

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 783 Uniform Commercial Real Estate Receivership Act

SPONSOR(S): Judiciary Committee, Beltran

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 660

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Mawn	Luczynski
2) Justice Appropriations Subcommittee	12 Y, 0 N	Smith	Gusky
3) Judiciary Committee	18 Y, 0 N, As CS	Mawn	Luczynski

SUMMARY ANALYSIS

A receiver is a person appointed by a court to take possession of another's property and to "receive, collect, care for, and dispose of the property or [its] fruits." In some instances, a receiver's appointment ("receivership") is governed by Florida statute. In other cases, such as receiverships for commercial real estate, a receiver is appointed under the court's equity powers ("equitable receivership"). The Uniform Commercial Real Estate Receivership Act (UCRERA), adopted by seven states since 2017, specifies the circumstances under which a receiver may be appointed for commercial real estate, the scope of such a receivership proceeding, and the receiver's powers, duties, and liabilities. In June of 2016, the Executive Council of the Florida Bar's Business Law Section formed the UCRERA Task Force ("task force") to study UCRERA and determine whether it should be enacted in Florida. The task force determined that existing receivership law in most states, including Florida, does not adequately provide a clear standard for receivership appointment or set forth a receiver's powers and duties, and that such lack of statutory guidance causes variation from one county to the next, as individual judges differ on when a receivership is an appropriate remedy.

CS/HB 783 adopts UCRERA. Specifically, the bill:

- Specifies when and how a court may appoint a receiver, but leaves such appointment in the court's discretion;
- States factors disqualifying a person from appointment as a receiver;
- Authorizes the court to require a receiver or a person requesting a receiver's appointment to post a bond for specified purposes;
- Establishes the general powers and duties of a receiver, and the duties of the owner of receivership property, subject to modification by a court;
- Provides the circumstances, with court approval, under which a receiver can sell or transfer receivership property other than in the ordinary course of business and allows a court to declare such transfer free and clear of all liens, which liens then attach to the proceeds of the transfer;
- Requires court authorization for a lawsuit against a receiver connected to the performance of the receiver's duties;
- Allows a court to remove a receiver for cause and replace a receiver that dies, resigns, or is removed;
- Authorizes a court to order the payment of a receiver's fees and expenses from specified sources;
- Provides that a mortgagee's request for appointment of a receiver or application of receivership property to a secured obligation does not make the mortgagee a mortgagee in possession, constitute a foreclosure action, or have other specified effects on the secured obligation; and
- Applies to receiverships for which a receiver was appointed on or after July 1, 2020.

The bill may have an indeterminate impact on expenditures for the State Courts System, to the extent that provisions in the bill increase judicial workload.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Receiverships

A receiver is a person appointed by a court to take possession of another's property and to "receive, collect, care for, and dispose of the property or [its] fruits."¹ In some instances, a receiver's appointment ("receivership") is governed by statute.² In other cases, such as receiverships for commercial real estate, a receiver is appointed under the court's equity powers ("equitable receiverships").³ Courts have found that equitable receiverships are "a drastic matter in that [they] constitute the taking of property and, therefore, should not be used...except in cases of necessity."⁴

Receiver's Appointment

Equitable receiverships are a secondary remedy, meaning that there is no independent cause of action one can bring to petition for a receiver's appointment.⁵ Instead, an equitable receivership is available only to a plaintiff bringing an underlying cause of action, such as a foreclosure, who motions the court to appoint a receiver.⁶ Ordinarily, the court must conduct a hearing on such a motion after notice to the adverse party.⁷ However, the court may conduct an ex parte hearing if the:

- Movant shows by specific facts in a sworn affidavit or verified pleading⁸ that "immediate and irreparable injury, loss, or damage, will result to the movant before the adverse party can be heard in opposition;"
- Movant's attorney "certifies in writing any efforts that have been made to give the adverse party notice and the reasons why such notice should not be required;" and
- Trial court's order "define[s] the injury, state[s] findings...why the injury may be irreparable, and give[s] the reasons why the order was granted without notice if notice was not given."⁹

In a commercial foreclosure proceeding based upon a mortgage default, courts have found that, if a mortgagee demonstrates a likelihood that he will prevail on the merits, that the mortgagor specifically pledged the property's rents and profits as security for the debt, and that such rents and profits are not being applied to the debt, a motion for a receiver's appointment should usually be granted.¹⁰ However, the decision to appoint an equitable receiver in any case, and what such receiver's powers and duties will be, is in the trial court's discretion.¹¹ Such decision is an appealable non-final order.¹²

¹ 1 Clark on Receivers § 11(a), at 13 (3d ed. 1959).

