

Florida's New Commercial Real Estate Receivership Act

By Daniel Coyle

In July, Florida became the ninth state to adopt the Uniform Commercial Real Estate Receivership Act (“UCRERA”).¹

The timing could not be better, given the near-universal prediction that defaults on commercial loans will skyrocket due to the COVID-19 pandemic once foreclosure moratoriums end and the growing suspicion that many borrowers will *not* reflexively file for bankruptcy. Those with experience as federal equity receivers and Chapter 7 trustees will find they are well suited to creatively and effectively use the greater powers receivers enjoy under UCRERA to achieve better and more fruitful outcomes.

Drafted in 2019 by the Uniform Law Commission, UCRERA significantly broadens the powers of state receivers of commercial real property while also establishing a standard set of rules governing the reasons authorizing appointment and the procedures for seeking appointment.² UCRERA's passage is a welcome event for receivers, trustees, fiduciaries, lenders and other parties involved with commercial real estate along with their counsel.

This article will analyze Florida's UCRERA as well as to point out some key differences between Florida's version and the Model Act.

I. Florida's Receivership Scheme Prior to UCRERA

In Florida, prior to UCRERA's enactment, receivers were generally appointed as an equitable remedy to preserve the *status quo* of the real estate and to collect the rents and profits.³ Appointment was difficult to obtain because: (1) it was in derogation of the common law, and; (2) it divested the property owner of the owner's right to manage and control the property.⁴ Consistently with this, the applicant also had to meet a high burden by demonstrating a serious and significant ongoing loss, usually, but not always, in the form of waste, even if the applicant had a right to appointment in a mortgage.⁵ The waste could take the form of ongoing damage or disrepair of the real property, failing to pay property taxes, or failure to turn over rents.⁶

Once appointed, the ultimate rights, duties and liabilities of the receiver were solely determined from the language of the order of appointment. In other words, they were left completely up to the court. One might think this discretion could result in robust powers but case law curtailed these powers significantly. For instance, it was improbable, if not impossible, to obtain an appointment order empowering the receiver to sell the real property⁷ because appointment does not affect the title to property or deprive the owner of rights to the property.⁸ Instead, receivers were limited to managing the property in the ordinary course of business.

II. UCRERA's Scheme

A. The Receiver's Powers under UCRERA

UCRERA broadens the powers of a receiver significantly, to the degree that the receiver obtains many of the same powers as a Chapter 7 trustee in bankruptcy.

The receiver is given the status of lien creditor under Florida's recording statute chapter (Ch. 695 *Fla. Stat.*) and Florida's enactment of the UCC pertaining to secured transactions (Ch. 679 *Fla. Stat.*), similarly to 11 U.S.C. §544 as to receivership property or fixtures.⁹ Thus, the receiver may now pursue avoidance/clawback actions regarding the property as a Chapter 7 Trustee or Debtor-in-Possession would.¹⁰ Similarly to 11 U.S.C. §542, the receiver is entitled to turnover of receivership property. Persons owing debts that constitute receivership property must pay those debts to the receiver.¹¹

One of the most significant improvements is that the receiver is authorized to sell the property before or after judgment. The receiver is now authorized to sell the receivership assets outside of the ordinary course of business before judgment and with the approval of the owners,¹² or after judgment and with court approval¹³, much like the bankruptcy process under 11 U.S.C. §365. As in a bankruptcy "363 sale," this is a sale of the asset "free and clear" of liens on the property, with the liens attaching to the proceeds.¹⁴ Good faith purchasers are protected from reversal or modification on appeal of an order approving the sale.¹⁵

The receiver also has the power to accept or reject executory contracts relating to the property with court approval.¹⁶ This power may be used even if the appointment of the receiver constitutes a breach under the contract.¹⁷ Also, the receiver's performance of an executory contract before court approval of its adoption or rejection does not preclude the receiver from later seeking approval to reject the contract.¹⁸

Similarly to a section 362 stay in bankruptcy, the court may enter an order providing for a stay of acts relating to the property to protect against misappropriation or waste.¹⁹ This order must describe in reasonable detail the act or acts restrained.²⁰

With court approval, the receiver may incur debt outside of the ordinary course of business, make improvements to the receivership property, make a distribution of receivership property, and take the other actions described above regarding selling the property, adopting or rejecting executory contracts.²¹

In addition to those innovative provisions, the receiver also has the more typical powers to collect, control, manage and perfect the property, operate the business, incur unsecured debt and pay expenses in the ordinary course of business, assert rights, claims and defenses relating to the property, and engage professionals.²²

Regarding its duties, the receiver must prepare and retain appropriate records, including a record of each receipt, disbursement and disposition of the property, account for the proceeds of all dispositions, file a copy of the order of appointment and disclose any fact arising which would

disqualify the receiver.²³ The receiver's powers and duties may be expanded, modified or limited by court order.²⁴

To further the goal of standardization of appointments and broaden the receiver's powers, UCRERA contains two provisions that seek to homogenize processes *across state lines*. The court may appoint a receiver already appointed in another state or even the nominee of that receiver, as an ancillary receiver of property located within the state, so long as the person would be eligible for appointment under the standards of UCRERA.²⁵ The ancillary receiver has the same rights, powers and duties as a receiver appointed under the statute.²⁶ Additionally, the Court may domesticate an order entered in another state appointing or directing a receiver.²⁷ The Act also provides that decisions of other states interpreting UCRERA's provisions are persuasive authority.²⁸

A court may award a receiver the reasonable and necessary fees and expenses of performing its duties and exercising the receiver's powers from revenue generated by the property.²⁹ Or, the court may order either the person who requested appointment or the person whose conduct justified appointment, to pay the reasonable and necessary fees and expenses of the receivership.³⁰

