



Florida's  
*Commercial Real  
Estate Receivership  
Law Substantively  
Changes*  
July 1, 2020 –  
Are You Prepared?

July 30, 2020

# Speaker Introductions



**Hon. Mindy A. Mora**  
*U.S. Bankruptcy  
Court for Southern  
District of Florida  
(West Palm  
Beach)*



**Hon. Edward C. LaRose**  
*Florida Second  
District Court of  
Appeals (Tampa)*



**Kenneth Murena**  
*Damian & Valori,  
LLP (Miami)*



**Manuel Farach**  
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**Andrew Layden**  
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**Senator Lori Berman**  
District 31  
Palm Beach County, Florida



**Representative Michael Beltran**  
District 57  
Hillsborough County, Florida

# Agenda

- Pre-UCRERA State of Florida Law
- Overview of UCRERA
- How Does UCRERA Affect Current Practice?

# Florida UCRERA Fast Facts

- Created Florida Statutes Chapter 714, titled “Uniform Commercial Real Estate Receivership Act”
- Effective July 1, 2020; does not apply if “receiver was appointed before July 1, 2020.” (§ 714.28)
- Already enacted in (1) Oregon, (2) Utah, (3) Nevada, (4) Tennessee, (5) Michigan, (6) Arizona, (7) Maryland, (8) North Carolina, and (9) Florida. Introduced in Connecticut

# Receiver for What?

- As an initial matter, Florida law contemplates an equitable remedy in a variety of circumstances – generally to enable the court to accomplish complete justice between the parties before it, including the preservation of and property disposition of the subject of litigation.
- For example:
  - Receiver of LLC, corporation, or partnership (e.g. Fla. Stat. § 605.0704, 607.1432)
  - Post-judgment receivers appointed in aid of execution (e.g. Fla. Stat. § 605.0503)
  - Receiver of trust estates or trust funds. (See Fla. Jur. Receivers § 17 (collecting authority))

# Pre-UCRERA State of Florida Law (Entitlement to Appointment of Receiver)

- “A receiver is typically appointed in foreclosure proceedings to preserve the status quo, preserve the property, and collect and apply rents and profits to the payment of the mortgage. The appointment of a receiver...should be approached with caution and circumspection. A cautious approach to the appointment of a receiver is appropriate because such an appointment is in derogation of the fundamental right of the legal owner to possession of the property. **To be entitled to the appointment of a receiver, the movant must show that the property is subject to a serious loss, and that the movant has a clear legal right to the property.**”  
(internal quotations omitted) *U.S. Bank. Nat. Ass’n v. Cramer*, 114 So.3d 1020, 1023 (Fla. 2d DCA 2013).

# Pre-UCRERA State of Florida Law (Entitlement to Appointment of Receiver)

- Examples of waste or other equitable basis for appointing a receiver:
  - Deferred maintenance that imperils the property
  - Stealing or misapplying rental income
  - Failing to pay another mortgage such that the mortgagee would have to pay the other mortgagee in order to defend another foreclosure
  - Need to have a receiver complete construction of a partially built project
  - Protect the property during protracted litigation (See Manuel Farach, West's Florida Practice Series: *Florida Real Estate Law* (2019), 28:9 at 454).



# The Current State of Florida Law (Entitlement to Appointment of Receiver)

- Post-Judgment: “...after the entry of a final judgment, the considerations dictating a cautious approach to the appointment of a receiver may carry less weight...After the entry of a final judgment, the requirement that the movant establish some legal right in the property is satisfied, as in this case, by virtue of the final judgment... Therefore, although there must still be some need to protect the property from waste or depreciation...the concern about effecting a taking of the owner’s property before the entry of judgment is eliminated or lessened by the entry of the judgment.” *Id.*

# The Current State of Florida Law (Receiver's Authority)

- Receiver's authority is defined by the order appointing the receiver - no uniform powers or limitations
- An order appointing a receiver may not grant the receiver the right to sell or otherwise dispose of the property. See *e.g. Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. 4th DCA 2010).