² See, e.g., s. 393.0678, F.S., (authorizing a receivership for a residential habilitation center or a group home facility owned and operated by a corporation or partnership under specified circumstances), s. 607.1430(2)(a), F.S., (authorizing a receivership if, in a shareholder proceeding, it is established that the directors are deadlocked in the management of the corporation's affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or suffered), and s. 720.3053, F.S., (authorizing a receivership if a homeowners' association fails to fill board of administration vacancies).

³ Courts of equity provide a forum for the granting of relief according to principles of justice. However, a court may not disregard controlling legal principles clearly established in law. 22 Fla. Jur, 2d Equity § 2.

⁴ *Electro Mech. Prods., Inc. v. Borana*, 324 So. 2d 638 (Fla. 3d DCA 1976).

⁵ Joseph E. Foster, [A Short Primer on Florida Receivership Law and the Answers to Some Frequently Asked Questions about Receiverships in General](http://www.trigild.com/wp-content/uploads/2012/10/Changing-Times-Changing-Tactics-Primer-on-Florida-receivership-law-2.doc), (Sept. 25, 2012), <http://www.trigild.com/wp-content/uploads/2012/10/Changing-Times-Changing-Tactics-Primer-on-Florida-receivership-law-2.doc> (last visited Feb. 12, 2020).

⁶ *Id.*

⁷ *Edenfield v. Crisp*, 186 So. 2d 545 (Fla. 2d DCA 1966); Fla. R. Civ. P. 1.610 and 1.620.

⁸ A verified pleading is a pleading signed under penalty of perjury. S. 92.525, F.S.

⁹ *DeSilva v. First Cmty. Bank of Am.*, 42 So. 3d 285 (Fla. 2d DCA 2010); Fla. R. Civ. P. 1.610.

¹⁰ *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241 (Fla. 1930).

¹¹ See Foster, *supra* note 5.

¹² *Turtle Lake Associates, Ltd. v. Third Financial Services, Inc.*, 518 So. 2d 959 (Fla. 1st DCA 1988); Fla. R. App. P. 1.610(a)(1)(A).

Receiver's Bond

Where a court appoints a receiver, a “bond with 'good and sufficient surety' should be required [of the receiver]...unless exceptional circumstances...are present.”¹³ The trial court has some discretion to determine the size of the receiver’s bond, but such bond must be “adequate to indemnify an adverse party any damages it might suffer through the receivership of its property”¹⁴ and “of a sufficiently high amount to protect the [adverse] party...should it ultimately be determined that the receivership was improvident.”¹⁵ Additionally, in setting the receiver’s bond amount, the court must consider the fair market value of the property in receivership.¹⁶ Where the bond amount is substantially less than the property’s fair market value, the receiver’s appointment is subject to reversal on appeal.¹⁷

Purposes of Receiver's Appointment

Equitable receiverships are generally only available in cases involving fraud, self-dealing, or waste.¹⁸ However, a court in a foreclosure action may appoint a receiver post-judgment “where it appears that to protect the interests of all parties the decree of sale under foreclosure is to be postponed until the termination of other litigation...and where the terms of the mortgage being foreclosed specifically provide for the appointment of a receiver by the court.”¹⁹

Receiver's Qualifications

A receiver, serving as an officer of the court, must be neutral and impartial, not favoring one party’s interests over those of any other party.²⁰ A receiver acting without neutrality and impartiality faces court sanctions and claims for damages by the parties to the action.²¹

Immunities and Defenses

A receiver acting within the scope of his or her duties has the benefit of judicial immunity given to officers of the court.²² Thus, a receiver cannot be sued without the court’s permission.²³ Further, a receiver has available to him or her any defenses existing in law.

