

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 660

INTRODUCER: Commerce and Tourism Committee and Senator Berman

SUBJECT: Uniform Commercial Real Estate Receivership Act

DATE: February 5, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Elsesser</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>McMillan</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 660 adopts the Uniform Commercial Real Estate Receivership Act and authorizes a court to appoint a receiver, who acting as the court's agent, takes possession of, manages, and, in some cases, transfers or sells property that is in danger of waste, loss, or diminution in value.

The bill covers interests in real property, as well as incidental personal property, related to the use or operation of real property. However, the bill does not apply to real property improved by one or two dwelling units which includes the homestead of an individual owner or an affiliate of an individual owner.

The bill in large part codifies the common law of receivership, in some cases clarifying or providing more specific procedures for the rules governing receiverships.

The bill takes effect July 1, 2020.

II. Present Situation:

Equitable receiverships are a creation of common law, which the Supreme Court has stated should be reserved for cases involving fraud, self-dealing, or waste.¹ The decision in equity to appoint a receiver lies in the sound discretion of the trial court.² Generally, a temporary receiver

¹ *Granada Lakes Villa Condominium Ass'n, Inc. v. Metro-Dade Investments Co.*, 125 So. 3d 756, 759 (Fla. 2013).

² *Ins. Mgmt, Inc. v. McLeod*, 194 So. 2d 16, 17 (Fla. 3d DCA 1966).

is appointed only to preserve the property and to protect the rights of all parties involved.³ Courts should not interfere unless absolutely necessary to do complete justice.⁴

Separately, a statute can authorize the appointment of a receiver, and statutory receiverships may serve a different role or purpose than an equitable receivership.⁵ Florida Statutes authorize the appointment of a receiver in several situations that do not involve any of the common law grounds of fraud, self-dealing, or waste for the appointment of an equitable receiver.⁶ Many other statutes allow for a state agency or officer to seek the appointment of a receiver for certain property.⁷ Further, a circuit court may appoint a receiver if, in a proceeding by a shareholder, “it is established that the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered.”⁸ “The appointment of receiver for a going corporation is a last resort remedy, and should not be employed when another adequate remedy is available.”⁹ Instead of restricting a court’s power to appoint a receiver, these statutory provisions authorize a court to appoint a receiver under certain enumerated circumstances that do not involve any of the common law grounds for the appointment of an equitable receiver.¹⁰

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.”¹¹ Appointing a receiver is a rare and extraordinary remedy.¹² To authorize the appointment of a receiver, a petitioner must show clear legal right to the property in controversy, or that he has some lien upon or property right in it, or that it constitutes a special fund of which he is entitled to satisfaction of his demand.¹³ While the parties’ agreement to the appointment of a receiver is considered in determining whether to grant an ex parte receivership, it alone is not dispositive.¹⁴

The notice provisions of Florida Rule of Civil Procedure 1.610 apply to an application for

³ *Id.*

⁴ *Recarey v. Rader*, 320 So. 2d 28, 30 (Fla. 3d DCA 1975).

⁵ *Granada Lakes*, 125 So. 2d at 759.

⁶ *Id.*; see, e.g., s.393.0678, F.S. (authorizing the appointment of a receiver for a “residential habilitation center or a group home facility owned and operated by a corporation or partnership” under certain circumstances); s. 607.1432, F.S. (authorizing the appointment of a receiver for the purpose of winding up and liquidating a corporation); s. 605.0704 (winding up and liquidating a limited liability company); s. 658.79, F.S. (authorizing the appointment of a receiver for an insolvent bank for the purpose of taking charge of the assets and affairs of the bank); s. 631.0515, F.S. (authorizing the appointment of a receiver for the purpose of winding up a deadlocked but not insolvent corporation that owns all the stock of a Florida insurer); ss. 719.1124, 720.3053, F.S. (cooperative or homeowners’ association if association fails to fill vacancies on board of administration).

