

OREGON'S NEW RECEIVERSHIP LAW — WHAT YOU NEED TO KNOW

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On June 15, 2017, Governor Kate Brown signed Senate Bill 899, enacting the Oregon Receivership Code (“the Code”). This new Code is the result of hard work by the Oregon Law Commission Receivership Work Group, formed in January 2016 to clarify and improve the statutes and law related to receivership in Oregon in time to provide recommendations to the 2017 Legislative Assembly. The Work Group included judges, receivers, a professor, and lawyers. The group was ably assisted in its efforts by legislative counsel and staff of the Oregon Law Commission. The Work Group considered the law, prepared the text of Senate Bill 899, and submitted the bill in early 2017.

Purpose

The Code’s purpose is to bring clarity to receivership practice in Oregon. Historically, Oregon has had very few specific statutes and rules governing receivership which has, instead, primarily been governed by common law. The case law in this area is archaic, particularly for counsel and judges who do not specialize in receivership. As a result, receivership cases have been more expensive and less predictable for the parties and the legal system than they needed to be.

Philosophically, the Work Group saw its mission as bringing clarity to existing law, rather than attempting to make wholesale substantive changes to the law. Many of the proposed provisions are simply codifications of existing Oregon common law. While the Work Group needed to make some decisions if the law was silent or unclear, these decisions were made after considering the balanced input of judges, receivers, and lawyers representing all types of constituencies in receivership.

Starting Points

As part of its drafting process, the Work Group considered a number of receivership statutes, including the Washington receivership statutes (RCW 7.60 et seq.) and the Uniform Commercial Real Estate Receivership Act. Ultimately, the Work Group crafted its own statute, taking the best from each of the sources it considered, with its own additions, to make the Oregon Receivership Code consistent with Oregon’s legal culture and practice.

Scope of the Statute

The Oregon Receivership Code is generally not intended to be used in consumer cases, nor is it intended to be a substitute for residential foreclosure. For example, the

court's power to entrust property that is primarily residential to a receiver and for a receiver to sell that property is available only in very limited circumstances, such as those involving waste and destruction, or enforcement of domestic relations orders. The Code generally cannot be used for household goods, exempt property, or property held in trust, except in domestic relations cases.

The Code is also not intended to supplant existing law regarding specialized types of governmental receiverships, such as insurance company receiverships. When a state agency is authorized to commence a receivership for regulatory purposes, the agency is given its choice of using its own existing statutes or opting in to the provisions of the Code.

Defining the Scope of the Receivership

Under the Code, a receivership may be imposed over all or a portion of the defendant's property. If the party seeking appointment of the receiver does not reasonably describe specific limited property subject to the receivership, then the receivership will exist over all of the defendant's eligible property.

When Receivership is Allowed

The situations in which a receiver may be appointed have not substantively changed from prior Oregon law. A receiver may be appointed before judgment, if the property subject to the action is in danger of being lost or materially impaired. A receiver may also be appointed after judgment, to effectuate the judgment, to preserve property pending appeal, to dispose of property, or to aid in collection.

A receiver may be appointed in a fraudulent transfer action. If a creditor has attached property, a receiver is allowed if the property is perishable, is in danger of waste, impairment, or destruction, or is abandoned. A receiver may also be appointed over an entity that is dissolved or insolvent, to protect the interests of owners or creditors.

The Code includes broad authority for the appointment of a receiver if the court, in its discretion, believes a receiver is necessary to secure justice for the parties. Although the court may consider the existence of a contractual provision providing for the appointment of a receiver, the court is not bound by the provision.

Powers of the Receiver

Common law contains a distinction between custodial receivers and general receivers. In practice, the lines between these two types of receivers are very difficult to locate. The Oregon Receivership Code does not rely on this historical distinction. Instead, the Code takes the "menu approach." The menu approach is simple: the statute sets forth a nonexclusive list of powers that may be granted to a receiver. This list includes most of the powers that a party would

typically seek to include in a comprehensive receivership order. The party requesting the receiver chooses what items off the menu that party believes the receiver should have under the facts of the particular case, and asks the court to include those powers in the order appointing the receiver. The party requesting the receiver may request items that are not on the menu. The opposing party or interested parties may object and ask that the powers be different or limited. The judge then has the authority to consider the facts and decide what powers the judge will grant to the receiver.

The advantage to this approach is that it forces the parties and the court to consider at the outset of the case what the receiver should be doing. This helps to avoid uncertainty during the case about whether the receiver really does or does not have authority to take certain actions.

Of course, the Oregon Receivership Code has preserved the possibility for any party, or the court on its own motion, to modify, expand, or limit the powers granted to the receiver as events in the case develop.

Participation and Service Rules

Under the Oregon Receivership Code, interested parties may appear and participate in a receivership without intervening to become formal parties to the case. This helps reduce costs for general creditors, potential purchasers, contract counterparties, and third parties who have an interest in how the case proceeds.

The Code also clarifies how notice must be given to various constituencies in the receivership case. The Work Group tried to balance the need to keep interested parties informed with the need to conserve limited estate resources.

At the outset of the case, the receiver is required by the Code to send a notice of the receivership to all known creditors by mail (or by another method approved by the court), as well as to publish notice in a newspaper. Otherwise, service of all interested parties is not required for every action in the receivership. The parties to the case (i.e., the entities in the caption) receive regular service of all pleadings as required by the Oregon Rules of Civil Procedure. Any interested person can file a request for special notice and indicate a preferred means of receiving notices. Notices must then be provided to the people and entities on the special notice list. Notice must be given to all known persons whose property interests may be directly affected by a proposed action. In addition, various provisions in the Oregon Receivership Code specify who must be served for particular purposes.