# Florida's UCRERA

## Scope (§ 714.04)

- Section 714.04 states that it applies “to a receivership initiated...for an interest in real property and any *incidental* personal property related to or used in operating the real property.” (Florida’s scope provision differs from uniform act)
- Chapter 714 does not apply to (among other things):
  - Actions in which “a state agency or officers is expressly authorized by statute to seek or obtain the appointment of a receiver.”
  - Actions “authorized or commenced under federal law”
  - Homestead property
  - Personal property “of an individual which is used primarily for personal, family, or household purposes.”

# Notice and Opportunity for a Hearing (§ 714.03)

- (1) Generally requires that the Court appoint a receiver only after “notice and opportunity for a hearing appropriate under the circumstances.”
- (2) Allows a Court to appoint a receiver “without written or oral notice to the adverse party” under very narrow circumstances: (a) affidavit or verified pleading demonstrates “immediate and irreparable injury, loss or damage to the movant” or similar result as to the property “before any adverse party can be heard in opposition” and (b) movant’s attorney certifies in writing all efforts to give notice or the reasons why such notice should not be required.
  - Differs significantly from the uniform act.

# Appointment of Receiver (§ 714.06)

- (1)(a) – Before judgment if the property or its revenue-producing potential: (1) is being subjected to waste, loss, substantial diminution in value, dissipation or impairment, or (2) has been or is about to be subject of a voidable transaction
- (1)(b) – After judgment (1) to carry out the judgment, or (2) preserve non-exempt real property pending appeal or during post-judgment collection
- (1)(c) – on equitable grounds, subject to the above-stated requirements

# Appointment of Receiver (§ 714.06)

- (2) – “In connection with the foreclosure or other enforcement of a mortgage, the court shall consider the following facts and circumstances...in deciding whether to appoint a receiver for the mortgaged property:
  - (a) to protect the property from waste, loss, diminution in value etc.;
  - (b) *“the mortgagor agreed in a signed record to the appointment of a receiver on default;”*
  - (c) *“the owner agreed, after default and in a signed record, to the appointment of a receiver;”*
  - (d) *the property and other collateral are “underwater;”*
  - (e) the owner “fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect; or
  - (f) a subordinate lienholder obtains appointment of a receiver.
- Florida’s language differs from uniform act – requiring court to consider factors as opposed to the more bright-line approach in the uniform act, and allowing a party to seek to dissolve or modify the receivership

# Receiver as Lien Creditor (§ 714.09)

- Upon appointment, the receiver has the status of a lien creditor under (1) Chapter 679 as to receivership property or fixtures; and (2) Chapter 695 as to receivership property that is real property
- Similar to 11 U.S.C. § 544?

# After-Acquired Property / Turnover (§ 714.10-11)

- Appointment does not affect the validity of a pre-receivership security interest in receivership property, and property acquired post-receivership is subject to a pre-receivership security agreement “to the same extent as if the court had not appointed the receiver.” (§714.10)
- Receiver entitled to turnover of receivership property, and persons owing debts that constitute receivership property must pay those debts to the receiver (§714.11)



# Powers and Duties of Receiver (§714.12)

- Unless otherwise limited, a receiver may:
- (b) operate a business constituting receivership property
- (c) in the ordinary course of business, incur unsecured debt and pay expenses
- (f) upon subpoena, compel a person to submit to examination under oath, or to produce a permit inspection and copying... with respect to receivership property “or any other matter that may affect administration of the receivership”
  - Florida’s examination provisions are unique; similar to FRBP 2004

# Powers and Duties of Receiver (§714.12)

- With court approval, a receiver may:
- (a) Incur debt...other than in the ordinary course of business
- (b) Make improvements to receivership property
- (c) Use or transfer receivership property other than in the ordinary course of business pursuant to § 714.16
- (d) Adopt or reject an executory contract of the owner pursuant to § 714.17

