

Podcast: What Does UCRERA Mean For Creditors?

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Nine states, including Florida, have passed the Uniform Commercial Real Estate Receivership Act, what's called the UCRERA. Members of our Business and Real Estate practice groups **Manuel Farach** (Fort Lauderdale) and **Marshall Grodner** (Baton Rouge) discuss what this means for creditors, especially in a time when lending and credit are so uncertain.

Manny Farach: Hi, I'm Manny Farach. I'm in the Business group of McGlinchey Stafford based in Fort Lauderdale. With me today is my partner Marshall Grodner, also in the Business group based in Baton Rouge. We're going to talk to you today about UCRERA. Marshall, how are you today?

Marshall Grodner: I'm doing fine, Manny, and I know you do some real estate litigation in Florida. I had a client call me today. The client is a commercial finance company, a lender who has a loan out to a manufacturer of widgets, distributor of widgets. Their main manufacturing plant is in Florida. The borrower is in default under their loan, and they have been very cooperative. They don't want to, neither the lender nor the borrower, want to fool with bankruptcy and all that stuff that goes on in a bankruptcy court. They can't really do a deed in lieu of foreclosure for various business reasons. So I was wondering, you know, in Florida, what can we do with regard to the real estate located in Florida?

Manny Farach: That's a perfect example of what UCRERA is meant to do. And by way of background, let me back up a step and talk about some of the things that UCRERA is clearing up in a lot of states. Historically in many states, receiverships are somewhat complicated. They should not be complicated, but they are complicated. They're infrequently used and they can get complex. And very frankly, both transactional lawyers and trial judges have issues with them, the reason being is they don't get used that often, and they're not quite sure how they work. What UCRERA does is, it creates a model act that allows people to follow the receivership process. And it's a model act that came from the National Uniform State Laws, called NCUSL in lawyer-talk. And it's used in these different states and it allows lenders across state lines to really sort of figure out what's going on with regard to law.

This is a perfect example of what could happen in situations such as this, Marshall, because UCRERA really brings in some of the bankruptcy elements, but also keeps it in state court. Bankruptcy is great sometimes for creditors, but the problem with bankruptcy is that you've got multiple parties involved in the bankruptcy, and you lose control of your case if you force somebody into bankruptcy. Why? Because you've got not only the bankruptcy judge, but the trustee, you've got the creditors, creditors' committee, and so forth and so on. UCRERA has a lot of features, which are really neat, which are a change from a lot of states' organic laws. First of all, UCRERA allows a receivership to be put into place by agreement. That means you, Marshall, as the transaction lawyer, can put language into your loan documents, and if certain triggers are met, hey, guess what? You now have a receivership once you go into state court.

Historically, that was a problem for a lot of state court judges. Why? Because they wanted to see something called waste. And what is waste? Well, waste, like beauty, is in the eyes of the beholder. You never knew exactly what one judge would say, as opposed to what another judge would say. If there is an agreement, if it's in their contract, that's perfect. That allows you to do certain things. To your point, Marshall, one of the things that UCRERA has in its provisions is the ability of a sale by the receiver. Some states, Florida included, do not allow a receiver to sell property. UCRERA, the model act, allows you to do that in certain situations. That way you can get the property sold quickly, you can cut your losses. You can get the nonperforming asset back into the stream of commerce and performing, and the liens, if any, attach to the proceeds of the sale, so you [the buyer] get a [property] free and clear [of liens]. If you're familiar with bankruptcy courts, this is just like an 11 USC 363 sale, where that's what happens. The bankruptcy court gets to sell it, and then it gets into the hands of a new creditor free and clear. And guess what? Everybody's on their way.

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Now, a couple other things that are important for your purposes, Marshall, and for our readers or listeners' purposes, UCRERA also makes the receiver a judgment lien creditor. What that does, similar again to the bankruptcy code, section 548, it gives a receiver certain powers. And to your final point, Marshall, UCRERA has powers of turnover, just like a bankruptcy court or bankruptcy trustee would have. So in other words, if you institute that foreclosure and all of a sudden your borrower, the debtor, says, "ah, you know what? I changed my mind. I'm not going to cooperate with you anymore, lender," what UCRERA can do, its provisions permit, is for the creditor to come into court and use the wider effect, the strong arm powers of the creditor of the statute, to force that debtor to turn over those assets. So in your particular situation, Marshall, UCRERA would work perfectly. And the best part is, it's not bankruptcy. So you're not going to incur that expense, and that cost, and that delay. And since it's a pretty new statute just about everywhere, that means that you get, as the creditor, to be able to perhaps mold, perhaps adjust, flex the statute's provisions in a fashion that works best for your particular situation. So, yeah, that's an example of how UCRERA can work and really assist creditors in a situation such as your client's.

Marshall Grodner: Well, Manny, it sounds like to me, I learned at least two things so far, and I'm sure I'm going to learn a lot more. Firstly, is that from now on, to the extent I have real estate collateral in Florida, I need to make sure that somewhere in my loan documents or in particular, my mortgage in Florida, there needs to be

some provisions allowing for the receivership from now on, firstly. And secondly, I've learned that we can, there are now procedures under state law that we can go through that work very similar to bankruptcy without all the issues, and in particular, the expenses, that arise in a bankruptcy case. What are the other advantages or disadvantages?

