

WHITE PAPER

prepared by

The Florida Bar Business Law Section's Task Force

for the

UNIFORM COMMERCIAL REAL ESTATE
RECEIVERSHIP ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

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**Brief Summary of UCRERA
and
the Business Law Section's UCRERA Task Force**

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.

In June of 2016, the Business Law Section (“BLS”) of the Florida Bar created a task force (the “BLS UCRERA Task Force”) to study and make recommendations regarding UCRERA and whether the BLS should seek to have it enacted in Florida with or without revisions. The BLS UCRERA Task Force comprised approximately 12 active members of the Bankruptcy/UCC Committee and the Business Litigation Committee of the BLS, including attorneys and judges, who held conference calls, on average twice per month, and met in person three times per year. The Task Force first determined whether the Act was necessary and would have a positive effect on Florida jurisprudence. Then, the Task Force identified six Sections of the Act that would create new substantive law and/or change existing Florida law and formed six sub-committees to analyze each such Section (3, 4, 6, 12, 14, and 16) and determine whether changes should be made to make them consistent with, to clarify, or to change Florida law. Five of the six sub-committees then proposed changes to the Sections and presented them to all Task Force members to obtain input (the Chapter 12 sub-committee did not propose any changes). Further revisions were made to each of the five Sections, and then the Task Force presented all of its proposed revisions to the Bankruptcy/UCC and Business Litigation Committees and the BLS executive council at the Florida Bar mid-year meeting in January 2019. Subsequently, additional revisions were made to those five Sections and the Task Force presented those revisions to the Bankruptcy/UCC and Business Litigation Committees and the BLS executive council at the Florida Bar annual meeting in June 2019. The Bankruptcy/UCC Committee proposed additional changes to two Sections (6 and 16), and the Task Force made those changes and other changes to those Sections and one other Section (14) during and after the annual meeting. Thereafter, the Task Force compiled all of the revisions into one document as a redline of the entire proposed Uniform Act and presented that document to the Finance and Lending Committee and the Litigation Committee of the Real Property Section (RPPTLS) to obtain their input. Those RPPPTLS Committees provided comments and suggestions for further revisions and additions to the Act. In accordance with many of those comments and suggestions, the Task Force further revised the Act and will present it to the Bankruptcy/UCC and Business Litigation Committees and the BLS executive council at the BLS Retreat over Labor Day Weekend for final approval by the BLS.

The Uniform Law Commission

The Uniform Law Commission (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 128th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

The Contexts in Which Receivers Are Appointed

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)).

Courts exercising general equity jurisdiction have traditionally appointed receivers in a variety of contexts:

- Courts have appointed pendente lite receivers to preserve property that is the subject matter of pending litigation, thereby preventing its waste, deterioration, or removal before judgment.
- Courts have appointed receivers after entry of a judgment to preserve the property pending appeal, to carry the judgment into effect, or to enforce the judgment.
- Courts have appointed receivers to preserve the property of a corporation, partnership, or other legal entity in the context of the dissolution or winding up of the entity, or where the entity is operationally dysfunctional because of an ownership or management dispute.

- Courts have appointed receivers, at the behest of one or more creditors, to collect, preserve, administer, liquidate and distribute the property of insolvent debtors.
- Where authorized by statute or the usages of equity, receivers may also be appointed for the administration of certain entities affected with the public interest, such as railways, banks, or insurance companies.
- Courts also commonly appoint receivers at the request of a mortgage lender that seeks to enforce a mortgage in default. A typical commercial real estate mortgage or deed of trust explicitly provides that on default, the mortgagee may seek the appointment of a receiver from a court with jurisdiction over the mortgaged premises; frequently, the terms of the mortgage or deed of trust purport to provide mortgagor consent for the appointment of a receiver following default.

