

MICHIGAN UNIFORM ASSIGNMENT OF RENTS ACT

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<http://www.house.mi.gov/hfa>

House Bill 4799 as introduced
Sponsor: Rep. Graham Filler

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4800 as introduced
Sponsor: Rep. Kyra Harris Bolden

Committee: Judiciary
Complete to 5-31-21

SUMMARY:

House Bill 4799 would create the Michigan Uniform Assignment of Rents Act, and House Bill 4800 would make a related change to the Revised Judicature Act. The new act is based on a model law recommended by the national Uniform Law Commission (ULC) to standardize state laws regarding assignment of rents (see **Background**, below).

Generally speaking, an assignment of rents allows a lender to collect income from rents or leases derived from mortgaged property after the mortgage has been defaulted on. It protects the lender against situations where a borrower is continuing to collect revenue from a property but is no longer making mortgage payments. The assignment of rents is thus additional security for repayment of the mortgage debt. In general, these agreements are more common for commercial properties than residential properties. In Michigan, they may currently apply in relation to mortgages for commercial or industrial property (except apartment buildings with fewer than six apartments) under 1953 PA 210.

House Bill 4799 would create a new act to govern the creation, perfection, enforcement, notification, assignment, and priority of security interests in rents.

Assignment of rents (section 4)

Under the bill, an *assignment of rents* as to real property would be created either by an enforceable *security instrument* granting a *security interest* in rents for that property or by a document granting a security interest in rents that is signed in connection with an enforceable security instrument regarding the property. Except as described below, an assignment of rents would create a presently effective security interest in all accrued and unaccrued rents arising from the property regardless of whether the document was an absolute assignment, an absolute assignment conditioned upon default, an assignment as additional security, or any other form of assignment. The security interest in rents would be separate and distinct from any security interest held by the *assignee* in the real property. A discharge of a security instrument would discharge any assignment of rents made in connection with the discharged security instrument.

Assignment of rents would mean a transfer of an interest in *rents* in connection with an obligation secured by real property located in Michigan from which the rents arise.

Rents would mean any of the following:

- Claims arising out of a default in the payment of sums payable for the right to possess or occupy real property of another person.

- Fees, charges, accounts, or other payments for the use or occupancy of rooms and other facilities in hotels, motels, or other lodging properties.
- Any of the following:
 - Sums payable for the right to possess or occupy, or the actual possession or occupation of, real property of another person.
 - Sums payable to an **assignor** under a policy of rental interruption insurance covering real property.
 - Sums payable to terminate an agreement to possess or occupy real property of another person.
 - Sums payable to an assignor for payment or reimbursement of expenses incurred in owning, operating, and maintaining, or constructing or installing improvements on, real property.
- Any other sums payable under an agreement relating to the real property of another person that constitute rents under another Michigan law.

Security instrument would mean a document that creates or provides for a security interest in real property, including a land contract, regardless of whether it also creates or provides for a security interest in personal property.

Security interest would mean an interest in property that arises by agreement and secures performance of an obligation.

Assignee would mean a person entitled to enforce an assignment of rents. Assignee would include the purchaser at a foreclosure sale by operation of law.

Assignor would mean a person that makes an assignment of rents or the successor owner of the real property from which the rents arise.

Upon a foreclosure of the security instrument, both of the following would apply:

- The assignment of rents made in connection with the security instrument would continue to be effective to the extent of the remaining **secured obligation** and would transfer to the purchaser at the foreclosure sale regardless of whether the foreclosure notice makes reference to the assignment of rents. Any transfer of the foreclosure deed by the holder of the deed would also transfer the assignment of rents to the transferee.
- The assignment of rents made in connection with the security instrument would automatically terminate upon the earlier of the following:
 - Redemption from the foreclosure sale.
 - Expiration of the redemption period without redemption.

Secured obligation would mean an obligation whose performance is secured by an assignment of rents.

Recording, perfection, and priority of security interest in rents (section 5)

A document creating an assignment of rents could be submitted for recording to the register of deeds in the same manner as any other document evidencing a conveyance of an interest in real property. The security interest created by an assignment of rents would be fully perfected upon recording, even if a provision of the document or another Michigan law would preclude or defer enforcement of the security interest until the occurrence of a subsequent event, such as a

subsequent default of the assignor, the assignee's obtaining possession of the real property, or the appointment of a receiver.