Receiver's Powers and Duties

Florida law does not specify a receiver’s general powers and duties.²⁴ Thus, the court order appointing the receiver establishes the receiver’s powers and duties for the particular receivership subject to the order.²⁵ However, a receiver cannot acquire any rights or powers over the property greater than those of the owner and mortgagee.²⁶ If the court makes an overly broad power grant, such action may be viewed as an abuse of the court’s discretion and the order may be subject to reversal on appeal.²⁷

The Florida Rules of Civil Procedure do set forth reporting and inventory requirements, however, requiring a receiver to file with the clerk of the court a “true and complete inventory under oath of the property coming under the receiver’s control or possession...within 20 days after appointment.”²⁸ Every three months, a receiver must also file with the clerk “an inventory and account under oath of any

¹³ *DeSilva*, 42 So. 3d 288; Fla. R. Civ. P. 1.610.

¹⁴ *Turtle Lake*, 518 So. 2d 959.

¹⁵ *Comprop Inv. Properties, Ltd. v. First Tex. Sav. Ass’n*, 534 So. 2d 418 (Fla. 3d DCA 1989).

¹⁶ *Rescom Inv., Inc. v. Strategic Consulting and Managing, Inc.*, 635 So. 2d 1061; *Cohen v. Rubin*, 554 So.2d 4 (Fla. 3d DCA 1989).

¹⁷ *Id.*

¹⁸ *Granada Lakes Villa Condominium Ass’n, Inc. v. Metro-Dade Investments Co.*, 125 So. 3d 756 (Fla. 2013).

¹⁹ *U.S. Bank Nat. Ass’n v. Cramer*, 113 So. 3d 1020 (Fla. 2d DCA 2013).

²⁰ *Lehman v. Trust Co. of Am.*, 49 So. 502 (Fla. 1909); *Beach v. Williamson*, 83 So. 860 (Fla. 1920).

²¹ See Foster, *supra* note 5.

²² *Id.*

²³ *Murtha v. Steijskal*, 232 So. 2d 53 (Fla. 4th DCA 1970).

²⁴ *MB Plaza, LLC v. Wells Fargo Bank, Nat’l Ass’n*, 72 So. 3d 205 (Fla. 2d DCA 2011).

²⁵ *Id.*

²⁶ *Hamilton v. Flowers*, 183 So. 811 (Fla. 1938).

²⁷ *MB Plaza, LLC*, 72 So. 3d 205.

²⁸ Fla. R. Civ. P. 1.620(b).

additional property or effects which the receiver has discovered or which shall have to come under the receiver's hands since appointment, the amount remaining in or invested by the receiver's hands since appointment, and the manner in which the same is secured and invested."²⁹

Receiver's Sale of Property

Courts have found that the sale of property by a receiver is "ordinarily improper."³⁰ When courts have authorized such sales, they usually involve sale of an entity, not real property, in the context of a business dissolution or partnership dispute where the sale is necessary to adequately protect the parties' rights.³¹

Court Powers

In addition to its authority to appoint a receiver and specify a receiver's powers and duties, the court has power in equity to make orders directing a receiver, an owner, or others relating to the receivership.³² Specifically, a court may grant a stay or injunction as necessary to prevent waste or misappropriation of receivership property. Further, the court may order the owner and anyone in possession of receivership property to surrender such receivership property, direct the owner to take actions relating to receivership property, remove a receiver for cause, and discharge a receiver if his or her appointment was improvident or a receivership is no longer necessary. Additionally, the court may order that the receiver's necessary fees and expenses relating to his or her receivership duties be paid out of receivership property.

Uniform Commercial Real Estate Receivership Act

The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, drafts and approves comprehensive statutory schemes designed to standardize laws across the states.³³ One such scheme is the Uniform Commercial Real Estate Receivership Act (UCRERA). Adopted by seven states since 2017,³⁴ UCRERA specifies the circumstances under which a receiver may be appointed for commercial real estate, the scope of such a receivership proceeding, and the receiver's powers, duties, and liabilities.³⁵

In June of 2016, the Executive Council of the Florida Bar's Business Law Section formed the UCRERA Task Force ("task force") to study UCRERA and determine whether it should be enacted in Florida.³⁶ The task force determined that existing receivership law in most states, including Florida, does not adequately provide a clear standard for receiver appointment for commercial real estate or set forth a receiver's powers and duties, and that such lack of statutory guidance causes variation from one county to the next, as individual judges differ on when a receivership is an appropriate remedy.³⁷

²⁹ *Id.*

³⁰ *Fugazy Travel Bureau, Inc. v. State*, 188 So. 2d 842 (Fla. 4th DCA 1966).