Mortgage Foreclosure Proceedings

Traditionally, mortgage lenders have sought the appointment of a receiver pending foreclosure for one or more of several reasons:

- The mortgaged property is located in a state where the foreclosure process takes a substantial period of time (*e.g.*, six months or longer). In such states, during the pendency of the foreclosure proceeding, the mortgaged premises will typically generate substantial rents from tenants or other occupiers. In most loan transactions, these rents have been assigned to the mortgagee as security for the loan, and the lender reasonably expects them to be applied toward reduction of the mortgage debt. Application of these rents to the debt is of particular importance where the value of the mortgaged premises has declined, the mortgage loan is “nonrecourse” (*i.e.*, where the borrower has no personal liability for the loan’s repayment), the mortgagee is a special purpose vehicle, or the mortgagee is otherwise unlikely to be able to pay a deficiency. In these situations, application of the rents to the mortgage debt could help to reduce or even eliminate the deficiency that might follow a completed foreclosure. Thus, obtaining the appointment of a receiver prevents the mortgagor from diverting rents to other creditors or insiders of the mortgagor pending a foreclosure sale.
- The mortgaged property is subject to waste, deterioration, or some other immediate physical harm that threatens to reduce the value of the mortgaged property and thus threatens the mortgagee’s security.
- The mortgaged property might be subject to a high vacancy rate or underperforming due to poor property management. In such a case, the mortgagee might wish to provide better and more active property management and to enter into new tenant leases. In this situation, the mortgagee might prefer to secure the appointment of a receiver to provide this day-to-day management, both because (1) the appointment of a receiver would insulate the mortgagee from the liability that the mortgagee would assume if the mortgagee provided this property management directly and thereby became a “mortgagee in possession,” and (2) the receiver might be a person with specialized expertise in operating and “turning around” a property of that type.
- The mortgaged collateral might include not only real estate but substantial personal property as well, as would be the case (for example) where the collateral is a hotel or resort property. In this situation, the mortgagee might wish to proceed with foreclosure in a judicial proceeding so as to minimize or avoid any claim that might arise if it disposed of the personal property under Article 9 of the Uniform Commercial Code and the disposition was subsequently attacked as being commercially unreasonable.

- The property might be subject to environmental contamination, and the mortgagee does not want to be in the chain of title or to rely solely on statutory exemptions from federal or state environmental laws that might depend on the mortgagee's status as a secured creditor. *See, e.g.*, 42 U.S.C.A. § 9601(20)(A) (excluding from federal CERCLA "owner and operator" liability any person who "without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the ... facility").

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); *see also Chromy v. Midwest Fed. Sav. & Loan Ass'n*, 546 So.2d 1172 (Fla. 3d DCA 1989); *Lakeview Townhomes of California Club, Inc. v. Coral Gables Fed. Sav. & Loan Ass'n*, 656 So. 2d 240, 240 (Fla. 3d DCA 1995); *Orlando Hyatt Associates, Ltd. v. F.D.I.C.*, 629 So. 2d 975, 976–77 (Fla. 5th DCA 1993) (noting that the assignment of rents statute does not apply to the assignment of profits); *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.

Some inter-state and intra-state variations include:

- There is substantial variation as to the circumstances that justify the appointment of a receiver, particularly in the case of mortgaged property. Some courts require that the petitioning party establish the existence of waste; other courts do not require the existence of waste if the property's value is insufficient to satisfy the mortgage debt; others simply permit the petitioning mortgagee to obtain a receiver if the mortgage is in default and the mortgagor consented in the mortgage to the appointment of a receiver after default.
- There is substantial variation as to the circumstances, if any, that justify *ex parte* appointment of a receiver and the procedures associated with *ex parte* appointment. Some courts routinely appoint receivers on an *ex parte* basis with no heightened evidentiary showing required, particularly where the mortgagor consented to *ex parte* appointment in the mortgage or deed of trust. Other courts refuse *ex parte* appointment outright or require the petitioning mortgagee to establish the circumstances justifying appointment without prior notice to the mortgagor.
- There is substantial variation as to the enforceability of provisions in the mortgage or deed of trust by which the mortgagor consents in advance to the appointment of a receiver after default. In some states, such contractual provisions are enforceable as a matter of right. *See, e.g.,*

Ind. Code § 32-30-5-1; Minn. Stat. Ann. § 559.17, subd. 2; N.Y. Real Prop. Law § 254(10); N. Mex. Stat. Ann. § 44-8-4(A). By contrast, most existing statutes provide (or have been interpreted to mean) that the decision to appoint a receiver rests in the discretion of the court, without regard to the terms of the mortgage. 4 Clark on Receivers § 950, at 1718 (3d ed. 1959).

