

Florida's New Receivership Act Offers Some Clarity for Commercial Real Estate Stakeholders

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Florida's Uniform Commercial Real Estate Receivership Act (UCRERA) went into effect on July 1, 2020, just in time to offer some clarity concerning a remedy banks and creditors may seek in light of the COVID-19 economy. A task force of the Florida Bar Business Law Section found that existing receivership law in Florida did not provide a clear standard for the appointment of a receiver or set forth a receiver's powers and duties, which led to a lack of predictability concerning receiverships in the commercial real estate context. The UCRERA has been adopted by eight other states.

The appointment of a receiver remains an equitable remedy and is not an independent cause of action. By largely codifying existing common law and providing additional framework, the UCRERA helps explain the role and scope of a receivership. The act specifies the circumstances under which a receiver may be appointed pre- and post-judgment but still leaves the ultimate decision to appoint a receiver in the court's discretion. A court must consider a list of factors and other relevant facts, including whether: (1) appointment is necessary to protect the commercial property from waste or other loss; (2) the mortgagor agreed to the appointment of a receiver upon default; (3) the owner agreed in a signed record after default to the appointment of a receiver; (4) the property and other collateral is not sufficient to satisfy the secured obligation; (5) the owner fails to turn over rents that the bank was entitled to collect; and (6) a subordinate lienholder obtains an order appointing a receiver for the property.

The act explains what will and will not disqualify a person from serving as a receiver. For example, a person is not disqualified merely because he or she was a receiver in an unrelated matter for one of the parties involved in the lawsuit. The UCRERA also allows the movant to nominate a person to serve as a receiver, but the court is not bound by the nomination. The receiver must post a bond or alternative security, such as a letter of credit, but the act does not specify how much the bond or security must be.

The UCRERA establishes the general powers and duties of the receiver, subject to modification by the court, and delineates what actions by the receiver require prior court approval. The receiver may, without court approval, collect and manage receivership property, operate a business constituting receivership property, incur debts and pay expenses in the ordinary course of business, and assert a cause of action or defense of the owner that relates to the receivership property. A receiver will need court approval to incur debt other than in the ordinary course of business, make improvements to the property, pay compensation to the receiver or a professional engaged by the receiver, and recommend the allowance or disallowance of claims submitted in the receivership. The act also sets forth the duties of the receiver, which include preparing and retaining business records, accounting for receivership property, filing with the recording office a copy of the order appointing the receiver, and disclosing to the court any fact that may disqualify the receiver. The act also specifies the duties of the property owner, including assisting and cooperating with the receiver, preserving and turning over property, and performing any duty imposed by court order or law.

The court may order the payment of a receiver's fees and expenses from specified sources, including requiring the party who sought the appointment to pay the fees and expenses if the receivership does not produce sufficient funds, or requiring the party whose actions necessitated the receivership to pay the expenses.

In a departure from the common law, the act provides a procedure whereby a receiver may, with court approval, sell receivership property before a judgment is entered if the owner either consents to the sale in writing or fails to timely object to the sale. Procedures for post-judgment sales by the receiver are less stringent. The court may authorize the sale to proceed free and clear of all liens, but any valid liens will attach to the proceeds of the sale with the same validity, perfection, and priority that the liens had immediately before the sale. These provisions of the act may lead to some uncertainty, especially as to whether title insurers will be willing to issue title policies for properties sold through a receivership.

Also with court approval, the receiver may adopt or reject an executory contract of the owner that relates to the receivership property. Notably, if the receiver does not request court approval of the contract within a reasonable time, the contract is deemed rejected. A rejection of an executory contract constitutes a breach effective immediately before the appointment of the receiver. The UCRERA also sets forth deadlines by which a claim for damages associated with the rejection may be submitted in the receivership. The receiver cannot reject certain unexpired leases, including when the leased premises is the tenant's primary residence.

The court may enter an "order staying certain actions to enforce claims against receivership property" after notice and an opportunity for a hearing. This feature is akin to the automatic stay in bankruptcy sans the automatic feature. The court may also issue an injunction to enjoin an act against receivership property in order to protect the receivership property.

The UCRERA will certainly be tested in the coming months as more commercial real estate loans go into default and require court intervention.

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