A perfected security interest in rents would take priority over the rights of a person that does either of the following after the security interest is perfected:

- Acquires a judicial lien against the rents or the real property from which the rents arise.
- Purchases an interest in the rents or the real property from which the rents arise.

A perfected security interest in rents would have priority over the rights of a person described above with respect to future advances to the same extent as the assignee's security interest in the real property has priority over the rights of such a person with respect to future advances.

A perfected security interest in rents would take priority as to rents over the rights of a person asserting a lien under the Construction Lien Act.

Enforcement of security interest in rents (section 6)

An assignee could enforce an assignment of rents by appointment of a receiver, notification to an assignor, or notification to a tenant (as described below) or by any other method sufficient to enforce the assignment under another Michigan law.

From the first date of enforcement, the assignee or the receiver (if applicable) would be entitled to collect the following rents:

- Rents that have accrued but remain unpaid on that date.
- Rents that accrue on or after that date, as they accrue.

From the first date of enforcement, a modification of the rental agreement would not be binding on the assignee without the assignee's written consent.

Notifications (section 3)

The bill would provide that a notification or a copy of a notification under the act must be given by first-class mail or another reasonable delivery service unless the recipient has agreed to receive notification by fax, email, or another electronic means or the parties have agreed to another method. The notification address would be the most recent one provided. Notification received in another manner would still be effective.

Appointment of receiver (section 7)

An assignee could appoint a receiver for the subject property if circumstances exist that would justify the appointment of a receiver under another Michigan law or if the assignor is in default and any of the following apply:

- The assignor has agreed in a signed document to the appointment of a receiver in the event of the assignor's default.
- It appears likely that the real property and any other collateral granted by the assignor to the assignee may not be sufficient to satisfy the secured obligation.
- The assignor has failed to turn over to the assignee *proceeds* the assignee was entitled to collect under the act.
- A subordinate assignee of rents obtains the appointment of a receiver for the real property.

Proceeds would mean personal property that is received or collected on account of a tenant's obligation to pay rents.

An assignee could file a petition for the appointment of a receiver if circumstances exist that would justify the appointment of a receiver under another Michigan law or if the petition is filed in connection with any of the following actions:

- To foreclose the security instrument.
- For specific performance of the assignment.
- To seek a remedy on account of waste or threatened waste of the subject property.
- To otherwise enforce the secured obligation or the assignee's remedies arising from the assignment.

An assignee that filed a petition for the appointment of a receiver would also have to provide notification with a copy of the petition to any other person that held a recorded assignment of rents arising from the real property 10 days before the date the petition was filed.

If an assignee enforces an assignment of rents by seeking the appointment of a receiver, the date of enforcement would be the date the assignee files the petition to appoint a receiver if the court enters an order appointing a receiver for the subject real property.

From the date of appointment, a receiver would be entitled to collect rents and would have the authority provided in the order of appointment and any other Michigan law.

The following rules would govern priority among receivers:

- If more than one assignee qualifies for the appointment of a receiver, a receivership requested by an assignee entitled to priority in rents would have priority over a receivership requested by a subordinate assignee, even if a court has previously appointed a receiver for the subordinate assignee.
- If a subordinate assignee obtains the appointment of a receiver, the receiver could collect the rents and apply the proceeds in the manner specified in the order appointing the receiver until a receiver is appointed under a senior assignment of rents.

Notification to assignor (section 8)

Upon the assignor's default, or as otherwise agreed by the assignor, the assignee could give the assignor a notice demanding that the assignor pay over the proceeds of any rents that the assignee is entitled to collect as described above. The assignee would have to record the notice in the office of the register of deeds in the same manner that the security instrument is recorded. The filing of a petition for appointment of a receiver, if it is served within 10 days after it is filed, would constitute a recorded notification demanding that the assignor pay over the proceeds of any rents that the assignee is entitled to collect. The assignee would also have to give a copy of the recorded or filed notification to any other person that held a recorded assignment of rents arising from the real property 10 days before the notification date.

If an assignee enforces an assignment of rents under these provisions, the date of enforcement would be the date on which the assignor receives a notification as described above. If the notification was served within 10 days after it was recorded, the date of enforcement would be the date of recording.

An assignee's failure to give a notification as described above to any person holding a recorded assignment of rents would not affect the effectiveness of the notification as to the assignor, but the other person would be entitled to any relief permitted under Michigan law.