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.
 - There is uncertainty regarding whether a receiver has the power to sell real estate. Customarily, a receiver's ability to sell receivership property varies depending on the circumstances of the receivership. When a court appoints a general receiver for all of the assets of an insolvent debtor, the court commonly authorizes the receiver to gather and sell the assets of the debtor. The court frequently empowers such a receiver, in the receivership order, to sell assets both in the ordinary course of business (such as sales of inventory) and even outside of the ordinary course with court approval.
 - By contrast, when a court appoints a limited receiver to take possession of a specific asset — such as a receiver for mortgaged property — the receiver's role is more typically viewed as custodial. For this reason, receivers appointed for mortgaged property are often viewed as having the power to operate, maintain, and preserve the property pending a foreclosure sale, but not to sell the property; instead, a sale would occur, if at all, only in the context of the foreclosure proceeding.

Advantages of Receiver's Disposition of Receivership Property

Receivership can be an effective way to dispose of real estate, and mortgaged real property in particular. Indeed, there are at least three specific contexts in which a sale by the receiver might be advantageous:

- Sale of property securing commercial mortgaged-backed securities (CMBS) loans. CMBS loans are held in real estate mortgage investment conduits ("REMICs"), which are special purpose vehicles used for the pooling of mortgage loans and the issuance of mortgage-backed securities. The Internal Revenue Code forbids REMICs from issuing new debt or making new loans, but permits some modifications to an existing defaulted loan. Thus, when a REMIC completes a foreclosure sale, it cannot make a new loan on a seller-financing basis. However, if the property can be sold (through a receiver or by the borrower directly) with the buyer assuming the mortgage, the mortgage loan can be modified and restructured under the REMIC rules. Often, this can produce a sale at a higher value than by comparison to a cash sale, and thus is attractive to lenders who want to avoid foreclosing on a property that is worth less than the outstanding mortgage debt. See generally John C. Murray and Kenneth R. Jannen, *Public and Private Sales of Real Property by Federal Court Receivers*, ACREL Papers (March 2011).
- Foreclosure sale at "arms-length" rather than "distress sale." Under current foreclosure law in all 50 states, a foreclosure sale is a "distress sale," i.e., a public auction sale, typically "on the courthouse steps." Foreclosure by sale has been justified as a means to protect the mortgagor's equity in the mortgaged property, particularly by comparison to the historical approach under which a defaulting borrower simply forfeited its interest in the mortgaged property (and any equity the borrower might have accumulated either through principal reduction or market appreciation). Nevertheless, there is concern that foreclosure sales do not always bring prices that reflect the value that might be obtained in an arms-length, non-distress sale. By contrast to a traditional foreclosure, a receiver could theoretically market the mortgaged property to potential buyers in the context of its operation of the property. Marketing of the property in an arms-length context could permit potential buyers to perform more meaningful and complete due diligence; further, a sale that is both free and clear of liens and rights of redemption and subject to judicial confirmation could produce greater finality regarding the title acquired by the buyer. In theory, providing potential foreclosure buyers with better information regarding the mortgaged property and greater certainty of title should produce sale prices higher than those that would be produced by distress foreclosure sales.
- Foreclosure in a "unified" sale of realty and personalty. In some circumstances, it might make sense for a creditor to sell "mixed" personal and real property collateral as a going concern in one sale, rather than selling the personalty under Article 9 and the realty in a separate real estate foreclosure. Ostensibly, U.C.C. § 9-604(a) facilitates unified sales of mixed collateral by providing that "[i]f a