³¹ *Id.*

³² *Schroeder v. Gebhart*, 825 So. 2d 442 (Fla. 5th DCA 2002) ("Once a court of equity acquires jurisdiction over a dispute, it is authorized to administer full, compete and final relief. Generally, courts of equity have wide discretion in fashioning remedies to satisfy the exigencies of the circumstances.")

³³ Wendel Rosen LLP, *The Uniform Commercial Real Estate Receivership Act (Part 1)*, <https://www.jdsupra.com/legalnews/the-uniform-commercial-real-estate-38854/> (last visited Feb. 12, 2020).

³⁴ These states are Arizona (2019), Maryland (2019), Michigan (2018), Nevada (2017), Oregon (2017), Tennessee (2018), and Utah (2017). UCRERA is also pending before the Colorado Legislature. See The Florida Bar Business Law Sections' Task Force for the Uniform Commercial Real Estate Receivership Act ("Task Force"), *White Paper* (2019).

³⁵ See Task Force, *supra* note 34.

³⁶ The Florida Bar Business Law Section, *Uniform Commercial Real Estate Receivership Task Force*, <https://www.flabizlaw.org/committees-task-force/task-forces/uniform-commercial-real-estate-receivership-act-task-force/> (last visited Feb. 12, 2020).

³⁷ *Id.*

Effect of Proposed Changes

CS/HB 783 creates the Florida Uniform Commercial Real Estate Receivership Act (“Act”), providing a statutory scheme for commercial real estate receiverships that largely codifies existing common law.

Definitions

The bill defines:

- “Receiver” as a person appointed by the court as the court’s agent, subject to the court’s discretion, to take possession of, manage, and, if authorized by the Act or court order, transfer, sell, lease, license, exchange, collect, or otherwise dispose of receivership property.
- “Receivership” to mean a proceeding in which a receiver is appointed.
- “Receivership property” to mean the property described in the order appointing a receiver or any subsequent order, including any proceeds, products, offspring, rents, or profits of or from the property.

Applicability

The bill specifies that the Act applies only to a receivership for commercial real estate and any incidental personal property related to or used in operating such property. Thus, the bill does not apply to:

- Actions in which a state agency is authorized by statute to seek a receiver’s appointment;
- Actions authorized or commenced under federal law;
- Real property with no more than two dwelling units, one of which is occupied by the owner or his or her affiliate;³⁸
- Homestead property; or
- Personal property used primarily for personal, family, or household purposes.

Such actions and property continue to be regulated by other statutes or the common law for equitable receiverships.

Receiver’s Appointment

Under the bill, a receiver’s appointment for commercial real estate remains a secondary remedy, as the bill does not create an independent cause of action one can bring to petition for a receiver’s appointment. A receivership could only be created when a party brings an underlying cause of action relating to commercial real estate, such as a foreclosure, and asks the court to appoint a receiver.

Like the common law, the decision to appoint a receiver is in the court’s discretion, and the court must conduct a hearing on a motion for receiver after notice to the adverse party unless the:

- Movant shows by specific facts in an affidavit or verified pleading that “immediate and irreparable injury, loss, or damage, will result to the movant or that waste, dissipation, impairment, or substantial diminution in value will result to the subject real estate before any adverse party can be heard in opposition;”
- Movant’s attorney “certifies in writing all efforts that have been made to give notice to all known adverse parties or the reasons why such notice should not be required;” and
- Trial court’s order “define[s] the injury, ...state[s] findings by the court why the injury may be irreparable, and...give[s] the reasons why the order was granted without notice if notice was not given.”³⁹

³⁸ The bill defines “affiliate” to mean, with respect to an individual, a companion of the individual, a lineal ancestor or descendant or an individual or his or her companion, a companion of an ancestor or descendant of an individual or his or her companion, a sibling, aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew of the individual, or any other person occupying the individual’s residence.

