

COMMERCIAL REAL ESTATE WORKOUT AND FORECLOSURE LAW
MICHIGAN ADOPTS THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

by Heather M. Olson and James B. Cunningham

While a receiver over commercial real estate is not a new concept in Michigan, historically, the process for appointing a receiver and the authority given to such a receiver lacked clarity, with no specific statutory authority (other than the Construction Lien Act) upon which to rely. However, this changed on February 6, 2018, when Governor Snyder signed legislation which adopted the Uniform Commercial Real Estate Receivership Act in Michigan (the "Act"). The Act will go into effect on May 7, 2018.

The Act codifies the Michigan Court Rules previously established by the Michigan Supreme Court related to receiverships and further expands upon them to bring more clarity, uniformity and predictability to the receivership process.

The Act is particularly helpful to a commercial mortgage lender who wishes to have a receiver appointed with the specific authority to sell the property..

The Act applies to a receivership over real property and personal property related to the real property or used in connection with its operations.

Highlights of the Act include:

- A receiver can be appointed in connection with an on-going judicial or non-judicial foreclosure action. A receivership action is no longer required to be ancillary to some other cause of action.
- The appointment of a receiver will not constitute an action within the meaning of Michigan's "one action" rule. Thus, the appointment of a receiver will not constitute "an action on the debt" for purposes of a non-judicial foreclosure by advertisement. See, MCL 600.3204(1)(b).
- A mortgagee is entitled to the appointment of a receiver in connection with a foreclosure of the mortgage where the mortgagor has agreed in writing to the appointment of a receiver upon a default.
- Upon appointment, the receiver obtains the status of a lien creditor as to both real and personal property.
- The mortgagor is required to turn over all receivership property in its possession, custody or control to the receiver and is subject to civil contempt sanctions if the mortgagor does not comply.
- The mortgagor is required to perform certain duties to cooperate with the receiver and is subject to damages, including attorneys' fees, for failure to comply.

- Powers that the receiver may or may not exercise with or without prior court approval are clearly defined.
- With court approval, a receiver may adopt or reject any executory contract of the mortgagor relating to the property.
- When dealing with a loan secured by properties in multiple states, the court may appoint a receiver appointed in another state, or that person's nominee, as an ancillary receiver with respect to the property located in Michigan. The court may also issue an order that gives effect to an order entered in another state appointing or directing the receiver in Michigan.
- Seeking the appointment of a receiver or having a receiver appointed will not make the mortgagee a "mortgagee in possession" of the real property, nor will it make the mortgagee an agent of the mortgagor. The Act further clarifies that the appointment of a receiver will not constitute an election of remedies by the mortgagee or limit any right available to the mortgagee.
- A receivership order will act as a stay against any act, action or proceeding (note: other than a proceeding in bankruptcy court) to obtain possession of, exercise control over, or enforce a judgment against receivership property, or to enforce a lien against receivership property (under certain circumstances).

One of the most substantial contributions of the Act is the inclusion of provisions defining the authority of the receiver and the procedure for the sale or transfer of real property. With respect to the sale of real property, the Act provides the following authority:

- Upon court approval, a receiver may sell, lease, license, exchange, or otherwise dispose of receivership property.
- The sale is free and clear of a lien of the person that obtained the appointment of the receiver, any subordinate lien, and any right of redemption, unless an agreement of sale provides otherwise. Such a sale would still remain subject to any senior lien.
- Any lien that is extinguished as a result of a sale attaches to the proceeds of sale with the same validity, perfection and priority the lien had before the sale, even if the proceeds of sale are not sufficient to satisfy the obligations secured by the lien.
- A sale may be conducted as a private sale.
- A creditor holding a valid lien on the property may "credit bid" at the sale.

Overall, the adoption of the Act will help streamline the receivership process in Michigan, providing clear guidelines for the appointment, authority, and termination of a receiver over real and personal

property. Perhaps, most notably, the Act will provide more certainty as to the validity of a receiver sale of property and should provide title companies with the assurance they need to insure such sales.

A full copy of the Act can be found [here](#).

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