

SENATE BILL NO. 2122
SENATE BUSINESS AND INDUSTRY COMMITTEE
JEFF BARTA, CHAIR
TESTIMONY IN SUPPORT OF SENATE BILL 2122

Mr. Chairman and members of the Senate Business and Industry Committee. I am Parrell Grossman. It is my privilege to serve as a member of the North Dakota Commission on Uniform Laws and of the National Conference of Uniform Laws. I appear on behalf of the North Dakota Commission in support of this proposed uniform law, the Uniform Commercial Real Estate Receivership Act, and to present this legislation for the Committee's consideration.

As this Committee might be aware, the National Conference of Commissioners (National Conference) studies topics that are suitable for uniformity across the states. The Commission members from each state exhaustively study and rigorously debate these laws. Part of that process includes input from various stakeholders including educational institutions, members of the business community and public, *et cetera*. When the final acts are approved and adopted by a vote of all the states, these uniform laws are available for adoption in the individual states. This uniform law was adopted by the Conference in 2015 and, thus far, approximately 14 states have enacted the uniform law. Part of the decision and timing in bringing proposed Acts to the North Dakota legislature involve the support of stakeholders involved in or impacted by the proposed law.

In this instance, the North Dakota Banker's Association (NDBA) and the Department of Financial Institutions (DFI), among others, support this legislation. I anticipate that both organizations may provide testimony today, possibly among other supporters.

I have attached several attachments to my testimony for your review, including the Final Act (with Comments) approved by the national conference, a Summary of the Act," and letters or journal articles in support. Please review these documents if you feel they would be helpful. North Dakota should adopt this Act because the Act; 1) Provides certainty for business owners and creditors; 2) Is fair to all parties; 3) Can preserve and maximize the value of commercial property; 4: Helps state courts implement proper remedies; and 5) Is limited to commercial property.

Now, I will explain the provisions of this Bill, which creates a new chapter 32-10.1 and adds a section to chapter 32-19.2 to North Dakota law. SECTION 1 creates chapter 32-10.1.

In the interests of brevity and not reinventing the wheel, most of my comments explaining the individual provisions of the Act, now sections of this chapter, are from the "American Bankruptcy Institute Journal," Volume XXXVI, No. 7, July 2017, authored by David E. Leta.

Section 32-10.1-01 "**Definitions.**" Line 7, page 1. The definitions in this section are similar to definitions found in the Bankruptcy Code and Uniform Commercial Code. However, some defined terms have no corresponding definitions in the Bankruptcy Code, while other important

terms are intentionally undefined to allow for situational flexibility. These definitions are fairly self-explanatory and would not seem to require discussion.

Next, **Notice and Opportunity for Hearing.**” is provided for in section 32-10.1-02 on line 16 of page 4. The court may enter orders only after notice and an opportunity for hearing as is appropriate in the circumstances, subject to some limited exceptions.

Next are **Scope and Exclusions** in section 32-10.1-03, starting on line 26, page 4. This chapter applies to all real property as well as related personal property, except where the real property is improved by one to four dwelling units, unless those dwelling units are used for commercial purposes. This chapter does not apply to a receivership authorized by the laws of this state in which the receiver is a government unit or individual acting in an official capacity on behalf of the governmental unit.

Section 32-10.1-04, starting on line 21, page 5, provides for **“Power of the Court.”** The court that appoints a receiver under this chapter has exclusive jurisdiction of the receivership proceedings under this chapter.

Next, is **“Appointment of a Receiver,”** Section 32-10.1-05, on line 22, page 5, section 32-10.1-07 sets forth the standards for a court appointing a receiver in circumstances both before and after a judgment. Before judgment, to protect a party that demonstrates an apparent right, title, or interest in real property, if the property or its revenue-producing potential are in danger of waste, loss, dissipation, or impairment and, after Judgment, to carry the Judgment into effect. It then contains some other provisions when in connection with a foreclosure or other enforcement of a mortgage. There are some protections when the court appoints a receiver on an *ex parte* basis.

Now, moving to **“Disqualification from appointment as receiver,”** section 32-10.1-06, starting on line 29, page 6. This section requires that the receiver be independent and disinterested. It then specifies certain types of relationships that do not disqualify a receiver, and further provides that while a party seeking an appointment may nominate someone. The court is not bound by that nomination.