Automatic Stay

The Oregon Receivership Code provides for a six-month automatic stay, which can be extended by court

order. There are exceptions to the automatic stay for continuation of a foreclosure action by the party seeking appointment of the receiver, criminal actions against the owner, certain domestic relations proceedings, perfection of security interests, governmental pursuit of police and regulatory powers, and establishment of tax liability.

Executory Contracts

The Code adopts rules similar to those in the bankruptcy code regarding assumption and rejection of executory contracts. Contracts must be assumed in their entirety, with all benefits and burdens. Executory contracts specifically include contracts under which a party has an unexercised option to require the other party to perform. Actions taken in violation of the automatic stay are voidable (not void), and are subject to actual damages and sanctions for civil contempt.

Receivership Sales

A receivership sale is very different from a foreclosure sale. With a foreclosure sale, the property is sold at auction to the highest bidder on the courthouse steps. Bidders must pay cash on the date of the sale, have little to no opportunity to do due diligence, have limited information about the title to the property, and take ownership of the property with unknown risks. As a result, the typical bidder at a foreclosure sale is the lender who commenced the foreclosure. If others bid at a foreclosure sale, the price is often depressed because of uncertainty about the property.

By contrast, a receiver stands in the shoes of the owner of the property and can sell it as if the receiver were the owner. A receiver can hire regular commercial brokers (subject to employment by the court), can show the property, and can coordinate due diligence efforts. A buyer can propose a purchase and sale agreement with more traditional contingencies (such as financing and due diligence), and closing can occur in a more commercially reasonable time frame and manner. During the process, interested parties will have the opportunity to assert their ideas about how marketing should be done and to whom, in order to maximize the value obtained at sale. Ultimately, a receiver is an arm of the court, and the court will decide what sale process is fair under the facts of the case.

As a result of the differences between foreclosure and receivership sales, the Work Group deemed it logical to include language that a receiver's sales be made without rights of redemption. Often the sale price for a property is depressed if the borrower has a right of redemption, because the buyer does not have certainty that it will end up owning the property. In addition, the buyer may feel hampered in using the property until after the redemption period ends, which further depresses the price.

Since the purpose of a receiver's sale is to maximize the value of the property, and all interested parties are able to participate in the process of crafting the sale (subject to the court's oversight), the need for a redemption right to prevent the sale at an artificially low price is unnecessary.

Claims

The receiver may set a claims bar deadline and object to claims. The Code gives the receiver control over the process for submitting claims. The Code also contains a process for objecting to claims and for allowance or disallowance of claims. If the estate is insufficient to provide distributions to creditors, the receiver may give notice that no claims process will take place.

The Code further sets forth priorities for payment of claims. The order of priorities is as follows: (1) recovery of costs of preserving secured property in the estate; (2) secured claims; (3) administrative expenses; (4) claims under 31 USC §3713; (5) claims asserting liens that do not have to be perfected under applicable law; (6) unperfected secured claims to the extent of their collateral; (7) wages, salaries, and commissions, including vacation, severance, and sick-leave pay; (8) consumer deposits up to \$2,850; (9) spousal or child-support obligations; (10) taxes; (11) general unsecured claims; and (12) interests.

Recovery of Costs

Under the Oregon Receivership Code, a receiver may seek to recover the costs and expenses of preserving property from the secured creditor's interest in property to the extent that the receiver's activities benefited the secured party.

Protection of the Receiver

In order to encourage the best-qualified people to serve as receivers, the Code provides that receivers should be protected from personal liability, except for their failure to follow court orders, instances of fraud, intentional misconduct, and similar bad acts. Parties wanting to sue the receiver must first obtain authority from the court that appointed the receiver.

Employment and Compensation of Receiver and Professionals

The Code sets forth the qualifications required for someone to serve as a receiver as well as the required disclosures by a proposed receiver. Under the Code, any person, whether or not a resident of Oregon, can be a receiver, unless the person or entity is not authorized to conduct business in Oregon, has been convicted of a crime, or (unless authorized by statute) is a sheriff of any county. A proposed receiver must disclose any conflicts of interest or affiliate relationships to any party to the receivership. The Code contains straightforward processes for employment and compensation of the receiver's professionals.

The court may appoint a successor receiver if a receiver resigns, dies, or is unable to serve, or if the court decides to remove the receiver for good cause.

General Administration

There are various options for providing bonds, security, or insurance for the receiver's actions, which the court can tailor to the needs of the case. There are also provisions governing receivership financing.

The Code requires the receiver to provide reports of the receiver's activities and the estate's financial condition. The reports must include a narrative description of the receiver's activities, as well as financial statements showing cash flow, receipts and disbursements, accounts receivable, tax status, and information on the estate's fees and expenses.

An owner of property is required to cooperate with the receiver. The receiver, with court approval, may apply to commence one or more ancillary receiverships if some property of the estate is located outside the boundaries of the state of Oregon.

Termination

The Oregon Receivership Code provides for the receiver to file a final report. Once the court approves the report, the court may discharge the receiver, exonerate the receiver's bond or any alternative security, and release the receiver from any further liability regarding the estate.

To learn more about this new Code, you may examine Chapter 358, 2017 Laws, or find it at <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB899/Enrolled>. The Oregon Receivership Code will become effective on January 1, 2018.