

Receivership Law May Streamline Real Estate Sales In Illinois

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On Aug. 1, Gov. JB Pritzker signed into law the Illinois Receivership Act, making Illinois the 16th state to adopt the [Uniform Law Commission's](#) Uniform Commercial Real Estate Receivership Act. The act becomes effective Jan. 1.

The act will modernize Illinois law and bring much-needed clarity to an inconsistent and outdated patchwork of Illinois statutes and case law.

A critical component of the act is the express provision granting receivers the right to sell commercial real estate, with or without court approval, depending on whether the sale is in the debtor's ordinary course of business. This key provision will be an invaluable resource for receivers, special servicers and commercial real estate lenders.

Current State of Illinois Law

Illinois receivership law is antiquated and scattered across different statutes. Illinois courts currently rely on common law and equitable principles as a supplement, which inherently means decisions are driven by the specific facts of the case rather than bright-line rules.

For example, Section 2-415 of the Illinois Code of Civil Procedure provides bond requirements for the appointment of receivers but does not expressly provide the powers or duties of a receiver, such as the power to sell or transfer assets.

The Illinois Mortgage Foreclosure Law, or IMFL, is more instructive, but still deficient in several respects.

Section 15-1704 of the IMFL applies to receivers for mortgaged real estate subject to a foreclosure action. While the IMFL provides some powers of a receiver, the list is nonexhaustive, and importantly, it does not expressly include the power to sell or transfer the mortgagor's assets.

The language is also ambiguous and states the receiver "shall have all the usual powers of receivers in like cases." Some duties are also mandatory, while others are permissive.

Under the IMFL, a foreclosing lender must demonstrate to a court that the circumstances warrant granting a

receiver the authority to sell because a receiver's sale is not currently addressed by statute.

Because granting a receiver the power to sell is rooted in the court's equitable powers, the court's granting of authority may also come with limitations or conditions, depending on the specific facts of the case.

Currently, secured parties may be hesitant to proceed with a receiver's sale because of unpredictable outcomes and a lack of clear statutory authority. In most cases, the varied results could translate to additional costs and delays for the secured lender or prospective purchaser.

Additionally, title insurers may be hesitant to insure the transaction or may simply pass the cost of the increased risk on to the receiver — and ultimately lender — or prospective purchaser.

The Act

The act provides much-needed clarity on the issue of receivers' sales of commercial real estate, among other new changes. It provides that a receiver may sell, lease or transfer receivership property outside the ordinary course of business with court approval, which is typically the case for secured creditors and special servicers.

Section 12, Subsection (b)(3), further authorizes the receiver to execute necessary documents and conveyances in the owner's name.

Section 16 of the act provides further details on a receiver's power to sell commercial real estate not in the ordinary course of business both by public and private sales.

Unless a purchase-and-sale agreement provides otherwise, the sale of commercial real estate under the act is free and clear of the lien of the person that sought appointment of the receiver (such as the foreclosing lender), any subordinate liens and any rights of redemption.

Also, unless a senior lienholder consents, the sale does not extinguish any senior lien on the real estate. Any lien that is extinguished in the disposition of the real estate will automatically attach to the proceeds of the sale with the same validity and priority as it had immediately before the transfer.

Looking Forward

The act provides clear statutory guidance for receivers' sales that will likely streamline the process going forward. However, the act includes several other components that are essential to the new framework.

Some of those provisions are codifications of practices and procedures already utilized by Illinois receivers and attorneys.

Receivers' sales will now have more certainty because they will be based on statute rather than equity. Moreover, several provisions create additional steps necessary to sell commercial real estate that were not previously required, such as a required notice of receivership, a formal claims process and a published notice of sale.

Also, because the act is not a mirror image of the Uniform Commercial Real Estate Receivership Act, the sales process will look slightly different in Illinois than in other UCRERA states.

Notice of Receivership

Section 12(c)(3) of the act requires receivers to record a formal notice of receivership.

The notice of receivership is comparable to a lis pendens or notice of foreclosure because it requires the receiver to promptly record with the county recorder's office a document setting forth, among other things, the name of the receivership, the owner of the real estate, title of the case and a legal description of the property.

The recording of the notice of receivership puts all parties that acquire a subsequent interest in the real estate on constructive notice.

