

New Options for Creditors: Florida Adopts the Uniform Commercial Real Estate Receivership Act

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Until July 1, 2020, there was no comprehensive statutory scheme for the appointment receivers of commercial real estate in Florida. Instead, receiverships of commercial real estate had been governed only by a patchwork of appellate court decisions handed down over the years, with many aspects left up to the trial court's discretion. That has now changed with Florida's adoption of the Uniform Commercial Real Estate Receivership Act (UCRERA) in the newly created Chapter 714 of the Florida Statutes.

Historically, receivers (court-appointed independent parties) could be appointed by a court upon the request of an interested party (usually a mortgage lender) only when the property was mismanaged, the owner committed waste, there was a need to collect and preserve the property's rents or income, or when the property was otherwise subject to serious risk of loss. With the implementation of UCRERA, these grounds are still available, but additional grounds have been added.

Among other grounds, UCRERA now permits the appointment of receiver if the property is about to be or has been the subject of a voidable transfer. This new ground could be particularly valuable to creditors who are seeking to avoid fraudulent transfers of commercial real estate. Additionally, while courts previously had the equitable power to appoint a receiver post-judgment, it was not a common occurrence. UCRERA now specifically authorizes the appointment of a post-judgment receiver pending a foreclosure or other execution sale and during any post-sale period of redemption.

As the name implies, UCRERA only applies to commercial real estate, not one- or two-dwelling residential property. However, it does expressly apply to other personal property related to or used in operating the real property. The clear inclusion of related personal property could prove very useful for receiverships of owner-operated businesses as the receiver could be empowered to continue the business and collect any accounts receivable related to the business at that property.

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Finally, UCRERA clarifies the ability of a receiver to sell the real estate that is the subject of the receivership – an issue that has long been a subject of debate under Florida law. Now it is clear that a receiver can sell the receivership property before judgment only with court approval and either the written consent of the owner or the failure of the owner to object after notice and a hearing. After judgment, however, the requirement of owner consent is removed and the receiver is empowered, upon court approval, to sell the property “to carry the judgment into effect.”

Notably, in either case, the court is now expressly empowered to order the sale free and clear of all liens on the property, thus making a receivership sale under UCRERA substantially similar to a sale under §363 of the Bankruptcy Code, and therefore potentially much more attractive to buyers.

These new provisions may combine to open up a new possibility for a secured creditor – a post-judgment receiver’s sale in lieu of a traditional foreclosure sale. Now armed with an express statutory authorization for this process, many secured lenders may find it more valuable to seek the appointment of a receiver prior to judgment, and then let the receiver sell the property after judgment instead of proceeding with a traditional foreclosure sale.

Foreclosure sales have been long-lamented for not bringing full value for the property, and therefore frequently end with the secured lender obtaining the property for a nominal credit bid. This process then leaves the creditor to both market the property for sale itself and to maintain it in the interim.

Instead, it appears that under UCRERA, it would now be possible to have the receiver do all of those tasks (including a full marketing of the property and a sale on customary non-distressed terms, including buyer due diligence), potentially maximizing recovery for the creditor.

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