³⁹ *DeSilva v. First Cmty. Bank of Am.*, 42 So. 3d 285 (Fla. 2d DCA 2010); Fla. R. Civ. P. 1.610.

The bill gives the court appointing a receiver under the Act exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property, consistent with its current authority under the common law.

Purpose of Receiver's Appointment

The bill both codifies and expands the common law relating to the purpose of a receiver's appointment. Before entry of a judgment on commercial real estate, the bill allows the court to appoint a receiver to protect the interests of a party if the property is in danger of waste, loss, or substantial diminution in value, consistent with the common law. However, the bill also allows the court to appoint a receiver if the property is about to be the subject of a voidable transaction. Further, the bill authorizes a court to appoint a receiver post-judgment to enforce the judgment, protect a property during the pendency of an appeal, or secure a property's rents to the person entitled to them after a foreclosure sale.

Bond

The bill requires a receiver to post a bond with the court conditioned on the faithful discharge of the receiver's duties, unless the court approves the posting of an alternative security, such as a letter of credit or deposit of funds. Like the common law, the bill charges the court with setting the bond amount; however, unlike the common law, the bill does not provide guidelines for what a minimum bond should be and limits claims against the bond to one year after the receiver's discharge.

The bill also allows a court to condition a receiver's appointment on the posting of a bond or other security by the person seeking the appointment for the payment of damages suffered by any person if the court later determines that the appointment was not justified. However, when an order appointing a receiver or providing for injunctive relief is issued on the pleading of the state or a political subdivision of the state, the court may dispense with a bond.

Receiver's Qualifications

As under common law, the bill requires a receiver to be neutral and impartial. However, the bill goes further, requiring a prospective receiver to submit to the court under penalty of perjury a statement that the person is not disqualified for appointment. Under the bill, a person is so disqualified if the person:

- Is affiliated with a party;
- Has an interest materially adverse to a party's interest;
- Has a material financial interest in the action's outcome, other than court-ordered compensation;
- Has a debtor-creditor relationship with a party; or
- Holds an equity interest in a party, other than a non-controlling interest in a publicly traded company.

The bill also specifies that a person is not disqualified to serve as a receiver solely because the person:

- Was appointed receiver or is owed compensation in an unrelated matter involving a party or was engaged by a party in an unrelated matter;
- Is obligated to a party on a debt that is not in default and was incurred primarily for personal, family, or household purposes; or
- Maintains a deposit account with a party.

Additionally, the bill authorizes the appointment of a receiver appointed in another state as an ancillary receiver with respect to property located in Florida if such a person is otherwise qualified to serve as a receiver and the appointment furthers the person's possession or control of property subject to the other state's receivership. An ancillary receiver has the same rights, powers, and duties of any receiver appointed under the Act.

Immunity and Defenses

The bill entitles a receiver to all defenses and immunities provided by state law for an act or omission within the scope of the receiver's appointment. As under common law, a receiver cannot be sued for such an act or omission without the court's approval.

Receiver's Powers and Duties

Unlike the common law, the bill specifies a receiver's general powers and duties. These include:

- Collecting, controlling, managing, conserving, and protecting receivership property;
- Operating a business constituting receivership property, including preservation, use, and sale in the ordinary course of business;
- Incurring unsecured debt and paying expenses incidental to the receiver's preservation, use, or sale of receivership property;
- Asserting a right, claim, cause of action, or defense of the owner relating to receivership property;
- Engaging a professional, such as an attorney, in accordance with the requirements of the Act;
- Giving notice of his or her appointment to the owner's creditors;
- Filing interim reports detailing the receiver's recent activities;
- Filing a final report upon completion of the receiver's duties; and
- Exercising any power conferred by court order, the Act, or other state laws.

Additionally, with court approval, a receiver may:

- Incur debt for a receivership property's use or benefit other than in the ordinary course of business;
- Improve receivership property;
- Use or transfer receivership property other than in the ordinary course of business; and
- Adopt or reject an executory contract⁴⁰ relating to receivership property, except for an unexpired lease of real property under which the owner is the landlord if the:
 - Tenant occupies the leased premises as his or her primary residence;
 - Receiver was appointed at the request of someone other than a mortgagee; or
 - Receiver was appointed at the request of a mortgagee and certain conditions are met.