# Duties of Owner (§ 714.13)

- “Shall” (a) assist and cooperate with the receiver, (b) preserve and turn over to the receiver all receivership property, (c) “identify all records and other information relating to the receivership property...”, (d) if subpoenaed, “submit to examination under oath by the receiver relating to (among other things) “any matter relating to the receivership property or the receivership”

# Stay; Injunction (§ 714.14)

- (1) Provides that the court may enter an order providing for a stay generally similar in scope to the automatic stay under 11 U.S.C. § 362 and subject to similar exceptions, but must “include in its order a specific description of the receivership property subject to the stay...” (permissive nature of stay is unique to Florida)
- (2)-(3) Provide that the court may enjoin an act, action, or proceeding against or relating to receivership property if necessary “to protect against misappropriation of, or waste relating directly to, the receivership property,” but must “describe in reasonable detail the act or acts restrained without reference to a pleading or other document.” (order requirements are unique to Florida)

# Stay; Injunction (§ 714.14)

- (4) allows a person subject to the stay or injunction to move for relief and such “motion must be heard within 5 days” or “at such time as the court determines is reasonable and appropriate.”
- (5) includes bankruptcy-like exceptions to the stay or injunction. (unique to Florida)
- (6) The Court may *void* an action that violates the stay or injunction
  - All these provisions are unique to Florida

# Sale Outside the Ordinary Course of Business *Before Judgment* (§ 714.16)

- Specifically authorizes a receiver sale of receivership property *before judgment* only if (a) after the commencement of the action the owner expressly consents, or (b) the owner “fails to object [to the proposed sale] after the receiver in good faith has provided reasonable advance written notice...and the receiver demonstrates...that the proposed use or transfer is necessary to prevent waste, loss, substantial diminution in value, dissipation, or impairment of the property or its revenue-producing potential or to prevent a voidable transaction involving the property.”
  - Florida law differentiates between sale before and after judgment and provides separate standards applicable to each

# Sale Outside the Ordinary Course of Business *After Judgment* (§ 714.16)

- With court approval a receiver may transfer receivership property outside the ordinary course of business “to carry the judgment into effect or to preserve nonexempt real property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment.”
- In either situation, service of notice to lienholders who are not parties “must be made as provided in chapter 48 for service of process” but if service cannot be made in such manner, the Court may order otherwise

# Sale “Free and Clear of Liens” (§ 714.16)

- The Court may order that a transfer is “free and clear” or liens on the property, with such liens attaching to the proceeds of the transfer with the “same validity, perfection, and priority” as immediately prior to the transfer
- Good faith purchasers protected from the reversal or modification on appeal of an order approving the transfer



# Executory Contracts (§ 714.17)

- Fla. Stat. § 714.02(4) defines “Executory Contract” by reference to the Countryman Test; Eleventh Circuit has applied the functional test. See e.g. *Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294, ft. nt. 13 (11th Cir. 2007)
- Executory contracts deemed rejected if not “adopted” within a “reasonable time after the receiver’s appointment”
- *Ipsso facto* clauses unenforceable (§ 714.17(4)).
- Rejection damages claims (§ 714.17(5)).
- “Assume and assign” if the owner has the right to assign “under the laws of this state” (§ 714.17(6) (more limited than bankruptcy equivalent))

# Uniformity of Application and Construction (§ 714.26)

- “In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that have enacted a similar law.”
- Florida-specific provisions?

# How Will UCRERA Affect Current Practice?

- Does this substantively change *entitlement* to the appointment of a receiver? If so, will this trigger more or less bankruptcy filings?
- How does this affect my Receivership Hearing and Receivership Order?
- Is a receivership after 7/1/20 a more viable insolvency alternative? Other options include wind-down and dissolution, ABC, Bankruptcy (Chapters 7 and 11), UCC transaction

# Final Thoughts

- Judge Mora
- Judge LaRose
- Manuel Farach
- Kenneth Murena