B. Sufficient Cause for Appointment

UCRERA provides grounds authorizing appointment prior to a judgment and grounds authorizing appointment after entry of a judgment.³¹ A court may appoint a receiver before judgment if the property or its revenue producing potential: (1) is subjected to waste, loss, substantial diminution in value, dissipation or impairment or (2) has been, or is about to be, the subject of a voidable transaction.³² After judgment, a court may appoint a receiver: (a) to effectuate the judgment or; (b) preserve the property pending appeal or when an execution has been returned unsatisfied and the owner refuses to apply the property in satisfaction of the judgment.³³

UCRERA also provides a non-exhaustive list of factors to be considered in ruling on a request for appointment based upon a mortgage, which include many of the same themes discussed previously (e.g., protection from waste, loss, diminution in value, etc.).

C. Procedure for Appointment

The Florida provision governing appointments³⁴ was significantly augmented from the Model Act because the Florida Rule of Civil Procedure governing appointments provides significant due process protections with which Florida's version of UCRERA had to harmonize. Appointment requires notice and opportunity for hearing, except that the court may issue an order without notice if immediate and irreparable injury, loss or damage will result to the applicant or that waste, dissipation, impairment, or substantial diminution in value will result before any adverse party can be heard.³⁵

The person seeking appointment without prior notice or hearing must provide security for the payment of damages, reasonable attorney fees, and costs incurred or suffered by any person if the court later concludes that the appointment was not justified.³⁶

III. Conclusion

UCRERA is a significant and welcome step in both standardizing the rights, powers, duties and procedures related to state receivers of commercial real property. With the moratoriums on foreclosures in multiple states ending or coming to an end, and the expected increase in commercial loan defaults, Florida's enactment of UCRERA is timely, and more states should consider passing their own versions of the Act.

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ENDNOTES

¹ Oregon, Utah, Nevada, Tennessee, Michigan, Arizona, Maryland, and North Carolina are the others. Connecticut has introduced a bill to enact the law.

² According to section 714.04(1), UCRERA applies to a receivership initiated in a court of Florida for an interest in real property and any incidental personal property related to or used in operating the real property. The insertion of the term "incidental" was to make clear that the Act does not apply to personal property, broadly, but instead only to personal property connected with or associated with commercial real property (e.g., fixtures). Property is defined broadly and expansively in section 714.02(13) to include all "right, title and interest, legal and equitable ... and includes proceeds, products, offspring, rets and profits."

³ *U.S. Bank Nat. Ass'n v. Cramer*, 113 So. 3d 1020, 1023 (Fla. 2d DCA 2013).

⁴ *Twinjay Chambers P'ship v. Suarez*, 556 So. 2d 781, 781 (Fla. 2d DCA 1990).

⁵ *Boyd v. Banc One Mortg. Corp.*, 509 So. 2d 966 (Fla. 3d DCA 1987).

⁶ *Smith v. State Life Insurance Company*, 153 So. 842 (1934); *Smith v. DuPuis*, 157 So. 491 (1934); (*Carr v. Marion Mortg. Co.*, 128 So. 12 (1930).

⁷ See, e.g., *Shubh Hotels Boca, LLC v. Fed. Deposit Ins. Corp.*, 46 So. 3d 163, 167 (Fla. 4th DCA 2010).

⁸ *Eppes v. Dade Developers Inc.*, 170 So. 875 (1936).

⁹ Fla. Stat. §714.09.

¹⁰ One limitation to this is that under Fla. Stat. §714.10, appointment does not affect the validity of a pre-receivership perfected security interest or property acquired post-receivership under a perfected floating lien.

¹¹ Fla. Stat. §714.11.

¹² Fla. Stat. §714.16(2).

¹³ Fla. Stat. §714.16(3).

¹⁴ Fla. Stat. §714.16(4).

¹⁵ Fla. Stat. §714.16(6).

¹⁶ Fla. Stat. §714.17.

¹⁷ Fla. Stat. § 714.16(4).

¹⁸ Fla. Stat. §714.17(3). Also, under Fla. Stat. §714.17(5), if the executory contract is rejected, it is treated as if it were breached as of the day before the date the receiver was appointed so that the aggrieved party may assert rejection damages against the receivership estate.

¹⁹ Fla. Stat. §714.14.

²⁰ Fla. Stat. §714.14(3). The permissive nature of this stay and the description requirements in the order are different than the Model Act, which provides that the appointment automatically provides for a such a stay. A person affected may apply for relief from the stay and the court must hear the motion within five (5) days or at such time as the court determines is reasonable and appropriate. Fla. Stat. §714.14(4).

²¹ Fla. Stat. §714.12(2).

²² Fla. Stat. §714.12(1).

²³ Fla. Stat. §714.12(3).

²⁴ Fla. Stat. §714.12(4).

²⁵ Fla. Stat. §714.24(1)(a).

²⁶ Fla. Stat. §714.24(3).

²⁷ Fla. Stat. §714.24(2).

²⁸ Fla. Stat. §714.26.

²⁹ Fla. Stat. §714.21(1).

³⁰ Fla. Stat. §714.21(2).

³¹ Fla. Stat. §714.06.

³² Fla. Sta. §714.06(1)(a).

³³ Fla. Sta. §714.06(1)(b).

³⁴ Fla. Stat. §714.03.

³⁵ Fla. Stat. §714.03(2).

³⁶ Fla. Stat. §714.06. Subsection 714.06(3) also provides that, if and when the Court determines the appointment was justified, and the order of appointment becomes final and no longer subject to appeal, the court will release the bond or other security.