However, the bill allows the court to expand, modify, or limit a receiver's powers and duties, so that, just as in the common law, a receiver's powers and duties could vary from case to case.

Sale of Receivership Property

Though sale of receivership property other than in the ordinary course of business is generally improper under common law, the bill authorizes a receiver to sell or transfer receivership property before a judgment is entered in the underlying action with court approval after reasonable notice to all parties if the owner:

- Expressly consents to the receiver's proposed transfer in writing, which consent must be noted in the motion to approve the transfer; or
- Fails to object, either before or at the hearing on the receiver's motion, despite reasonable advanced written notice of such hearing.

The court may also allow a receiver to transfer receivership property post-judgment to carry the judgment into effect or preserve the property during the pendency of the judgment's appeal. Such transfers by a receiver may be declared by the court to be free and clear of any liens on the property at the time of transfer. In that case, valid liens on the property extinguished by the transfer attach to the transfer's proceeds with the same validity, perfection, and priority the liens had immediately before the transfer.

⁴⁰ An executory contract is a contract that has not yet been fully completed or performed or a contract the obligation of which relates to the future. Black's Law Dictionary 395 (6th ed. 1996).

Liens, Security Interests, and Receivership Property

Under the bill, a receiver has the same status as a lien creditor under chapter 679, F.S.,⁴¹ as to receivership property or fixtures and chapter 695, F.S.,⁴² as to receivership property that is real property. Further, the bill provides that property acquired by a receiver or an owner after the receiver's appointment is subject to a security agreement entered into before the appointment to the same extent as if the court had not appointed the receiver.

The bill also provides that, unless the court orders otherwise, on a receiver's demand, a person:

- Who owes a debt that is receivership property and is matured or payable on demand must pay the debt; and
- That has possession, custody, or control of receivership property must turn the property over to the receiver.

Owner's Duties

In addition to setting out a receiver's powers and duties, the bill also specifies duties of the owner of receivership property. Under the bill, the owner must:

- Assist and cooperate with the receiver in the administration of the receiver's duties;
- Preserve and turn over all receivership property in the owner's possession, custody, or control;
- Identify and make available all records and other information relating to the receivership property in the owner's possession, custody, or control;
- If subpoenaed, submit to examination under oath about any matter relating to the receivership property; and
- Perform any duty imposed by court order.

If an owner knowingly fails to perform his or her duties, the bill authorizes the court to sanction the failure as civil contempt and award the receiver actual damages, reasonable attorneys' fees, and costs.

Stays and Injunctions

The bill authorizes the court, after notice and opportunity for a hearing, to enter a stay of any act, action, or proceeding relating to receivership property to obtain possession of, exercise control over, or enforce a judgment or lien against the receivership property. The court may also enjoin any act, action, or proceeding relating to receivership property if the injunction is necessary to protect the receivership property against misappropriation of, or waste relating directly to, the receivership property. In connection with a stay or injunction, the court may direct the party requesting such stay or injunction to post a bond before the stay or injunction may take effect.

If the court grants injunctive relief, the injunction must specify the reasons for entry and must describe the act or acts restrained in reasonable detail. An injunction is binding on the parties to the action, the parties' officers, agents, servants, employees, and attorneys, and on any person who receives actual notice of the injunction and is in active concert with the parties. However, a person whose act, action, or proceeding is stayed or enjoined, or who is otherwise adversely affected by a stay or injunction, may petition the court for relief from the stay or injunction. The court must hear such a motion within five days after the movant requests a hearing or at such time as the court determines is reasonable and appropriate under the circumstances and may grant relief for cause shown.

⁴¹ Chapter 679, F.S., relates to secured transactions under the Uniform Commercial Code.

⁴² Chapter 695, F.S., relates to record of conveyances of real estate.

Fees and Expenses

As under common law, the bill allows the court to award a receiver reasonable and necessary fees and expenses for performing his or her duties, which fees and expenses may be paid from receivership property. The bill also allows the court to order the following persons to pay such fees and expenses:

- A person that requested the receiver's appointment, if the receivership doesn't produce enough money to pay the fees and expenses; or
- A person whose conduct justified or would have justified the receiver's appointment.