⁷ See, e.g., s. 400.966, F.S. (authorizing the appointment of a receiver for intermediate care facilities for the developmentally disabled); s. 409.994 (authorizing the appointment of a receiver for community-based care agencies); s. 394.903 (crisis stabilization unit or residential treatment facility); s. 429.22, F.S. (authorizing the appointment of a receiver for assisted living facilities); s. 497.160, F.S. (authorizing the appointment of a receiver for funeral, cemetery, and consumer services).

⁸ *Wenzel v. Burman*, 76 So. 3d 1005, 1006 (Fla. 3d DCA 2011) (quoting s. 607.1430(2)(a), F.S. (2011)).

⁹ *Rader*, 320 So. 2d at 30.

¹⁰ *Id.*

¹¹ *DeSilva v. First Cmty. Bank of Am.*, 42 So. 3d 285, 290 (Fla. 2d DCA 2010).

¹² *Plaza v. Plaza*, 78 So. 3d 4, 6 (Fla. 3d DCA 2011).

¹³ *Apalachicola N.R. Co. v. Sommers*, 85 So. 361, 361 (1920).

¹⁴ *DeSilva*, 42 So. 2d at 288.

receivership.¹⁵ Ordinarily, a hearing is required before appointment of a receiver.¹⁶ Pursuant to rule 1.610, a receiver can be appointed without notice or a hearing if: (1) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; (2) the movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required; and (3) the trial court's order defines the injury, states why the injury may be irreparable, and gives the reasons why the order was granted without notice if notice was not given.¹⁷ The party requesting the appointment of a receiver without notice must set forth, in sworn form and with sufficient particularity, specific facts and circumstances reflecting that delay in appointing the receiver will result in irreparable injury to the property, or that giving notice itself will precipitate such injury to the property.¹⁸ Thus, a receivership might be appropriate without notice and a hearing if the property is at immediate risk of being diverted, dissipated, destroyed, allowed to deteriorate, or wasted.¹⁹

A bond with "good and sufficient surety" should be required on the appointment of a receiver unless exceptional circumstances precluding the need or ability to provide a bond are present in the case.²⁰ The party seeking appointment of a receiver should pay a receivership bond adequate to indemnify an adverse party any damages it might suffer through the receivership of its property.²¹ Additionally, the receiver should post bond to cover the damages that will be incurred if the receiver fails in his duties.²²

The trial court's grant or denial of the appointment of a receiver and the court's termination or refusal to terminate a receivership is an appealable nonfinal order.²³

The courts are generally vested with considerable discretion in determining who will pay the cost and expenses of receiverships.²⁴

The appointment of a receiver in a case filed in federal court based on diversity jurisdiction is governed by federal law.²⁵

III. Effect of Proposed Changes:

The bill authorizes a court to appoint as its agent a receiver, who takes possession of, manages, and, in some cases, transfers or sells property that is in danger of waste, loss, or diminution in value.

¹⁵ See Fla. R. Civ. P. 1.620(a).

¹⁶ *Edenfield v. Crisp*, 186 So.2d 545, 548 (Fla. 2d DCA 1966).

¹⁷ *DeSilva*, 42 So. 3d at 288 (citing Fla. R. Civ. P. 1.610(a)(1)-(2)).

¹⁸ *Id.* (citing Fla. R. Civ. P. 1.610(a)(1)(A)).

¹⁹ *Id.*

²⁰ *Turtle Lake Associates, Ltd. V. Third Financial Servs., Inc.*, 518 So. 2d 959, 961-62 (Fla. 1st DCA 1988).

²¹ See *Id.*

²² *Id.*

²³ Fla. R. App. P. 9.130(3)(D).

²⁴ *Barredo v. Skyfrieght*, 430 So. 2d 513, 514 (Fla. 3d DCA 1983).

²⁵ *Nat'l Partnership Inv. Corp. v. Nat'l Housing Development Corp.*, 153 F.3d 1289, 1291 (11th Cir. 1998).