security agreement covers both real and personal property, a secured party may proceed ... as to both the personal property and the real property in accordance with the rights with respect to the real property,” in which case Article 9’s foreclosure provisions do not apply. U.C.C. § 9-604(a)(2). Unfortunately, § 9-604(a)’s language leaves a number of interpretive questions that compromise its potential effectiveness in the mixed collateral context. These questions include (a) whether the security interests in the realty and the personalty must be created in the same document or can arise under separate documents; (b) whether the personalty and realty must be used in some closely related way to be sold in a unified sale; and (c) whether the secured party must dispose of all of the personalty under the rules of real estate law or can instead dispose of some of it (along with the land) in a unified sale and the rest in an Article 9 disposition. These interpretive gaps might discourage some mortgagees from attempting unified sales.

Existing Federal and State Law Applicable to Receivership Sales

Federal statutory law governing the sale of receivership property has evolved further than state statutory law. Federal law authorizes receivers appointed by a federal court to sell mortgaged property free and clear of liens. 28 U.S.C.A. §§ 2001 to 2004. The federal statutes are vague with respect to the procedures for marketing and selling the property, “thereby allowing for flexibility and creativity.” Kay Kress, Federal Receiverships (2005 ABA Business Law Section Meeting). Furthermore, federal courts have concluded that “the power of sale is within the scope of a receiver’s ‘complete control’ over receivership assets ..., a conclusion firmly rooted in the common law of equity receiverships.” Securities Exch. Comm’n v. American Capital Investments, Inc., 98 F.3d 1133, 1144 (9th Cir. 1996). The federal statute specifically authorizes receivers appointed by a federal court to conduct a private sale after notice to all interested parties and a hearing. 28 U.S.C. § 2001(b). Further, federal courts have concluded that there is no right of post-sale redemption from judicial sales conducted under 28 U.S.C.A. § 2001(b), notwithstanding any state statutory redemption rights the mortgagor might otherwise claim. *See, e.g., United States v. Heasley*, 283 F.2d 422 (8th Cir. 1960).

Most existing state statutes do not specifically authorize a receiver to conduct a sale of real property, and some courts have held that in the absence of express statutory authority, receivers lack the authority to conduct such sales. *See, e.g., Kirven v. Lawrence*, 137 S.E.2d 764 (S.C. 1964) (receiver does not have inherent power of sale, as receivership is “custodial” in nature and designed to preserve the status quo); *Andrick Dev. Corp. v. Maccaro*, 311 S.E.2d 95 (S.C. Ct. App. 1984) (same); *Eppes v. Dade Developers, Inc.*, 170 So. 875 (Fla. 1936); *Shubh Hotels Boca, LLC v. FDIC*, 46 So.3d 163 (Fla. Dist. Ct. App. 2010) (receiver lacked power to sell hotel even though court had authorized the sale; no Florida statute authorizes a court-appointed receiver in a foreclosure case to sell the mortgaged property in contravention of mortgagor’s right of redemption).

To provide the needed clarity, the Act provides more explicit rules addressing the extent to which a receiver can sell receivership property, either subject to or free and clear of existing liens and rights of redemption.

Substantial benefits could flow to the resolution of distressed commercial mortgage loans if state law explicitly granted a receiver the power of sale as recognized under federal law.

Summary of the Primary Provisions of the Act and the Business Law Section's Proposed Revisions

- **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). The court may issue an order without an actual hearing if no interested party timely requests a hearing or the particular circumstances require the issuance of an order before a hearing can be held.

BLS Revisions:

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 personal property that is related to the real property or used in its operation. § 4(a). It does not govern a receivership for an interest in real property improved by one to four dwelling units, unless (1) the interest is used for agricultural, commercial, industrial, or mineral extraction purposes, other than incidental uses by an owner occupying the property as the owner's primary residence; (2) the interest secures an obligation incurred when the property was used or planned for use for agricultural, commercial, industrial, or mineral extraction purposes; (3) the owner planned or is planning to develop the property with one or more dwelling units to be sold or leased in the ordinary course of the owner's business, or (4) the owner collects rents or other income from an unrelated tenant or other occupier. § 4(b). The Act does not provide the exclusive method for the appointment of a receiver. § 4(d).