Notification to tenant (sections 9 and 10)

The assignee could give a tenant of the real property a notification demanding that the tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue upon the assignor's default, or as otherwise agreed by the assignor. (The bill offers a model form that would be sufficient to provide this notification, but use of the form would not be required.) The assignee would have to give a copy of the notification to the assignor and to any other person that held a recorded assignment of rents arising from the real property 10 days before the notification date. The notification would have to be signed by the assignee and would have to do all of the following:

- Identify the tenant, assignor, assignee, premises covered by the agreement between the tenant and the assignor, and assignment of rents being enforced.
- Provide the recording data for the document creating the assignment or other reasonable proof the assignment was made.
- State that the assignee has the right to collect rents in accordance with the assignment.
- Direct the tenant to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue.
- Describe the manner in which any unpaid accrued rents and unaccrued rents as they accrue affect the tenant's payment obligations, as further described below.
- Provide the name and phone number of a contact person and an address to which the tenant can direct payment of rents and any inquiry for additional information about the assignment or the assignee's right to enforce the assignment.
- Contain a statement that the tenant may consult a lawyer if the tenant has questions about its rights and obligations.
- Have attached a copy of the recorded or filed notification to the assignor as described above.

If an assignee enforces an assignment of rents, as described above, then the date of enforcement as to the tenant would be the date the tenant receives a notification substantially complying with the above notification requirements.

The bill would provide that all of the following apply following receipt of a notification substantially complying with the above notification requirements (subject to provisions described below and any other claim or defense that a tenant has under an agreement enforceable against the assignee or under another Michigan law):

- A tenant is obligated to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant has previously received a notification from another assignee of rents given by that assignee in accordance with this section and the other assignee has not canceled that notification.
- A tenant that pays rents to the assignor is not discharged from the obligation to pay rents to the assignee.
- A tenant's payment to the assignee of rents then due satisfies the tenant's obligation under the tenant's rental agreement to the extent of the payment made.

- A tenant's obligation to pay rents to the assignee continues until the tenant receives a court order directing the tenant to pay the rent in a different manner or a signed document from the assignee canceling its notification, whichever occurs first.
- A modification of the rental agreement is not binding on the assignee without the assignee's written consent.

However, a tenant that has received a notification under the above notification requirements would not be in default under its rental agreement for nonpayment of rents accruing within 30 days after the date the notification is received before the earlier of the following:

- 10 days after the date the next regularly scheduled rental payment would be due.
- 30 days after the date the tenant receives the notification.

Upon receiving a notification from another creditor that is entitled to priority as described above that the other creditor has enforced and is continuing to enforce its interest in rents, an assignee that has given a notification to a tenant as described above would have to immediately give another notification to the tenant canceling the earlier notification.

An assignee's failure to give a notification under the above notification requirements to any person holding a recorded assignment of rents would not affect the effectiveness of the notification as to the assignor and those tenants receiving the notification. However, the person entitled to the notification would be entitled to any relief permitted under Michigan law.

Application of proceeds (section 12)

Unless otherwise agreed, an assignee that collects rents under the act or collects upon a judgment in a civil action to recover proceeds as described below would have to apply the sums collected in the following order:

- To the assignee's reasonable expenses of enforcing its assignment of rents, including, to the extent provided for by agreement and not prohibited by other Michigan law, reasonable attorney fees and costs incurred by the assignee.
- To reimbursement of any expenses incurred by the assignee to protect or maintain the real property subject to the assignment.
- To payment of the secured obligation.
- To payment of any obligation secured by a subordinate security interest or other lien on the rents if, before distribution of the proceeds, the assignor and assignee receive a notification from the holder of the interest or lien demanding payment of the proceeds.
- To the assignor.

Payment of expenses (section 13)

Unless otherwise agreed by the assignee, and subject to the provision described below, an assignee that collects rents following enforcement by notification to an assignor or a tenant would not need to apply them to the payment of expenses of protecting or maintaining the subject real property.

Unless a tenant has made an enforceable agreement not to assert claims or defenses, the right of the assignee to collect rents from the tenant would be subject to the terms of the agreement between the assignor and tenant and any claim or defense arising from the assignor's nonperformance of that agreement.