The bill does not apply to real property improved by one or two dwelling units, to residential real property occupied by the owner or the owner's immediate family, to personal property used primarily for personal, family, or household purposes. The bill does not apply to homestead property. The bill applies to property that is commercial in nature, and thus can apply to residential property from which the owner collects rents from tenants. The principles of law and equity supplement the bill unless they are displaced by a particular provision of the bill.

General Purposes and Procedure for Appointment of Receiver

The bill allows a court to appoint a receiver before a judgment on the property has been entered to protect the interests of a party that demonstrates an apparent right, title, or interest in real property that is the subject of the action, if the property (or its revenue-producing potential) (1) is being subjected to or is in danger of waste, loss, substantial diminution in value, dissipation, or impairment, or (2) is or is about to be the subject of a voidable transaction (most commonly due to fraud).²⁶ If a judgment has been entered, the bill authorizes a court to appoint a receiver to enforce the judgment or to protect the real property during the pendency of an appeal of the judgment.

The provision for post-judgment appointment expands the common law, as courts have noted that the appointment of a receiver after entry of a judgment generally serves "no good purpose," and should happen only "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, the complainant is entitled to the appointment of such receiver pending the execution of the final decree."²⁷ The bill is consistent with the common law's allowance of the appointment of a receiver post-judgment to protect the interest of parties, but additionally allows the court to appoint a receiver post-judgment to carry the judgment into effect.

Appointment of Receivers in Connection with Foreclosures

More specifically, the bill allows a court to appoint a receiver in connection with a mortgage foreclosure or enforcement if:

- Appointment is necessary to avoid waste, loss, diminution in value, transfer, dissipation, or impairment of the subject property,
- The mortgagor agreed to the appointment of a receiver upon default,
- The owner agreed to the appointment of a receiver after default,
- The subject property and other collateral held by the mortgagee are not valuable enough to pay the secured obligation,
- In the case of a rental property, the owner fails to turn over collected rents or mortgage proceeds, or
- The holder of a subordinate lien obtains a receiver for the property.

²⁶ "A fraudulent transfer of property is voidable at the instance of a creditor." *Smith v. Effective Teleservices, Inc.*, 133 So. 3d 1048, 1052 (Fla. 4th DCA 2014); see also s. 726.109(1), F.S.

²⁷ *U.S. Bank Nat. Ass'n v. Cramer*, 113 So. 3d 1020, 1023 (Fla. 2d DCA 2013).

Court Authority to Stay Proceedings over Receivership Property

The bill authorizes a court, after notice and opportunity for a hearing, to stay all proceedings to obtain possession or control over the receivership property or to enforce a lien against the property; the court may enjoin actions against the subject property. The court may condition the stay on the payment of a bond by the party requesting the stay. The court's order to stay proceedings, however, does not stay a mortgage enforcement or foreclosure, a criminal proceeding, or an action by a governmental unit enacting its regulatory power or tax authority. The bill also provides that if the court grants an injunction, it must specify the reasons for entry and the act or acts being restrained by the injunction.

Obligation to Turn Property over to Receiver

Once a receiver is appointed, the bill requires a person owing debt on receivership property to pay the debt or turn over the subject property to the receiver on the receiver's demand. If the debtor has notice that a receiver has been appointed, the person does not satisfy the debt by paying the owner. If a creditor has possession of the subject property, the creditor, rather than the receiver, may retain possession of the subject property until the court orders adequate protection of the creditor's lien. A court may enter sanctions for civil contempt against a party that fails to turn over property to the receiver.

Qualifications for Receivers

The bill describes the necessary qualifications for a receiver by listing criteria that disqualifies a person from serving as a receiver. As a result, the qualifications under the bill are more stringent than those described in the common law of equitable receiverships. Under the bill, a person may not be a receiver if he or she is an "affiliate" of a party to the receivership action. An affiliate is defined as a companion, family member, a person who lives in the same residence as the party, or regarding a corporation or other non-individual entity, someone who controls the entity or is a fiduciary of the entity. Additionally, a person may not be a receiver if the person has a financial interest adverse to a party or has a financial interest in the outcome of the action, or has an equity interest in a party.

