

**2013 HOUSE JUDICIARY**

**HB 1191**

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee  
Prairie Room, State Capitol

HB 1191  
Job 17592  
DATE January 23, 2013

Conference Committee

*Cameron Hicklo*

## Explanation or reason for introduction of bill/resolution:

To provide for security interests in rents.

## Minutes:

Testimony 1

**Chairman Kim Koppelman:** Opens HB 1191.

**Rep. Andy Maragos:** Introduced HB 1191. He introduced the bill on behalf of the banking association.

**Marilyn Foss, General Counsel for the North Dakota Bankers Association:** See attached testimony #1. Tape time 1:43 to 27:57. This bill is version of the Uniform Assignments of Rents Act, I have abbreviated it. The Uniform Assignments of Rents Act takes about a page and it starts out with a section saying you can enforce an assignment or rents in any way that is now permitted by law and then it has three more sections saying you can enforce it by directly taking the rents from the borrower by the notice by the receivership. I compressed those all into one sentence that says you can enforce it by any way now permitted by law including notice to the borrower, notice to the tenant, or by the appointment of the receivership. That's the difference between this and the Uniform Assignments of Rent Act. She started to explain the bill, mentioning on line 4 had an error as it should say Security interest deleting the word rates.

**Rep. Diane Larson:** She asked the definition of perfection, perfecting something, and when you are saying rents are you talking rental property?

**Marilyn Foss:** Yes, I am talking about rental property. I'm talking about when you are taking out a loan and you're promising to repay that loan and the bank is taking collateral for that. The process of the bank taking collateral is the bank taking a security interest in the collateral. So a mortgage is the bank taking a security interest in the real property and if there is an assignment of rents and the

property produces rents whether it is producing at the time you are getting the mortgage or sometime in the future that is the bank taking a security interest in the rents. If you are borrowing money to buy a car and either the car dealer or the lender gives you a loan to borrow then you give them a security interest and they take the title to the car and have their interest in the car noticed with the Motor Vehicle Dept. that is the lender or the car dealer taking a security interest in the collateral which is the car. There is a whole chapter of the code under the Uniform Commercial Code that deals with security interest. In our Code it is Chapter 41.09. When I am talking about perfection, between the lender and a borrower there is no need for perfection of the security interest. If we are entering a contract in which you are saying I give you a security interest in a type of collateral whether real estate or personal property. I as a lender if you default on the loan or some condition or term of the loan I as the lender can enforce that security interest against you as the borrower. We have a system of public notice of security interests so getting a lenders noticed on the title of a car is how the secured perfects the interest in that car. There is a system that the Secretary of State runs for such things as a tractor, a couch what happens is the lender files a financing statement and it is public. It gives notice to other potential creditors that I am claiming a security interest in this property. If you have a dispute between two people claiming in the same collateral under our rules related to that in Chapter 41.09 between tow creditors the general system to determine who has first priority is who was first to file. This bill follows that system, the security itself is based on the borrower where the terms of default would be in the loan documents and then you get perfection of that interest by filing in the mortgage records because this is related to real property with the county recorder.

**Vice Chairman Larry Klemin:** Line 4 page 1 where you suggested taking out the word rates, I am thinking it should say security interests in rents.

**Marilyn Foss:** It very may well may.

**Vice Chairman Larry Klemin:** On the subject of perfection, perfection is simply the filing of the financing statement to give notice. That is called perfection.

**Marilyn Foss:** She continued going through the bill.

**Rep. Randy Boehning:** Does this also cover contract for deeds?

**Marilyn Foss:** I would say no. It would cover them if there is an assignment of rents in the contract for deed.

**Rep. Randy Boehning:** So you would have to write in that the contract to make that happen.

**Marilyn Foss:** Your contract for deed would have to have a provision in it that worked as an assignment of rents. That said on default of payments the contract seller was entitled to rents.

**Rep. Kathy Hogan:** Usually in the title there is some reference to Century Code and this title is not there. So I wondered where it fits.

**Marilyn Foss:** There is no reference to the Century Code because there is no reference in the Century Code. That why is says to provide for.

**Chairman Kim Koppelman:** On the lack of primacy of the lien by the Internal Revenue Service since this is a Uniform Law, I assume the federal government will not try to trump this by supremacy when the states are taking this tact, is that fair to say?

**Marilyn Foss:** The rules from the IRS claim to priority, the IRS lien is perfected automatically. They don't have to file, if there was an IRS lien in place before this I think the IRS lien would have primacy. But if the assignment of rent is filed and the IRS lien comes after that filing that would be claims between two people and we would be first in the public record.