However, the act states that it would not limit the standing or right of a tenant, assignor, or other affected person to request a court to appoint a receiver for the subject real property or to seek other relief on the ground that the assignee's nonpayment of expenses of protecting or maintaining the real property has caused or threatened harm to the tenant's, assignor's, or other affected person's interest in the property.

Disposition of proceeds and action to recover (section 14)

Both of the following would apply if an assignor collects rents that the assignee is entitled to collect:

- The assignor must turn over the proceeds to the assignee, less any amount representing payment of expenses authorized by the assignee.
- The assignee continues to have a security interest in the proceeds so long as they are identifiable. (Cash proceeds would be considered identifiable under the act if they are maintained in a segregated account or, if commingled with other funds, to the extent the assignee can identify them by a method of tracing, including application of equitable principles, that is permitted under Michigan law with respect to commingled funds.)

In addition to any other remedy available to the assignee under Michigan law, if an assignor fails to turn over proceeds to the assignee as described above, the assignee could recover from the assignor or a person liable under the Uniform Voidable Transactions Act, or both, in a civil action, both of the following:

- The proceeds, or an amount equal to the proceeds, that the assignor was obligated to turn over.
- Reasonable attorney fees and costs incurred by the assignee to the extent provided for by agreement and not prohibited by Michigan law.

The assignee could maintain an action described above without bringing an action to foreclose any security interest that it may have in the real property, and an action described above would not bar a foreclosure by advertisement under the Revised Judicature Act. Any sums recovered in the action would have to be applied in the manner described above.

Unless otherwise agreed, if an assignee entitled to priority enforces its interest in rents after another creditor holding a subordinate security interest in rents has enforced its interest by notification to an assignor or a tenant, the creditor holding the subordinate security interest in rents would not be obligated to turn over any proceeds that it collects in good faith (honesty in fact and the observance of reasonable commercial standards of fair dealing) before the creditor receives notification that the senior assignee has enforced its interest in rents. The creditor would have to turn over to the senior assignee any proceeds that it collects after it receives the notification.

Limitation on the effect of actions under the act (section 11)

The enforcement of an assignment of rents by one or more of the methods described above (appointment of receiver, notification to assignor, or notification to tenant), the application of proceeds by the assignee after enforcement as described above, the payment of expenses as described above, or an action to recover as described above would not do any of the following:

- Make the assignee a mortgagee in possession of the real property.
- Make the assignee an agent of the assignor.

- Constitute an election of remedies that precludes a later action to enforce the secured obligation or the security instrument.
- Make the secured obligation or the security instrument unenforceable.
- Limit any right available to the assignee with respect to the secured obligation.

Conflicting interests (section 15)

An assignee's security interest in identifiable cash proceeds would be perfected if its security interest in rents were perfected. An assignee's security interest in identifiable noncash proceeds would be perfected only if the assignee perfected that interest in accordance with Article 9 of the Uniform Commercial Code (UCC). Priority between an assignee's security interest in identifiable proceeds and a ***conflicting interest*** would be governed by the priority rules in Article 9, except that an assignee's perfected security interest in identifiable cash proceeds would be subordinate to a conflicting interest perfected by control under Article 9 and would have priority over a conflicting interest perfected other than by control.

Conflicting interest would mean an interest in proceeds held by a person other than an assignee that either is a security interest arising under Article 9 of the UCC or is another interest if Article 9 resolves the priority conflict between that person and a secured party with a conflicting security interest in the proceeds.

Scope, effect, and applicability (sections 4 and 16 to 19)

The new act would not apply to an assignment of rents regarding an interest in real property improved by one to four dwelling units unless one or more of the following apply:

- The interest is used for agricultural, commercial, industrial, or mining purposes, other than incidental uses by an assignor occupying the property as the assignor's primary residence.
- The interest secures an obligation incurred at a time when the property was used or planned for use for agricultural, commercial, industrial, or mining purposes.
- The assignor planned or is planning to develop the property into one or more dwelling units to be sold or leased in the ordinary course of the owner's business.
- The assignor is collecting or has the right to collect rents or other income from the property from a person other than an affiliate of the assignor.

The act would govern enforcement of an assignment of rents and the perfection and priority of a security interest in rents even if the document creating the assignment was signed and delivered before the act took effect. However, the act would not affect any of the following:

- An action or proceeding commenced before the effective date of the act.
- The enforceability or perfection of an assignee's security interest in rents or proceeds that was respectively enforceable or perfected immediately before the effective date of the act.
- The priority of an assignee's security interest in rents or proceeds with respect to the interest of another person if the interest of the other person was enforceable and perfected, and that priority was established, immediately before the effective date of the act.