Powers and Duties of Receivers

The bill authorizes a receiver to manage receivership property. If the receivership property is a business, the receiver is authorized to operate the business. A receiver may assert rights of the property owner. With court approval, the receiver may incur debt to benefit the receivership property and make improvements to the property. The receiver may, with court approval, engage with and pay professionals (such as attorneys, appraisers, auctioneers, or brokers) to assist in the administration of the receivership.

Transfer of Receivership Property

Before a judgment on the property is entered, the receiver may, with court approval, sell, lease, exchange, or transfer receivership property "other than in the ordinary course of business," if the

property owner expressly consents, in writing, to the receiver's proposed transfer or fails to object to the proposed transfer after receiving notice. After a judgment is entered, in the action in which the receiver is appointed, the receiver, with court approval, may transfer property to carry the judgment into effect or to preserve the property during the pendency of an appeal of the judgment.

The court may order that these pre- and post-judgment transfers of property are free and clear of liens on the property at the time of the transfer. If the court enters such an order, the liens that were previously on the property then attach to the proceeds of the transfer of the property. This transfer may occur in an open-market sale other than a public auction, and a creditor holding lien on the property may purchase the property, with the purchase price offset by the amount secured by the lien.

This provision allowing property transfers constitutes an expansion of the common law rule, which states that although there may be instances in which the parties to a foreclosure could agree that a sale by receiver would be appropriate, a sale by a receiver is ordinarily improper and, even if authorized, should be carefully watched by the court.²⁸

Receiver Authority Regarding Executory Contracts

The bill allows a receiver, with court approval, to accept or reject executory contracts of the owner. This essentially codifies the common law rule that a receiver is generally not obligated to carry out the executory contracts of the owner of the estate being administered unless he elects to be bound thereby.²⁹ Executory contracts are contracts where each party has remaining unperformed obligations, including apartment leases and business real estate or equipment leases.

If the receiver does not request court approval to adopt or reject the owner's executory contract within a reasonable time after being appointed, the receiver is deemed to have rejected the contract. A receiver's performance of an executory contract before court approval does not constitute an adoption of the executory contract. If a receiver rejects an executory contract, any right to possesses property pursuant to that contract is terminated.

If the receiver rejects an executory contract for sale of the receivership property that is real property in possession of the purchaser, a receiver's termination of the executory contract constitutes a termination of the contract and the purchaser has a lien on the property for the recovery of any part of the purchase price the purchaser paid. Alternatively, the purchaser may retain its right to possession of the property and continue to perform all obligations under the executory contract, offsetting any damages caused by the owner's nonperformance.

If the executory contract in question is an unexpired lease on real property for which the owner is landlord, the receiver may not reject this contract if:

- The property is a tenant's primary residence,
- The receiver was appointed at the request of someone other than the mortgagee (i.e. the

²⁸ *MB Plaza, LLC v. Wells Fargo Bank, Nat. Ass'n*, 72 So. 3d 205, 207 n.1 (Fla. 2d DCA 2011).

²⁹ *Real Estate Marketers, Inc. v. Wheeler*, 298 So. 2d 481, 483 (Fla. 1st DCA 1974).

- lender), or
- The receiver was appointed at the request of the mortgagee/lender, and
 - The lease is superior to the lien of the mortgage,
 - The tenant has an enforceable agreement with the mortgagee or holder of a senior lien
 - requiring that the tenant's occupancy will not be disturbed as long as the tenant performs its obligations under the lease,
 - The mortgagee consented to the lease, or
 - The terms of the lease were reasonable and the tenant had no actual or constructive knowledge that the lease violated the mortgage.