Mortgagee's Enforcement

The bill specifies that a mortgagee's request for a receiver's appointment or application of receivership property to a secured obligation does not:

- Make the mortgagee a mortgagee in possession of the real property⁴³ or the owner's agent;
- Constitute an election of remedies precluding a later action to enforce the secured obligation;
- Make the secured obligation unenforceable;
- Limit any right available to the mortgagee with respect to the secured obligation; or
- Constitute a foreclosure action.

Receiver's Removal or Replacement

Similar to the common law, the bill allows a court to remove a receiver for cause. Additionally, the bill requires a court to appoint a new receiver following a receiver's death, resignation, or removal, and to discharge a receiver and relinquish control over receivership property if the court finds that the receivership was improvident or the circumstances no longer merit a receivership.

Further, a person adversely affected by an order appointing a receiver may move to dissolve or modify the order at any time. The court must hear such a motion within five days after the movant requests a hearing on the motion or at such time as the court determines is reasonable and appropriate under the circumstances and may grant relief for cause shown.

Miscellaneous Provisions

The bill specifies that:

- In applying and construing the Act, consideration must be given to promoting uniformity of the law with respect to its subject matter among states with similar laws.
- The Act does not apply to receiverships for which a receiver was appointed before July 1, 2020.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Creates ch. 714, F.S., relating to the Uniform Commercial Real Estate Receivership Act.

Section 2: Provides an effective date of July 1, 2020.

⁴³ In a foreclosure, if a mortgagor voluntarily turns over the property to the mortgagee or abandons the property, the mortgagee becomes a mortgagee in possession. See Robert Kratovil, *Mortgages- Problems in Possession, Rents, and Mortgagee Liability*, 11 DePaul L. R. 2 (1961), <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3442&context=law-review> (last visited Feb. 12, 2020).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate impact on expenditures for the State Courts System, to the extent that provisions in the bill increase judicial workload.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to impact county or municipal governments.

2. Other:

Florida is a "lien theory" state, meaning that a mortgagee only has a lien on mortgaged property, while the mortgagor holds genuine fee simple title to the property.⁴⁴ A foreclosure sale raises due process concerns, as the enforcement of a mortgagor's rights necessarily results in the mortgagor's loss of his or her ownership interest in the real property. Consequently, all mortgage foreclosures in Florida must be filed and prosecuted as civil lawsuits, affording the mortgagor the same rights as a respondent in other civil actions. A receiver's sale or transfer of real property free and clear of all liens raises similar due process concerns, and title companies have expressed concern about their ability to insure title obtained in such a manner.⁴⁵

The bill provides that, in applying and construing the Act, consideration must be given to promoting uniformity of the law with respect to its subject matter among states with similar laws. This appears to direct the courts, which may implicate article II, section 3 of the Florida Constitution, relating to separation of powers.

⁴⁴ Some states are "title theory" states, considering a mortgagee to have an ownership interest in the property subject to the mortgage. See Foster, *supra* note 5.

⁴⁵ See Foster, *supra* note 5.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 12, 2020, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Specified that the Act does not apply to real property improved by one or two dwelling units which includes the owner's homestead or the homestead of the owner's affiliate.
- Clarified that, in deciding whether to appoint a receiver for a mortgaged property, the court must consider whether the mortgagor agreed to a receiver's appointment on default.
- Provided that, when any order appointing a receiver or granting injunctive relief is issued on the pleading of the state or a political subdivision, the court may dispense with the bond requirement.
- Authorized a court to hear a motion to dissolve or modify an order appointing a receiver at a time the court determines is reasonable under the circumstances.
- Clarified that an injunction is binding on any person who receives actual notice of the injunction and is in active concert with the parties.
- Authorized a person adversely affected by a stay or injunction to motion for relief from such stay or injunction and specifies when a court must hear the motion.
- Clarified that a property owner's express consent to the disposition of receivership property by the receiver must be in writing.
- Required that service of notice to a financial institution lienholder be made under s. 655.0201, F.S.
- Clarified that the judgment that may trigger specified receiver actions must be entered in the action in which the receiver is appointed.
- Made technical changes.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.