

WHITE PAPER

prepared by

The Florida Bar Business Law Section's Task Force

for the

UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

Brief Summary of UCRERA

The Uniform Commercial Real Estate Receivership Act (UCRERA) is a comprehensive body of law that provides for the circumstances and conditions under which a receiver may be appointed over commercial real estate, the scope and procedures of a receivership proceeding, the effect of the appointment of a receiver, the authority of the receivership court, and the powers, duties and liability of the receiver.

Definition and Purpose of a Receivers

A receiver is a person appointed by a court to take possession of the property of another and to “receive, collect, care for, and dispose of the property or the fruits of the property.” 1 Clark on Receivers § 11(a), at 13 (3d ed. 1959).

“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.” *DeSilva v. First Cmty. Bank of Am.*, 42 So.3d 285, 290 (Fla. 2d DCA 2010); *see also Baumgartner*, 128 So. at 248 (observing same). “The appointment of a receiver ... should be approached with caution and circumspection.” *DeSilva*, 42 So.3d at 288 (alteration in original) (quoting *Edenfield v. Crisp*, 186 So.2d 545, 548 (Fla. 2d DCA 1966)). 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.” *Twinjay Chambers P'ship. v. Suarez*, 556 So.2d 781, 781 (Fla. 2d DCA 1990); *see also Plaza v. Plaza*, 78 So.3d 4, 6 (Fla. 3d DCA 2011) (“Appointing a receiver is a rare and extraordinary remedy.”); *Warshall v. Price*, 617 So.2d 751, 752 (Fla. 4th DCA 1993) (“Before ... trial[,] ... a motion for the appointment of a receiver of the property of the defendant is a drastic matter constituting a taking of property and requires a showing of exigent circumstances.”); *Electro Mech. Prods., Inc. v. Borona*, 324 So.2d 638, 639 (Fla. 3d DCA 1976) (“The appointment of a receiver is a drastic matter in that it constitutes a taking of property and, therefore, should not be used by the courts except in cases of necessity.”).

Under *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241 (Fla. 1930), the seminal case governing the appointment of a receiver, courts are required to balance the mortgagor's right to own and possess its property against the interests of the mortgagee in protecting its security in the property. Thus, to be entitled to the appointment of a receiver, the movant must show, at a minimum, "that [the] property is subject to a serious loss," and that the movant has a "clear legal right ... to the property." *Plaza*, 78 So.3d 4, 6 (Fla. 3d DCA 2011) (alteration in original) (quoting *Apalachicola N.R. Co. v. Sommers*, 79 Fla. 816, 85 So. 361, 361 (Fla. 1920)).

The Need for a Uniform Act

1. There is no clear standard as to when a receiver should be appointed over real property, when there is waste or another potential adequate remedy at law. See *MB Plaza, LLC v. Wells Fargo Bank Nat. Ass'n.*, 113 So. 3d 1020, 1024 (Fla. 2d DCA 2013) ("Waste would have provided a justifiable basis for the trial court to exercise its discretion by appointing a receiver in *Seasons Partnership*, but this court did not intend to make waste a condition precedent to such an appointment."); *McAllister Hotel v. Schatzberg*, 40 So. 2d 201, 203 (Fla. 1949) (holding an appointment of receiver should be exercised only in those cases where exigencies demand it and no other protection to the applicants can be devised by the court). See also, *Sharon Gardens Assoc. v. Florescue*, 629 So.2d 1002 (Fla. 4th DCA 1993) (holding that Plaintiff is not entitled to receiver where partner or partnership was not insolvent); *Wheeler v. Matthews*, 70 Fla. 317 (Fla. 1915) (holding where a president of an insolvent corporation collects the corporate assets and uses the money to pay some creditors in full, some in part, and some receive none, such conduct does not constitute fraud or a spoliation); *Recarey v. Rader*, 320 So.2d 28 (Fla. 1975) (holding appropriate and effective relief could have been granted and no receiver needed where appellees requested the court to appoint a receiver to take charge of assets and operations of the hospital after appellants voted at stockholders' meeting to sell hospital, eliminating all of appellees' equity as stockholders). *Atco Const. & Development Corp. v. Beneficial Sav. Bank, Fla. Stat.B.*, 523 So. 2d 747 (Fla. 5th DCA 1988); *Florida Reinvestment Corp. v. Cypress Sav. Ass'n*, 509 So. 2d 1352 (Fla. 4th DCA 1987); *Boyd v. Banc One Mortgage Corp.*, 509 So.2d 966, 967 (Fla. 3d DCA 1987); *Polycoat Corp. v. City Nat'l Bank of Miami*, 327 So.2d 126, 127 (Fla. 4th DCA 1976) (reversing ex parte receivership because there were no "extreme circumstances of irreparable damage"); *Edenfield v. Crisp*, 186 So.2d 545, 548 (Fla. 2d DCA 1966) (affirming receivership based on allegations that property and assets had been diverted); *Cassara v. Wofford*, 159 Fla. 565, 28 So.2d 904, 905 (Fla. 1947) (quashing ex parte receivership because it was not apparent that giving notice of intent to appoint receiver would result in immediate injury).