**Vice Chairman Larry Klemin:** I think the IRS does file their liens to give notice of them and also there are some situations where the IRS can have priority.

**Marilyn Foss:** You can get notice of the IRS liens, that's when you update a title you get information about IRS liens that have been filed. It's not likely there would be a dispute unless there is a super priority section.

**Vice Chairman Larry Klemin:** To give an example in a farm loan almost all of the farm loans that I have seen had mortgage and a separate document called assignment of rents. Those are long term loans 20 or 25 years and the person farming the land decides to rent that farm land out. In the meantime they keep on paying their loan to the bank but the assignment of rents does not mean they can't rent the land out it just means that if they do rent the land and if they don't pay the bank then the bank can notify the tenant of the farmer to pay the rents to the bank instead of paying it to the farmer.

**Marilyn Foss:** It also doesn't mean you don't still own the real estate. It just means to the extent that to pay the loan you need to get the rents and if there are excess rents the borrower is entitled to those.

**Rep. Diane Larson:** An apology, I don't usually interrupt someone while they are doing their testimony but I felt I wasn't going to understand your testimony.

**Marilyn Foss:** I appreciate that we have new members in several committees and it must be very difficult.

**Chairman Kim Koppelman:** What if the renter ignores the lienholders notification to send them the rent?

**Marilyn Foss:** The renter does that at their own risk. When there is an assignment of rents in place and the lienholder notifies the tenant the renter better pay the rents owed or the renter can be held liable for it.

**Chairman Kim Koppelman:** So would mean double rent if they paid the landowner inappropriately and didn't pay the bank?

**Marilyn Foss:** That is possible although it does not occur very often. Renters are informed of that, no one is trying to trick them. They are told if you don't it to us you can be held liable for it. When the assignments of rents comes into play it is no different if a person sold the building and the tenants continued to pay to the former owner.

**Chairman Kim Koppelman:** Asked for further testimony in support.

**Jack McDonald, appearing on Independent Community Banks of North Dakota:** We do support the proposal as presented and ask for a do pass. The vast majority of times this comes into play with mortgages and when you are foreclosing on a mortgage. That's a long process so the assignment of rents is important because if you are foreclosing from a banks standpoint and there is \$10,000 per month of rents coming in you don't want the rents to go to the person you are foreclosing on. You want them to come to the lender or whoever gave the loan.

**Chairman Kim Koppelman:** I can conceive of a renter thinking it's between the bank and the landlord and I have a contract with the landlord to pay him rent.

**Jack McDonald:** There are a lot of problems doing that, the renter would risk eviction as well as legal action for back rent.

**Chairman Kim Koppelman:** Closes the hearing on HB 1191 as there was no additional testimony.

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee  
Prairie Room, State Capitol

HB 1191  
Job 17632  
DATE January 23, 2013

Conference Committee

*Carmen Hecklo*

## Explanation or reason for introduction of bill/resolution:

To provide for security interests in rents.

## Minutes:

**Chairman Kim Koppelman:** There was one item noted on line 4 by Vice Chairman Larry Klemin that rates should be replaced with in rents.

**Rep. Lois Delmore:** Moved to accept the amendment.

**Vice Chairman Larry Klemin:** Seconds.

Voice vote carries.

**Rep. Lois Delmore:** Moved a do pass on HB 1191 as amended.

**Rep. Karen Karls:** Seconds motion.

12-0-2

Rep. Bill Kretschmar will carry the bill to the floor.

13.8187.01001  
Title.02000

Adopted by the Judiciary Committee

January 24, 2013

24/13  
JLC

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1191

Page 1, line 4, replace "rates" with "in rents"

Renumber accordingly

Date: 1-23-13  
Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO.**

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Delmore Seconded By Rep. Klemin

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman			Rep. Lois Delmore		
Vice Chairman Lawrence Klemin			Rep. Ben Hanson		
Rep. Randy Boehning			Rep. Kathy Hogan		
Rep. Roger Brabandt					
Rep. Karen Karls					
Rep. William Kretschmar					
Rep. Diane Larson					
Rep. Andrew Maragos					
Rep. Gary Paur					
Rep. Vicky Steiner					
Rep. Nathan Toman					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

*Voice Vote - Carried*

Date: 1-23-13  
Roll Call Vote #: \_\_\_\_\_

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. HB - 1191

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Delmore Seconded By Rep. Karls

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman	/		Rep. Lois Delmore	/	
Vice Chairman Lawrence Klemin	/		Rep. Ben Hanson	/	
Rep. Randy Boehning	/		Rep. Kathy Hogan	/	
Rep. Roger Brabandt	/				
Rep. Karen Karls	/				
Rep. William Kretschmar	/				
Rep. Diane Larson	/				
Rep. Andrew Maragos					
Rep. Gary Paur					
Rep. Vicky Steiner	/				
Rep. Nathan Toman	/				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1191: Judiciary Committee (Rep. K. Koppelman, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1191 was placed on the Sixth order on the calendar.