The act would not preclude subordination by agreement as to rents or proceeds.

The act provides that it modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, except that it does not modify, limit, or supersede section 7001(c) of that act or authorize electronic delivery of any of the notices described in section 7003(b).¹

The act provides that, in applying and construing its provisions, consideration must be given to promoting uniformity of law among the states that enact it.

Repealers (section 20)

Finally, the bill would repeal two public acts that now provide for and regulate the assignment of rents:

- 1953 PA 210, which authorizes the assignment of rents to accrue from leases as additional security to mortgage obligations.
- 1925 PA 228, which authorizes and regulates the assignment of rents of property mortgaged under a trust mortgage or deed of trust.

House Bill 4800 would amend the Revised Judicature Act to provide that an action or proceeding under the Michigan Uniform Assignment of Rents Act to enforce an assignment of rents is not an action or proceeding to recover the debt in a foreclosure.

With some exceptions, the act prohibits a party from foreclosing a mortgage by advertisement if an action or proceeding has been instituted at law to recover the debt secured by the mortgage or any part of the mortgage. This is known as the “one action” rule. Under the bill, an action to enforce an assignment of rents under the new act proposed by HB 4799 would not count as an action to recover debt secured by the mortgage for purposes of this provision.

MCL 600.3204

Each bill would take effect 90 days after its enactment. The bills are tie-barred to one another, which means that neither could take effect unless both were enacted. In addition, HB 4799 is tie-barred to a bill that is identified only by its request number.

BACKGROUND:

The ULC, also known as the National Conference of Commissioners on Uniform State Laws, provides states with nonpartisan model legislation that can be adopted by any state to bring clarity and stability to critical areas of state law and to unify areas of the law among the different states enacting it.

In 2005 the ULC adopted a Uniform Assignment of Rents Act, intended to “bring consistency to commercial real property transactions by establishing a comprehensive statutory model for the creation, perfection, priority, and enforcement of a security interest in rents.”² The uniform

¹ The referenced provisions concern consumer disclosures and such notifications as those concerning the default, acceleration, repossession, foreclosure, or eviction under a credit agreement secured by, or a rental agreement for, an individual’s primary residence. The federal act is available here: <https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap96.pdf>

² <http://www.uniformlaws.org/Default.aspx>

act has been endorsed by the Council of State Governments and the American Bar Association, and to date five state have enacted the legislation.³

As described by the ULC, “when a lender makes a mortgage loan on income-producing real property, the lender requires the borrower to execute a document typically entitled an ‘Assignment of Leases and Rents.’ This assignment can... provide the mortgagee with a security interest in rents that accrue before the mortgagee can complete a foreclosure proceeding. In many states, the foreclosure process can be quite lengthy, and the mortgage lender faces a heightened risk that while a foreclosure proceeding is pending, the borrower may continue to collect rents and spend them other than to reduce the mortgage debt or paying operating expenses of the real property...The assignment typically permits the lender to take steps following the borrower’s default to collect rents and apply them to reduce the mortgage debt. These steps may include... the lender’s taking physical possession of the project (becoming a ‘mortgagee in possession’), obtaining the appointment of a receiver for the project, or notifying tenants to direct all future rent payments to the lender.”⁴

FISCAL IMPACT:

House Bill 4799 would have an indeterminate fiscal impact on local units of government. Establishing the Michigan Uniform Assignment of Rents Act is intended to protect the creditor’s interest in rent income from property in the event that the property owner defaults on the mortgage, as well as to protect the rights of tenants to notices and the effect of notices. Establishment of the act would make it clear that any mortgage, deed of trust, etc., that provides a creditor with interest in property would also provide a security interest in the rental income of that property in the event that there is a default on the debt. The extent to which the bill would affect court caseloads and, subsequently, associated administrative court costs is not known.

House Bill 4800 is a technical companion bill to House Bill 4799 and would not have a direct fiscal impact on the state or on local units of government.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

³ <https://www.uniformlaws.org/committees/community-home?communitykey=87c82f3e-a630-4d14-b6df-55afb591d496&tab=groupdetails>

⁴ <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6331cf69-54ce-0e09-922c-cc19de4a7baf&forceDialog=0>