In UCRERA, it's still going to be a binary situation. And if you need that automatic stay, UCRERA even has a provision, similar to the bankruptcy code, which allows a trial judge to get an automatic stay.

Manny Farach: Well, one of the things that people don't recognize that you have an issue with in bankruptcy court, especially from the transactional side, we're accustomed as transactional lawyers, as business lawyers, to thinking in terms of twos, binary: you've got a lender and a borrower, you've got a buyer and a seller. We never think beyond that narrow scope. And what ended up happening in bankruptcy court that creates problems for us is that you go into bankruptcy court and you've got a whole universe of people. Not only do you have the buyer and the seller, the borrower and the lender, but you also have all the unsecured creditors, the secured creditors, you've got the trade creditors. It goes on and on. And that creates issues for us. In UCRERA, it's still going to be a binary situation. And if you need that automatic stay, UCRERA even has a provision, similar to the bankruptcy code, which allows a trial judge to get an automatic stay. So in a lot of ways, you're really taking the best of what the bankruptcy court can offer, and you're plugging it into a state court system, and really you're able to create some wonderful situations for you, so that you can take non-performing collateral and put it back into the stream of commerce as performing collateral.

Marshall Grodner: Well, that's great. Are there any provisions in Florida's version that are different from the national version? Just so those people who are familiar with the national version will have some idea as to Florida's peculiarities.

Manny Farach: Florida is no different than any other state in that it's got its own organic law. Of course, the United States is a compilation of 50 states with 50 different individual state legal systems, including individual organic law. Florida's reputation, and it's a well-deserved reputation, is that of a debtor's haven. Historically Florida has been a state which has protected debtors. And I'm sure, you know, I know, you know, Marshall, and I'm sure a lot of our listeners know, that Florida is one of the states in the union that has an unlimited homestead protection. In other words, your homestead protection, as long as you meet the constitutional requirements for a homestead, is unlimited in terms of value. Other states may have a \$50,000 cap or a \$100,000 cap. In Florida, it's unlimited. So if I have a judgment against Debtor A, and Debtor A is sitting in his estate on the beach worth \$50 million, and my judgment is for, say, \$10 million, under Florida's homestead law, I can't proceed against that particular debtor. So along those lines, UCRERA is limited, and the power of sale is limited in a certain way in Florida, again, to protect debtors. But in terms of residential property, we're not going to be able to help, but obviously UCRERA is a commercial receivership act. So we shouldn't have those types of homestead issues popping up on us.

Marshall Grodner: So what are the debtor's rights or obligations under Florida's law, receivership law?

Manny Farach: Well, the debtor still has the right to notice as part of, again, the debtor protection provisions or policy, I should say, of Florida law. Extensive notice provisions were built into Florida's version of UCRERA, but they aren't to the point of being onerous. They're the type of protections that you would expect, due process

protections. You can always do, if you're representing the borrower, the debtor in this particular situation, you can always come in to state court, and you can do certain things in order to protect your client. One of the things that I would tell clients to do, if they were a borrower and had a UCRERA provision, is build a right of redemption into the sale provision. We talked earlier about the fact that UCRERA has a sale provision, which allows the receiver to sell a property without a foreclosure sale. You don't have to go through the entire foreclosure process. You don't have to have a foreclosure judgment. You don't have to have a foreclosure sale. You don't have rights of appeal, all that good stuff. You don't need to do that. The receiver can sell, but you always wonder if there's any redemption issues. In the UCRERA process, I would advise, for example, borrowers/debtors, if there is going to be a receivership right of sale, to build in that right of redemption, whether 10 or 20 or 30 days, whatever they need. And chances are, under Florida's system, that courts are going to allow that. So that's certainly one of the things that you may want to do.

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Marshall Grodner: And from a creditor's standpoint, they may want to build that in as well, since there is an argument that even an equity, even a non-statutory right of redemption is there, so if you build it in to your receivership process and grant a right of redemption to the debtor for the shortest period possible, then that would also not only benefit the debtor imposing a right, non-contractual right of redemption, but also allow the creditor to say "after X days, that I did give them a right of redemption," and makes it easier to go through with the process, it sounds like to me.

Manny Farach: And as a final point, we've had some questions from title insurers as to whether this [statute clogs the equity of redemptions and whether] what they call a "constitutional right of redemption," whether that creates any problems for them. So if you build that particular provision into the process, you're going to make your title insurer happy. So that's a good conclusion for me as to what we're doing right now. So if we can probably end up right now.

Marshall Grodner: Well, I would just say Manny, I'm going to call my client back and say, call Manny Farach, and let's do a receivership in Florida.

Manny Farach: Well, yes. And I'm happy to take their call unless they need help in Louisiana. Then I'm going to tell them to call Marshall Grodner.

Marshall Grodner: Thanks, Manny.

Manny Farach: Thanks, Marshall. I hope you all had a good time listening to us. If you have any questions, please feel free to give us a shout. Thanks.

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