Very few states have comprehensive statutory guidance regarding the appointment and powers of receivers for commercial real estate. In the vast majority of states, receivers are appointed pursuant to a court's general equitable power to appoint a receiver, with minimal statutory guidance either expressly confirming or limiting the power of a receiver. A small handful of states (including California, Indiana, Nebraska, New Mexico, Ohio, Oklahoma, and South Dakota) provide a moderate amount of statutory guidance regarding the appointment and powers of receivers. Only two states — Washington and Minnesota —

provide a comprehensive statutory codification of the laws governing the appointment and powers of receivers and receivership procedures.

Because courts often determine whether to appoint a receiver based on standards governing the entry of a preliminary injunction, the lack of guidance with respect to the standards governing the appointment of a receiver creates a problem, especially where there is equity in the subject property, such that damages are otherwise available to the mortgagor. Considering the foregoing inconsistencies, the Act was prepared to provide consistency and guidance with respect to when a receiver should be appointed and will ensure that the *status quo* is preserved while a foreclosure or other action affecting the real property is pending.

2. No uniform law addresses the appointment and powers of real estate receivers in a comprehensive fashion. Although the Uniform Assignment of Rents Act (UARA), promulgated in 2005, does address the evidentiary showing necessary to obtain the appointment of a receiver, UARA's focus is limited to appointment at the request of an assignee of rents, and nothing in UARA explicitly addresses either receivership procedure or the scope of the powers that a receiver of real estate may exercise before foreclosure.
3. There is variation from state to state with regard to the laws governing appointment and powers of receivers. Furthermore, because most states have such minimal statutory guidance, there is even variation from one county, district, parish, or municipal subdivision to the next within a state, as individual judges might have disparate perspectives on the circumstances in which a receivership constitutes an appropriate remedy.
4. In many states, existing receivership statutes simply do not address a number of questions concerning receivership procedure. For example, many state statutes do not address such issues as the necessity or amount of the receiver's bond, the necessity or amount of a bond from the person seeking appointment of a receiver, the eligibility requirements for service as a receiver, or the requirements for notification to creditors. These shortcomings make it more difficult for "best practices" to develop in the receivership context.
5. The existing receivership laws in most states do not adequately set forth the powers that a receiver may (or may not) exercise, either with or without prior approval of the court. This can result in potential uncertainty regarding the ability of a receiver to borrow money, to approve or reject executory contracts entered into by the owner of the property (including unexpired leases), to sell receivership property other than in the ordinary course of business, or to make improvements to receivership property.

Summary of the Primary Provisions of the Act as Revised by the Business Law Section

- **Notice and Opportunity for a Hearing (Section 3)**. Under the Act, the court may enter orders only after notice and opportunity for a hearing as is appropriate under the circumstances. § 3(a), (b). Because the Florida Rules of Civil Procedure, and, more specifically, Rule 1.610(b) governs the entry of an injunction without notice, and comports with due process, Section 3 was revised so it is consistent with Rule 1.610(b) to ensure

adequate due process protections are guaranteed, in a flexible manner that is consistent with Florida jurisprudence.

