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THE FLORIDA LEGISLATURE PASSES A COMPREHENSIVE COMMERCIAL REAL ESTATE PROPERTY RECEIVERSHIP ACT

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Commercial real estate is, of course, big business in Florida. And many constituents are financially dependent on it. Business owners and operators generate revenues while lenders advance monies to acquire those properties and provide working capital for operations.

When business takes a turn for the worse (especially under volatile market conditions…!), the relationships between business owners/operators and their lenders can become strained. More conservative lenders may be more apt to seek to wrest control of collateral from business owners/operators, in hopes of protecting their repayment prospects and liquidating collateral without delay. Business owners/operators, however, may be understandably resistant to abandoning ship, especially if substantial equity remains trapped in the business or commercial property.

Quite often, when loan enforcement proceedings begin, these acute tensions are revealed through battles over whether a receiver should be appointed by a court to take control of an ongoing business or property. Florida courts have long relied on a few instructive case decisions to guide a judge's specific decision whether to appoint a receiver in a particular controversy; even if a receiver is appointed, serious disputes can arise as to the receiver's specific powers such as whether he or she is empowered to sell the collateral before a final judgment is rendered.

In order to better define the grounds on which a receiver may be appointed, and to describe his/her powers and those of the courts, several states have enacted versions of the Uniform Commercial Real Estate Receivership Act ("UCRERA"). And as of March 11, 2020 the Florida Legislature adopted its own version of the UCRERA. See CS/HB 783. That legislation remains subject to the Governor's review.

Florida's version of the UCRERA applies only to interests in real property and any personal property used in the operation of that property; the legislation does not apply to some properties such as residential real properties that involve individual homestead exemptions from forced sale. Florida's UCRERA provides specific grounds on which a request for a receiver's appointment may be made, and also guides the courts on the use of receivers to protect property interests on a pre-judgment and/or post-judgment basis. The legislation also contains specific timeframes by which a court must consider motions to dissolve or modify an appointment that was made without notice to adverse parties. It also outlines the right of a receiver to collect property and monies considered part of the receivership property; operate a business; assert claims held by the owner of receivership property; compel witnesses to be examined, and even apply to courts in other states to act as an ancillary receiver for property located outside of Florida. The legislation also lays out specific duties of an owner of receivership property to submit to an examination by the receiver and grant access to various records.

Florida's UCRERA also grants broad powers to Florida state judges to act in essence as federal bankruptcy judges, such as the power to stay any proceedings that affect or concern receivership property and to enjoin anyone whose acts threaten to waste or misappropriate receivership property; exceptions to this 'stay' power mimic those described in the automatic stay provisions of the federal Bankruptcy Code.

Perhaps the most controversial provisions of the UCRERA are those that empower a receiver, upon court approval and after notice to all parties, to transfer, sell or dispose of receivership property before a final judgment has been entered that adjudicates the rights of an owner or a lender in that property. This power appears available even over the objection of an owner/operator of the receivership property. Similar to the federal Bankruptcy Code, Florida's UCRERA would permit a state court judge to order a transfer of receivership property free and clear of liens that had affixed thereto.

The UCRERA also provides a receiver with the opportunity to adopt or reject executory contracts relating to receivership property, upon court approval; this power is akin to the assumption/rejection provisions set forth in section 365 of the federal Bankruptcy Code.

Through this legislative act, Florida seeks to grant to state court judges many of the powers bestowed upon federal bankruptcy judges. While this added guidance relating to state court receiver appointments may be welcomed, the execution of these provisions will certainly prove interesting. One result from Florida's passage of UCRERA might be a drop in federal bankruptcy filings because the UCRERA (if it becomes law) will provide many key rights and powers that had been made available to interested parties only through the federal bankruptcy courts.

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