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FISCAL IMPACT REPORT

ORIGINAL DATE 2-13-09

SPONSOR O'Neil LAST UPDATED _____ HB 539

SHORT TITLE Uniform Assignment of Rents Act SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

House Bill 539 seeks to bring uniformity to commercial real property transactions by establishing a comprehensive statutory model for the creation, perfection, priority, and enforcement of security interests in rents arising from real property.

In New Mexico, common law of real property provides the guideline for the creation, perfection, priority and enforcement of security interests in rents. There are no detailed statutory provisions governing the secured interests in rents. This results in significant disagreements and different holdings in the courts including bankruptcy court. HB 539 attempts to codify the security interest in rents.

House Bill 539 proposes to enact a statute identical to the American Bar Association's Uniform Assignment of Rents Act.

SIGNIFICANT ISSUES

The following issues presented by the AGO are significant and are addressed by the American Bar Association Drafting Committee on Uniform Assignment of Rents Act whose report¹ is incorporated by reference to this analysis:

A security interest in rents as a distinct form of collateral

HB539 provides that the security interest in rents is separate and distinct from any security held by the assignee in the real property. HB 539 would then reverse and reject bankruptcy court decisions that hold that rents do not constitute separate collateral, but are “subsumed within the land.” HB 539 would allow for the enforcement of the collection of rents pending the bankruptcy of the mortgagor/owner.

“Perfection” of a security interest in rents

HB 539 codifies the principle that an assignment of rents is perfected and effective against third persons upon its proper recordation with the county clerk’s office. This codification rejects existing case law that suggests that a security interest in rents is inchoate or ineffective until the lender takes affirmative action after default to obtain possession of the real property, impound the rents, secure the appointment of the receiver, or some other similar legal action. Once the security interest is perfected, the lender needs to take no further action to protect the enforceability and priority of the lender’s security interest in rents. Under HB 539, the trustee/debtor-in-possession cannot avoid under 11 U.S.C. Section 544(a) a security interest that was properly perfected prior to bankruptcy.

“Absolute” assignments of rents

HB 539 establishes that an assignment of rents executed in conjunction with and to secure payment of mortgage debts creates only a security interest in rents, even if the assignment purports to constitute an absolute transfer of the rents. This is consistent with a long-established mortgage law principle that instruments purporting to make an absolute conveyance of title nevertheless constitute equitable mortgages if the surrounding circumstances demonstrate that the parties are using title to secure payment of a debt.

Appointment of Receiver

HB 539 establishes a uniform guideline to appoint receivers for mortgaged real property including a receivership clause.

Characterization of real property revenues

HB 539 expands the characterization of “rents” to include not only rents received from persons in a landlord-tenant relationship but also licensees or other persons who pay for the right to possess or occupy the real property of another.

¹ ULA Data Base in Westlaw: Uniform Assignment of Rents Act

Enforcement by notification to assignor/owner

The assignee may bring an action against assignor separately and without required to bring a foreclosure action to recover any rents not turned over.

Enforcement by notification to tenants

HB 539, like the Uniform Assignment of Rents Act, provides language to be used in a standard form.

**Mortgage creates a security interest in rents by default
Expenses of operating and preserving the real property**

HB 539 does not obligate the assignor to use the rents received to pay reasonable expenses of operating and maintaining the real property even if the obligation is expressed or implied into its tenant leases. The tenant may bring an action of receivership to enforce operating and maintenance provisions. The State of California has a comprehensive assignment of rents statute that places an affirmative obligation on the assignee to use whatever rents it collects to operate and maintain the real property. It appears that this is consistent with protecting the interest of the assignee in the real property.

Coordination with Uniform Commercial Code Article 9

HB 539 provides a set of rules to establish priority between conflicting interests.

EO/mt