Effect of Enforcement by Mortgagee

If a mortgagee requests appointment of a receiver to enforce a secured obligation, the appointment does not make the mortgagee a possessor of the receivership property, does not make the mortgagee an agent of the owner, does not make the secured obligation unenforceable, or limit any right available to the mortgagee with respect to the secured obligation.

Receiver Liability and Reporting Requirements

The bill provides that a receiver may be sued personally for an act or omission in administering receivership property if there is approval from the court that appointed the receiver. The court may require the receiver to file reports describing the receiver's activities, which may include receipts and disbursements, payments made to professionals, and fees and expenses of the receiver. After the receiver's services are complete, the receiver must file a final report describing the receiver's activities, listing the receivership property and any property received during the receivership, payments to professionals, listing distributions made or proposed to be made to creditors, and requesting the approval of fees. After the court approves the receiver's final report and the receiver distributes all receivership property, the receiver is discharged.

Notice of Appointment of Receiver and Claims against and Distribution of Property

Upon appointment, the receiver must give notice to creditors of the owner of receivership property either by mail or by publication as directed by the appointing court. The notice must specify the dates by which creditors holding claims against the owner of the receivership property must submit claims to the receiver; these dates must be at least 90 days after notice of appointment of receivership. Failure to submit claims to the receiver can bar a creditor's entitlement to a distribution from the receivership. The bill describes facial requirements for a claim submitted by the creditor. The receiver may object to a creditor's claim, and the court may allow or disallow the claim based on Florida law governing creditor claims.

The bill allows a court to appoint a receiver without notice to the adverse party if (1) it appears that immediate injury, waste, or diminution in value to the subject real estate will occur and (2) the attorney for the party moving for the appointment of a receiver certifies in writing that all efforts have been made to notify all adverse parties, or the reasons why such notice should not be required. The bill also requires the court's order appointing a receiver to define the injury and

state why it may be irreparable. Additionally, the court must explain why the order was granted without providing notice to adverse parties. This provision mirrors the notice exception in Florida Rule of Civil Procedure 1.610(a)(1).³⁰

Removal of Receiver and Termination of Receivership

The appointing court may remove a receiver for cause and must replace a receiver that is removed, dies, or resigns. The appointing court may discharge a receiver if the court finds that the appointment of the receiver was improvident, the circumstances no longer warrant a receiver, or the appointment of the receiver was sought in bad faith. If the appointment was sought in bad faith, the court may assess against the person who sought the appointment, the fees of the receivership, and the actual damages caused by the appointment.

Bonding Requirement

The bill requires that the party moving for appointment of a receiver give bond in an amount the court deems proper before an order or injunction is entered. The bond must be conditioned for the payment of costs and damages sustained by the adverse party if the order is improperly entered. This provision effectively codifies a common law rule.³¹

Distribution of Receivership Property

The distribution of receivership property to a creditor with a perfected lien must be made in accordance with the creditor's priority based on Florida law. The distribution to a creditor with an unsecured claim must be made as directed by the court. Therefore, the common law rule for preference after appointment of a receiver remains that once property is placed under the control of the court through appointment of a receiver, no creditor may obtain preference by any lien rendered subsequent even if the suit under which the judgment lien is acquired was commenced prior to the date of the order appointing the receiver.³² A receiver appointed by the court has the status of a "lien creditor" as defined in s. 679.1021, F.S., (the Uniform Commercial Code), and the receiver's interest therefore takes priority over certain other security interests in the receivership property.³³

Miscellaneous Provisions

A party adversely affected by an injunction or order appointing receiver may move to dissolve or modify the order at any time, and the court shall hear the motion within 5 days after the movant applies for a hearing on the motion or at a time deemed reasonable by the court.

The bill does not apply to actions in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver. The bill therefore does not affect the receivership proceedings outlined in, e.g. s. 400.966, F.S. (intermediate care facilities for the developmentally disabled); s. 409.994, F.S. (Community-based care agencies); s. 394.903 (crisis

³⁰ *DeSilva*, 42 So. 3d at 288.

