

## WFG Underwriting Bulletin



To: All Florida Policy Issuing Agents of WFG National Title Insurance Company

From: WFG Underwriting Department

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Subject: Uniform Commercial Real Estate Receivership Act

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Several States have enacted a version of the Uniform Commercial Real Estate Receivership Act (hereinafter the "Act"). Adoption of the Act coincides with the potential for commercial real estate foreclosures to be on the rise due to Covid-19's effect on the financial ability of tenants and landlords to pay their leases and mortgages, respectively. The Act does not provide an independent cause of action for a receivership. The receivership must be filed in conjunction with an existing lawsuit such as a mortgage foreclosure or a judgment lien foreclosure.

### **Authority**

The Act provides much needed statutory structure for receiverships and provides authority for receivers to convey real property pursuant to a court order. In addition to codifying common law authority for receiverships, the Act authorizes courts to enter orders providing receivers with authority similar to that of a bankruptcy trustee, such as:

1. To use or transfer receivership property other than in the ordinary course of business.
2. To sell property free and clear of liens.
3. To adopt or reject executory contracts of the owner.

Additionally, the Act authorizes courts to enter stay orders and injunctions to prevent enforcement of other judgments or liens against receivership property. Any act in violation of the stay or injunction may be voided by the court. Under the Act, a receiver has the status of a lien creditor.

### **Appointment of Receiver**

Notice and Opportunity for Hearing. The Act provides that the court may issue an order appointing a receiver only after notice and opportunity for a hearing. However, the Act also provides that the court may issue an order appointing a receiver without notice to the adverse party if an affidavit, verified pleading, or motion alleges facts showing that immediate and irreparable injury, loss, or damage will result to the party requesting the receiver; or that waste, dissipation, impairment, or substantial diminution in value to the real estate will result before the adverse party can attend a hearing regarding the appointment of a receiver.

Before Judgment. The court may appoint a receiver before a judgment is entered in the underlying lawsuit if the party requesting the receiver shows that it has an interest in the real property; that the property or its revenue producing potential is in danger of waste, loss, substantial diminution in value, dissipation, or impairment; or that the real property has been or is about to be the subject of a voidable transaction.

After Judgment. The court may appoint a receiver after a judgment is entered in the underlying lawsuit to fulfill the purpose of the judgment; to preserve the property during an appeal; to allow the property to be used in satisfaction of a judgment after an execution is returned unsatisfied and the owner refuses deliver possession of the property to satisfy the judgment; or to preserve real property sold in a foreclosure or execution sale – including the right to collect the rents and other monies due to the buyer of the property during the redemption period after the sale.

Considerations of the Court. In a mortgage foreclosure or other lawsuit enforcing a mortgage, the court will consider the following when deciding whether to appoint a receiver for the mortgaged property:

1. Whether a receiver is necessary to protect the property from waste, loss, substantial diminution in value, transfer, dissipation, or impairment;
2. Whether the mortgagor agreed in writing to the appointment of a receiver on default;
3. Whether the owner agreed in writing after default to the appointment of a Receiver;
4. Whether the property and other collateral held by the mortgagee are insufficient to satisfy the debt;
5. Whether the owner fails to deliver the rents and other monies to the mortgagee which the mortgagee is entitled to receive; or
6. Whether a receiver was appointed for the holder of a subordinate lien.

Bond. The Act requires the receiver to post a bond conditioned on the faithful performance of the receiver's duties. There is no set formula for the amount of the bond in the Act. The Act merely states that the court will list the amount of the bond in the order. In lieu of posting a bond, the court may authorize the receiver to post alternative security such as a letter of credit or deposit funds with the court. A receiver may obtain authority from the court to act before posting a bond if the receiver needs to take immediate action to prevent imminent injury, loss, or damage; or to prevent immediate waste, dissipation, impairment, or substantial diminution in value to the property.

### **Sale of Property**

Before Judgment. Pursuant to a court order, a receiver may sell receivership property before a judgment is entered in the underlying lawsuit if notice of the receiver's motion to sell and notice of the hearing on the motion are given to all parties having an interest in the property including all owners and lienholders, as long as:

1. The owner, after commencement of the case, expressly consents in writing to the

- receiver's sale of the property; or
2. The owner fails to object to the receiver's motion to sell the property before or at the hearing on the receiver's motion to sell the property provided that the receiver has provided reasonable advance notice of the proposed sale, and the motion avers that the sale is necessary to prevent waste, loss, substantial diminution in value, dissipation, or impairment of the property or its revenue.

After Judgment. Pursuant to a court order, a receiver may sell receivership property after a judgment is entered in the underlying lawsuit to fulfill the purpose of the judgment; to preserve non-exempt real property pending an appeal; or when an execution has been returned unsatisfied and the owner refuses to allow the property to be used to satisfy the judgment.

Orders to Sell Free and Clear of Liens. The court may authorize a sale of the property by the receiver free and clear of liens. Upon transfer of the property, the liens will attach to the proceeds from the sale with the same priority that the liens had prior to the conveyance. The Act provides that the liens are extinguished as to the property upon conveyance of the property pursuant to the order. For WFG to insure without exception for the liens pursuant to an order to sell free and clear, WFG requires that the motion to sell free and clear and the order authorizing the sale free and clear list the official records books and pages where all of the liens are recorded.

Review of Lawsuit. A review of the lawsuit must be performed by the agent and a Checklist regarding that review be completed and sent to WFG Underwriting for review. In addition to the information requested in the Checklist, Underwriting may require certain documents from the lawsuit be provided by the agent to WFG's Underwriting Department to assist with WFG's analysis of whether to insure a conveyance by the receiver. At the hyperlink below is a Checklist Form that may be used to review the lawsuit.

### **Underwriting Approval**

Insuring title based on a conveyance from a receiver is high risk because of due process concerns as to whether the former owner(s) and lienholders received adequate notice of the receiver's motion to sell the property, the hearing on that motion, and the sale pursuant to the order. The potential for legal challenges to title by former owners and junior lienholders claiming that they did not receive adequate notice of the receiver's motion to sell the property, the hearing on that motion, or any other legal challenges regarding the authority of the receiver to sell the property makes insuring these transactions an extra hazardous risk. Therefore, you must obtain express approval in writing from WFG's Underwriting Department in order to insure a conveyance by a receiver.

[Click Here to Obtain a copy of the Receivership Checklist.](#)

**NOTE: The information contained in this Bulletin is intended solely for the use of employees of WFG National Title Insurance Company, its title insurance agents and approved attorneys. Disclosure to any other person is expressly prohibited unless approved in writing by the WFG National Title Insurance Company's Underwriting Department. The Agent may be held responsible for any loss sustained as a result of the failure to follow the standards set forth above.**