- **Scope (Section 4)**. The Act applies to receiverships for real property as well as incidental personal property that is related to the real property or used in its operation. § 4(a). It only governs a receivership for an interest in residential real estate certain limited circumstances. § 4(b). The Act does not provide the exclusive method for the appointment of a receiver. § 4(c). The Act respects Florida homestead rights and exemptions pursuant to bankruptcy law. § 4(d). The Act comports with Fla. Stat. §§ 671.103 and 726.111 and provides examples of principals of law and equity that supplement this Section, unless they are displaced by another Section of the Act.
- **Court (Section 5)**. The state’s court of general equity jurisdiction has exclusive jurisdiction of the receivership proceeding. § 5.
- **Appointment (Section 6)**. The Act establishes standards under which a court may appoint a receiver in the exercise of its equitable discretion. § 6(a). The Act also establishes standards under which a petitioning mortgage lienholder is entitled to appointment of a receiver, either as a matter of right or as a matter of the court’s discretion. § 6(b). Section 6 was adopted to provide consistency and guidance with respect to when a receiver should be appointed and will ensure that the status quo is preserved while a foreclosure or other action affecting the real property is pending. In Section 6(a), which lists the conditions under which receiver can be appointed pre-judgment, “substantial diminution of value” was added to the list of “waste, loss, dissipation or impairment” of the property or its revenue-producing potential. Section 6(b) provides a non-exhaustive list of facts and circumstances a court may consider in deciding whether to appoint a receiver in such a proceeding (adding “substantial diminution in value” to list of “waste, loss, transfer, dissipation or impairment”). This is more consistent with existing Florida jurisprudence than requiring the appointment of a receiver as a matter of entitlement. *See, e.g., Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241, 247 (Fla. 1930) (“it was held in *Armour Fertilizer Works v. First National Bank*, 87 Fla. 436, 100 So. 362, that the power to appoint a receiver is one inherent in a court of equity; one that was not a matter of right but rested in the discretion of the court...”).
- **Identity and Independence of Receiver (Section 7)**. Because a receiver holds receivership property for the benefit of all interested parties, the Act requires that the receiver provide sworn evidence of the receiver’s independence, § 7(a), (b), subject to an exception to prevent disqualification based on certain pre-existing relationships that are de minimis in nature. § 7(c). While a party seeking the appointment of a receiver may nominate a person to serve as a receiver, the nomination is not binding on the court. § 7(d).
- **Effect of Appointment; Stay; Injunction (Section 10, 11, 14)**. On appointment, a receiver has the status and priority of a lien creditor with respect to receivership property. § 9. Appointment of a receiver does not affect the validity of a pre-receivership security interest in receivership property, and property acquired after appointment is subject to any pre-receivership security agreement to the same extent as if no receiver had been appointed. § 10. On appointment, persons having possession, custody or control of receivership property must turn the property over to the receiver, and persons owing debts that constitute

receivership property must pay those debts to the receiver. § 11. After notice and a hearing, if necessary to protect against misappropriation of, or waste relating directly to, the receivership property, a court that appointed the receiver may enter a stay applicable to all persons, of an act to obtain possession of, exercise control over, or enforce a judgment against receivership property (or a portion thereof), as well as an act to enforce a lien against receivership property. § 14(a). In appropriate situations, the court can expand the scope of the stay, § 14(b), and grant relief from the stay, § 14(c). However, for policy reasons, certain actions are outside the scope of the stay. § 14(d). The court shall determine whether an additional bond or alternative security will be required as a condition to entry of the stay and, if required, direct the party requesting the stay to post a bond or alternative security as a condition for the stay or injunction to become effective.