Next section is **“Receiver’s Bond,”** section 32-10.1-07 on line 18, page 7. Every receiver must post a bond that is conditioned on the faithful discharge of the receiver’s duties in an amount specified by the court.

“Status of Receiver as a lien creditor.” Section 32-10.1-08 on line 3, page 8, provides that the receiver has the status of a lien creditor under the Uniform Commercial Code in chapter 41-09 as to personal property and as to real property under chapter 41-19, this state’s applicable recording statutes.

Section 32-10.1-09, **“Security Agreement covering after acquired property,”** provides that the appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property.

Section 32-10.1-10 “**Collection and turnover of receivership property.**” This section provides that, on appointment, persons having possession, custody, or control of receivership property must turnover the property to the receivers, and persons owing debts that are receivership property must pay those debts to the receiver.

Section 32-10.1-11 “**Powers and duties of receiver.**” Starting on line 27, page 8. This section grants very broad and usual parties to the receiver. A receiver may exercise certain powers with only court approval, such as transferring property outside the ordinary course of business. This section also sets forth the receiver’s performance and reporting duties.

Section 32-10.1-12. “**Duties of owner**” on line 15, page 10. This section places the duties of assistance, cooperation, and turnover on owners of receivership property. If the owner is not an individual then these duties apply to each officer, director, manager, member, partner, or other person exercising control over the affairs of the owner.

Section 32-10.1-13. **Stay - Injunction.**” Starting on line 8, page 11. Entry of the order of appointment imposes a stay applicable to all persons, of any action to obtain possession of, exercise control over, or enforce a judgment against receivership property. This section excludes certain actions from the automatic stay including actions to foreclose or enforce a mortgage.

Section 32-10.1-14. “**Engagement and compensation of professional.**” On line 6, page 12, this section provides that, with court approval, the receiver may engage and pay professionals to assist in the performance of the receiver’s duties, in any amounts approved by the court.

Section 32-10.1-15. “**Use or transfer of receivership property not in the ordinary course of business.**” With court approval the receiver may use, sell, lease, exchange or transfer receivership property other than in the ordinary course of business.

Section 32-10.1-16. “**Executory Contract.**” On line 18, page 13, this section provides that a receiver may an executory contract of the owner that relates to the receivership property. An executory contract is a contract under which each party has an unperformed obligation. The receiver may do the same with unexpired leases.

Section 32-10.1-17. “**Defenses and immunities of receiver.**” On line 9, page 15. This section expressly provides the receiver immunity for acts or omissions within the scope of the receiver’s appointment.

Section 32-10.1-18. “**Interim Report of Receiver.**” On line 14, page 15. A receiver may file, or if ordered by the court, shall file an interim report that includes the activities of the receiver, receipts and disbursements, disposition of receivership property, and fees and expenses of the receiver, etc.

Section 32-10.1-19. “**Notice of Appointment, Etc.**” On line 23, page 15. Requires the receiver to notify creditors of the owner of a receiver’s appointment, It specifies how creditors must file claims with the receiver, and priority of claims, etc.

Section 32-10.1-20. “**Fees and Expenses.**” On line 1, page 17. The court may award a receiver from the receivership property the reasonable and necessary expenses of performing the duties of the receiver.

Section 32-10.1-21. “**Removal of a Receiver.**” The court may remove a receiver for cause, replace a receiver that dies, resigns, or is removed. The court may discharge a receiver and terminate the court’s administration of the receivership if the circumstances no longer warrant the continuation of the receivership.

Section 32-10.1-22. “**Final report of receiver – Discharge.**” Line 28, page 17. On completion of the receiver’s duties that includes, among other things, a description of the receiver’s activities, a list of receivership properties, a list of disbursements, dispositions, and distributions, and a request for payment of the receiver’s fees and expenses.

There are four more sections that don’t require detailing unless the Committee thinks otherwise.

Finally, SECTION 2 of the Bill creates a new section to chapter 32-19.2 on “Applicability” which provides as follows “This chapter does not apply to a commercial real estate receivership under chapter 32-10.1. Chapter 32-19.2 applies to the appointment of trustees for commercial buildings during foreclosures and section 2 of this Bill would ensure that unique chapter would not apply to a proceeding under chapter 32-10.1.

That concludes my testimony. Thank you, Mr. Chairman and members of the Committee. The Commission on Uniform Laws respectfully asks that you give Senate Bill 2122 a “Do Pass” recommendation and, with that, I will stand for any questions.