ariz. 522, 527, 323 P.3d 1173, 1178 (Ariz.App. 2014)(holding that "a receiver is immune from suit unless the appointing court specifically finds that the receiver has acted outside the scope of the appointment order. . . . Like the court itself, the receiver's immunity from suit exists by virtue of the *context* in which he acts, not the *content* of his actions.").

As a separate matter, the Act codifies the *Barton* Doctrine set forth by the United States Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881).

Therefore, the gating function for a person to sue a receiver personally for any act or omission as a receiver is that he must prove to the court which appointed the receiver that she "acted without authority." A.R.S. §33-2617(B).

A court in deciding whether a receiver's specific actions fall within the scope of the *Barton* Doctrine must review "the nature of the function that the [receiver] or his counsel was performing during commission of the actions for which liability is sought. . . . [If the receiver acted] 'within the context' of [her] role of 'recovering assets for the estate,' leave must be obtained. . . . Acts are presumed to be part of the duties of the [receiver] or his counsel 'unless Plaintiff initially alleges at the outset facts demonstrating otherwise.' " *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012). Even allegations of intentional misconduct, including fraud, by a receiver, are covered by the doctrine such that a cause of action alleging such a claim must be approved by the appointing court before it is filed. *Id.*, 688 F.3d at 158.

Although not relying or citing to *Barton*, the Arizona Court of Appeals in *Mashni* reached the same result and even clarified that receivers in Arizona do not owe fiduciary duties to all of the creditors of the receivership. Instead, a receiver has a duty of fidelity to the court and its orders. *See Mashni supra*, 234 Ariz. at 528.

A receiver appointed under the Act may, therefore, take great comfort in more than 130 years of case law from federal courts and the recent decision from the Arizona Court of Appeals establishing that a court which appoints a receiver has control over if and when he or she can be sued. She also should not fear that she can be charged with breaching

chimerical fiduciary duties to unsecured creditors so long as she acts in accordance with the terms of the order appointing her.

3. Miscellaneous Provisions.

a. Removal & Termination.

A court may only remove a receiver "for cause." A.R.S. §33-2620(A). "Cause" is not defined in the Act. The comment to UCRERA §22 is not particularly helpful in understanding the circumstances that may constitute "cause". Citing to *Clark on Receivers* the Commissioners state that "[c]ertainly, 'cause' would include the receiver's refusal or failure to carry out its duties." UCRERA at p. 70.

The Act authorizes a court to terminate the receivership if it finds that the appointment was improvidently granted or the circumstances do not justify continuing the receivership. In the event the court does so, it may award the fees and expenses of the receivership and actual damages caused by the receivership against a person the court determines sought the appointment wrongfully or in bad faith. A.R.S. §33-2620(D).

b. Receiverships in Another State

Section 33-2622 is a significant provision that will aid receivers appointed in another state where property relating to that proceeding is located in Arizona. It allows an Arizona court to appoint the foreign receiver or his nominee as an "ancillary receiver" as to property in Arizona if she is eligible to be a receiver, pursuant to A.R.S. §33-2606, and the appointment of that person will assist her in performing her duties and exercising her powers in that other proceeding. As a general matter, an "ancillary receiver" will have

powers, obligations and rights of a receiver appointed under the Act. Section 33-2622(A) & (C).

The Act also explicitly authorizes a court to issue any order which "gives effect to an order entered in another state appointing or directing a receiver." As a result, a court in Arizona may issue an order allowing a foreign receiver to seize and sell property located here or do any other lawful act which aids him in the performance of his duties as a receiver in the other state.

If receivership property in an Arizona case is located in a different state, the person who obtained the appointment or the receiver should promptly determine whether that state has adopted UCRERA. If that is the case, it will be relatively easy for either of them to obtain control over that property by the appointment of an ancillary receiver under the analog to Section 33-2622 in that state. The time, expense and uncertainties of administering receivership property in several states will be substantially reduced if it is a UCRERA state. Lenders to borrowers with assets in multiple states should see this provision as a substantial benefit. If the other state has not adopted UCRERA, the lender in the Arizona case or the Arizona receiver will have to initiate an action under the statutory provisions or common law in that jurisdiction to protect and obtain control of property in that locality.

It is unclear if a court in Arizona could appoint an ancillary receiver with respect to property in Arizona owned by an affiliate of the person that is the subject of the receivership proceeding in the other state even if the affiliate is also a borrower from the lender who obtained the foreign receivership. The Arizona judge very well may consider whether the

moving party is able to satisfy the requirements for appointing a receiver under Section 33-2605.

c. Impact on Rights of Lender.

Section 33-2623 explicitly provides that a lender holding a deed of trust does not waive certain rights and does not become an agent of the owner or a "mortgagee in possession" of the real estate that is the subject of the receivership simply because it asked for or obtained the appointment of a receiver.

4. What is Missing from AZ Statute?

One significant provision of UCRERA is conspicuously, but inexplicably, missing from the Act. Section 20 of the UCRERA provides an entire process for the filing and ultimately adjudication of claims of creditors against the receivership. This includes notice to the creditors of the requirement to file claims by a bar date.

The author has not been able to locate anything in the legislative history indicating the reasons the Arizona legislators elected not to adopt this provision. Its absence, however, should reduce the expense of administering a receivership.

III. Conclusion.

The Act and UCRERA are any excellent innovation that provide needed clarity and certainty in an important area of the law. Each of the provisions discussed above should benefit all parties in receivership proceedings and the judge's handling the cases. Receiverships properly administered under the act by professionals able to properly utilize

the applicable elements of the statute should return a greater value to all participants than other available alternatives.