This is a new requirement that receivers are currently not required to do under the IMFL. Indeed, it was often not necessary since most receivers were appointed in commercial real estate foreclosures in which the foreclosing lenders already recorded notices of foreclosure.

This new requirement is a critical part of the new sales process. For one, the new notice requirement envisions circumstances where lenders may seek the appointment of a receiver without foreclosing their security interest in the real estate.

In those cases, the act shifts the responsibility from lenders to court-appointed receivers to put the world on notice of the pending receivership.

Most importantly, by ensuring subsequent interests in the real estate are deemed to have constructive notice, the new notice requirement helps facilitate the disposition of the real estate free and clear of subordinate liens.

The notice requirement provides assurances to title insurers, much like a lis pendens, because it provides legal authority that subsequent interests are inferior to the lien of the plaintiff.

This new process may help provide more options for title insurance for receivers' sales. However, like any new legislation, there is uncertainty with how the act will be interpreted by courts.

Thus, while title insurers may welcome the added clarity to Illinois law, there may be initial hesitancy without any clear precedent.

In fact, many title insurers believe the act is an important step toward streamlining receivers' sales, but the true benefits may not be fully realized until courts and practitioners can test the act's reliability and create a record of successful transactions.

Notice of Appointment and the Claims Process

Section 20 of the act creates a formal notice of appointment and claims process. Prior to the act, a formal claims

process was not uncommon, but it varied by court and case, and there was no statutory framework. Going forward, a receiver is tasked with sending out notice to all creditors of the owner upon appointment.

The owner is also required to provide the receiver with a list of creditors. The notice must provide creditors at least 60 days to file a notice of claim in accordance with the procedures established by the act and order of the court.

While any claim that is filed in accordance with the act and court's order is prima facie evidence of the claim's validity, the receiver and any other party with an interest in the receivership estate may file an objection to the claim.

The claims process creates a reliable framework for receivers, as fiduciaries, to ascertain and verify all claims related to the real estate.

Because the receiver is required to seek court approval prior to selling the real estate, the claims process ensures that creditors with valid claims are accounted for in any sale. It also supports the efforts to sell the real estate free and clear because a receiver can address certain claims before they mature or become liens against the property.

Indeed, the claims process actually encourages a sale because the act provides that any lien extinguished upon the sale or transfer of the real estate automatically attaches to the sale proceeds with the same validity and priority as it had before the transfer.

Additionally, the act provides that a claim filed outside the 60-day period, or more if the court order provides otherwise, is not entitled to a distribution from the receivership estate. This provision further supports efforts to sell real estate free and clear of claims because it provides clear guidelines on what claims are not entitled to distributions from the receivership estate.

It is also worth noting that the notice-and-claims process can be avoided altogether under the act if the court determines that the receivership estate will be insufficient to satisfy all perfected liens on the property.

Notice of Sale

The act further requires that notice by publication must be given to the owner and all persons having an interest, including unknown owners, nonrecord claimants and unknown necessary parties.

This is different than the notice of receivership required by Section 1 and is comparable to the public notice of sale required by a foreclosing lender or selling officer under the IMFL.

As Compared to Other Receivership Acts

Michigan is another state that adopted a variation of the Uniform Commercial Real Estate Receivership Act in the form of the Michigan Receivership Act. The considerations for receivers in Michigan are different than Illinois because Michigan allows for nonjudicial foreclosures.

Michigan is also a one-action state, and the Michigan Receivership Act importantly clarifies that seeking a receiver

does not constitute an election of remedies that later precludes an action to enforce the debt.

Like the Illinois act, the Michigan Receivership Act allows for receivers' sales, and the remedy is frequently utilized. The Michigan law was a welcome change for secured creditors in Michigan, and the act will likely be in Illinois as well.

Conclusion

Starting on Jan. 1, receivers' sales of commercial real estate will look different in Illinois. The act brings welcome clarity to this area of law and contains several provisions that are either new or different than prior practice.

Practitioners should familiarize themselves with the new framework to take advantage of these new procedures. The true benefits of the act may take time to develop as courts, practitioners and title insurers put the act into practice, but the act is a positive development that will streamline the process of receivers' sales of commercial real estate in Illinois.

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