³¹ See *Turtle Lake Associates, Ltd. v. Third Financial Servs., Inc.*, 518 So. 2d 959, 961-62 (Fla. 1st DCA 1988).

³² *Sunland Mortg. Corp. v. Lewis*, 515 So. 2d 1337, 1339 (Fla. 5th DCA 1987).

³³ See ss. 679.334(4), 679.703, 679.704, and 679.705, F.S.

stabilization unit or residential treatment facility); s. 429.22, F.S. (assisted living facilities).

The bill confers to the court appointing the receiver the exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property. This effectively codifies the common law rule.³⁴

The bill allows the court to require the party seeking appointment of a receiver to give security to cover any damages, reasonable attorneys' fees, and costs incurred if the court later determines that the appointment of a receiver was not justified. The court will remit the security to the party who paid it if the court determines that the appointment of receiver was justified. This generally codifies the common law rule, while defining a more specific procedure.³⁵

The bill allows the appointing court to award the receiver reasonable and necessary fees, paid from the receivership property. Alternatively, the court may order the fees be paid by a person that requested the appointment of the receiver or a person whose conduct justified the appointment of a receiver.

The bill allows a court to appoint a receiver that was appointed in another state as an ancillary receiver to property located in Florida. This provision is consistent with the common law rule that applies principles of comity, and Florida courts generally recognize a foreign receiver's standing to bring an action in this state.³⁶ Under certain circumstances, a foreign receiver may be listed as an ancillary receiver for property located in Florida.³⁷

The bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

³⁴ See, e.g., *Knickerbocker Trust Co. v. Green Bay Phosphate Co.*, 62 Fla. 519, 524 (Fla. 1911) (“A receiver is the agent of the court ...”).

³⁵ See *Turtle Lake*, 518 So. 2d at 961-62 (Fla. 1st DCA 1988).

³⁶ *Farley v. Farley*, 790 So. 2d 574, 575 (Fla. 4th DCA 2001).

³⁷ See *Id.* at 574.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may minimize the risk of the waste or dissipation of property that is the subject of foreclosure proceedings, which will provide protection to creditors.

C. Government Sector Impact:

The bill adds procedures for the appointment of a receiver and may increase judicial labor.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 714.01, 714.02, 714.03, 714.04, 714.05, 714.06, 714.07, 714.08, 714.09, 714.10, 714.11, 714.12, 714.13, 714.14, 714.15, 714.16, 714.17, 714.18, 714.19, 714.20, 714.21, 714.22, 714.23, 714.24, 714.25, 714.26, 714.27, 714.28.

IX. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism Committee on February 5, 2020:

The committee substitute:

- Adds “incidental” to modify personal property to clarify that only incidental personal property located on the commercial property that was related to or used in operating commercial property is governed by the Act;
- Gives the court discretion to hear a motion to dissolve or modify an order appointing a receiver at a time the court determines is reasonable and appropriate;
- Gives the court discretion to hear a motion for relief from a stay or an injunction at a time the court determines is reasonable and appropriate;

- Allows a person who is adversely affected by a stay or an injunction to apply to the court for relief;
- Clarifies that ch. 714 does not apply to real property improved by one or two dwelling units which includes the homestead of an individual owner or an affiliate of an individual owner;
- Inserts “in writing” to avoid issues as to whether the owner of the subject property actually provided consent to the receiver’s proposed use or transfer of the subject property before a judgment was entered;
- Clarifies that if service cannot be effectuated pursuant to ch. 48, F.S. on a financial institution lienholder, as provided in s. 655.0201, F.S., the receiver may effect service of notice on the nonparty lienholder pursuant to ch. 49, F.S. or as otherwise ordered by the court; and
- Clarifies that s. 714.16(3), F.S. is referring to “the action in which the receiver is appointed.”

B. Amendments:

None.