- **Powers and Duties of Receiver; Duties of Owner (Section 12, 13)**. The Act sets forth the receiver’s presumptive powers, § 12(a), as well as those that the receiver may exercise only with court approval. § 12(b). The Act also sets forth the duties of the receiver, § 12(c), and the duties of the owner of receivership property. § 13.
- **Engagement and Compensation of Professionals (Section 15)**. The Act authorizes the receiver to engage and pay professionals to assist in the administration of the receivership following court approval. § 15.
- **Use, Sale, Lease, License, or Other Transfer of Receivership Property Other than in Ordinary Course (Section 16, 20, 21)**. Before judgment, with court approval, the Act permits the receiver to use, sell, lease, license, exchange or otherwise transfer receivership property other than in the ordinary course of business if the owner of the property expressly consents or fails to object before or at hearing after the Receiver has provided reasonable advance notice of the transfer and established that the property is subject to waste, loss, dissipation, or substantial diminution in value. § 16(b). After judgment, with court approval after notice and a hearing, a receiver may dispose of receivership property 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 (consistent with appointment standard). § 16(c). Unless the agreement of transfer provides otherwise, the transfer is free and clear of all liens, which attach to the proceeds of the transfer with the same validity, perfection, and priority as they had with respect to the property. § 16(d). The sale may be conducted as a private sale, and creditors with valid secured claims may credit bid. § 16(e). The Act also provides a safe harbor for purchasers, in case a party objects to the sale but fails to get a stay of the order approving the sale. § 16(f). Secured creditors are entitled to the proceeds of their collateral according to the priority rules established by law other than this Act, § 20(g), although the court may award the receiver the reasonable and necessary fees and expenses for carrying out the receiver’s duties. § 21(a).
- **Executory Contracts and Unexpired Leases (Section 17)**. With court approval, a receiver may adopt or reject an executory contract of the owner relating to receivership property. § 17(b). The Act covers the mechanics for adoption or rejection of executory contracts. § 17(c). The receiver may also assign an adopted executory contract to the extent permitted by the contract and applicable law other than this Act, but free of so-called “ipso facto” clauses. § 17(d), (f). The Act specifies the consequences of a receiver’s rejection of

an executory contract. § 17(e). The Act contains protections for purchasers in possession of real property or real property time share interests that are analogous to those contained in the Bankruptcy Code. § 17(g). The Act also limits the receiver's ability to reject the unexpired lease of a tenant, permitting rejection of the lease only in very limited situations. § 17(h).

- **Immunity of Receiver (Section 18)**. Consistent with the receiver's status as an officer of the court, the Act provides the receiver with immunity for acts or omissions within the scope of the receiver's appointment. § 18(a). Further, the Act incorporates the Barton doctrine and provides that a receiver cannot be sued personally for an act or omission in administering receivership property except with the approval of the appointing court. § 18(b).
- **Claims (Section 20)**. The Act requires the receiver to notify creditors of the appointment of the receiver unless the court orders otherwise, § 20(a), (e), and requires creditors to file claims with the receiver as a precondition to obtaining any distribution from receivership property or the proceeds of such property. § 20(b). The Act permits the receiver to recommend disallowance of claims. § 20(e). The Act also authorizes the court to forgo the filing of unsecured claims where the receivership property is likely to be insufficient to satisfy secured claims against the property. § 20(f).
- **Receiver's Reports (Sections 19, 23)**. The receiver must file interim reports (as directed by the court) and, on completion of the receiver's duties, a final report. §§ 19 and 23.
- **Ancillary Receivership (Section 24)**. Where a receiver has been appointed by another state, the Act authorizes the court to appoint that person or its designee as an ancillary receiver for the purpose of obtaining possession, custody and control of receivership property located within this state. § 24(a). The Act also permits the court to enter any order necessary to effectuate an order of a court in another state appointing or directing a receiver. § 24(b).
- **Receivership in Context of Mortgage Enforcement (Section 25)**. The Act makes clear that the appointment of a receiver on request by a mortgagee or assignee of rents, and actions taken by the receiver, do not make the mortgagee or assignee of rents a "mortgagee in possession," do not constitute an election of remedies or make the secured obligation unenforceable, and do not constitute an "action" within the meaning of a state's "one- action" rule. § 25(a). In a state with anti-deficiency rules, where a receiver conducts a sale of receivership property free and clear of a lien, the state's anti-deficiency rules will apply to any person that held a lien extinguished by the sale to the same extent those rules would have applied after a foreclosure sale not governed by the Act. § 25(b).

Status of Enactment in Other States

Thus far, 7 states have enacted it and 1 has introduced it:

1. Oregon (Enacted 2017)
2. Utah (Enacted 2017)
3. Nevada (Enacted 2017)
4. Tennessee (Enacted 2018)
5. Michigan (Enacted 2018)
6. Arizona (Enacted 2019)
7. Maryland (Enacted 2019)
8. Connecticut (Introduced 2019)
9. Florida (To Be Introduced 2020?)