BLS Revisions:

Preliminary Matters. Much discussion on the scope of the Act focused on procedural issues, such as notice for hearings and due process. Given that a comprehensive list of all of the issues that could arise regarding notice was impossible, the Act instead focuses on those means already employed by courts as a matter of law.

Change to subsection (a). The phrase "initiated in a court of this state" was added to conform with the Oregon act, as that state was most similar to Florida regarding other receivership issues.

Change to subsection (b). The phrase “a receivership for interest in real property improved by one to four dwelling units unless” was removed as surplusage. For subsections (1) through (5), the content was changed to reflect specific concerns of overreaching by the Act, inconsistent with well-established Florida law. More particularly, it was important to make clear that the Act does not apply to residential or individual property that is not commercial in nature.

Addition of subsection (d). This was added out of concern for respecting Florida homestead rights and exemptions pursuant to bankruptcy law.

Change to subsection (e). Language was added to comport with Fla. Stat. §§ 671.103 and 726.111 and give 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). Where the court appoints a receiver on an *ex parte* basis, the court may require the party seeking appointment to post security for any damages, attorney’s fees and costs incurred by a person injured by an appointment later determined to be unjustified. § 6(c).

BLS Revisions:

There is no clear standard as to when a receiver should be appointed over real property. *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.”)

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. 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.

In Section 6(b), rather than listing the facts or circumstances under which a receiver may or shall be appointed in a mortgage foreclosure proceeding, BLS proposes this subsection serve as 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. Entry of the order of appointment effects a stay, applicable to all persons, of an act to obtain possession of, exercise control over, or enforce a judgment against receivership property, 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 Act also addresses the consequences of a violation of the stay. § 14(e), (f).

BLS Revisions:

Rather than making the appointment order operate as an automatic stay of all proceedings involving the subject of the receivership, we revised the language to permit a court that appointed a receiver to enter a stay after notice and a hearing;

Clarified that the stay can be as to all or a portion of the receivership property, and that the extent of such stay shall be defined in the order creating the stay, should such order be entered;

Added language that requires the Court to include a specific description of the receivership property that will be subject to the stay in any order granting such a stay and title the Order: “Order Staying Certain Actions to Enforce Claims against Receivership Property”;

Clarified that a court may enter an injunction or stay if it is necessary to protect against misappropriation of, or waste relating directly to, the receivership property (rather than just to facilitate the administration of the receivership property);

Added:

(f) The scope of the receivership property subject to the stay described in this Section 14, Subsection (a)

(g) In connection with the entry of an order under subsection (a) or (b), the court shall determine whether an additional bond or alternative security will be required as a condition to entry of the stay or injunction and, if required, direct the party requesting the stay or injunction to post a bond or alternative security as a condition for the stay or injunction to become effective.

Deleted:

- (f) Under this section, the court may:
- (1) award actual damages caused by the violation, reasonable attorney’s fees, and costs; and
 - (2) sanction the violation as civil contempt.

- **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)**. 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. § 16(b), (c). Unless the agreement of transfer provides otherwise, the transfer is free and clear of rights of redemption and liens other than liens that are senior to the lien of the person who obtained the receiver’s appointment. § 16(c). Liens extinguished by the receiver’s sale attach to proceeds with the same validity, perfection, and priority as they had with respect to the property sold. § 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).

BLS Revisions:

Before judgment, with court approval after notice and a hearing, a receiver may dispose of receivership property if owner expressly consents or fails to object before or at hearing on receiver’s duly noticed motion to approve sale.

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).

Clarified that a court may order that the transfer of receivership property is free and clear of all liens (and not just senior liens) and that any valid lien attaches to the proceeds of the transfer.

Deleted reference to rights of redemption so as not to affect existing Florida law.

- **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?)