Page 1, line 4, replace "rates" with "in rents"

Renumber accordingly

**2013 SENATE JUDICIARY**

**HB 1191**

# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee  
Fort Lincoln Room, State Capitol

HB1191  
3/11/2013  
Job #19689

Conference Committee

Committee Clerk Signature



**Minutes:**

*Attached testimony*

## To provide for security interests in rents

### Senator David Hogue - Chairman

Marilyn Foss - General Counsel for the ND Bankers Association - See written testimony (1)  
Senator Hogue asks Ms. Foss to provide them with a copy of the federal case she referenced. She replies yes and states it was in bankruptcy court and her legislative banking committee says this is an issue that should be addressed. Ms. Foss explains ways to enforce this. Committee discusses Article 9 and that it does not address this. Senator Sitte asks for more examples of this dealing with real estate. Senator Nelson asks about security deposits. Ms. Foss says that is not rent, they are deposits that bear interest and are owned by the tenant.

Greg Tschider - Credit Union Association of the Dakotas - In favor of the bill and says this will clarify the issues. He said leaving this as it is would mean it would have to be sued out. He explains with rent deposits they are to be put into special accounts but often times that does not happen. Someday the legislature may have to look into that. He requests a do pass.

Dana Bohn - Executive Director of the ND Farm Credit Counsel - In favor of the bill.

Opposition - none

Neutral - none

Close the hearing on 1191

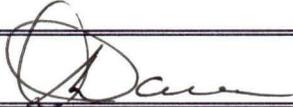
# 2013 SENATE STANDING COMMITTEE MINUTES

**Senate Judiciary Committee**  
Fort Lincoln Room, State Capitol

HB1191  
3/27/2013  
20606

Conference Committee

Committee Clerk Signature



**Minutes:**

Vote

**Senator David Hogue - Chairman**

Senator Hogue explains what the intent of this bill is and what it means to the lender. He says this bill makes it clear who has priority. He goes to explain the chain of priority.

Senator Sitte moves a do pass  
Senator Berry seconded

Vote - 7 yes, 0 no  
Motion passes  
Senator Hogue will carry

Date: 3-27-13  
 Roll Call Vote #: 1

**2013 SENATE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1191**

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By S. Sitte Seconded By S. Berry

Senators	Yes	No	Senator	Yes	No
Chairman David Hogue	X		Senator Carolyn Nelson	X	
Vice Chairman Margaret Sitte	X		Senator John Grabinger	X	
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment S. Hogue

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1191, as engrossed: Judiciary Committee (Sen. Hogue, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1191 was placed on the Fourteenth order on the calendar.**

**2013 TESTIMONY**

**HB 1191**

1-23-13  
/

TESTIMONY OF MARILYN FOSS  
(NORTH DAKOTA BANKERS ASSOCIATION)

HB 1191

Mr. Chairman, members of the committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. I am appearing today to support HB 1191 which is "a version" of the Uniform Assignment of Rents Act and which recognizes this type of contractual security interest in our statutes, provides they may be enforced in any way now permitted by law, and provides the rules that apply when there is a dispute about priority to rents and proceeds.

Security interests in rents are common in North Dakota; virtually all mortgages include an assignment of rents that gives the lender a security interest in rents and they are also given to secure repayment of commercial loans that are not secured by a mortgage. Yet, when it comes to assignments of rents our statutes are silent.

This silence creates uncertainty. The uncertainty doesn't involve the parties to the assignment of rents because the rights and obligations of the parties to the assignment are contractual. This bill doesn't change that; between the assignor and assignee of rents, the contractual terms of the assignment continue in force and may be enforced in any way that is now permissible (including requiring the borrower pay the rents to the lender, having tenants pay rent directly to the lender, or having a receiver appointed to collect and distribute rents.)

What the bill does do that is new is to explicitly address the competing security interests in rents as occur when there are either multiple assignments of rents to different lenders or, more commonly, a competing claim by the IRS under a tax lien. These situations involve questions of perfection and priority. With the bill the applicable rules for resolving such disputes are stated, rather than being left to argument: perfection of an assignment of rents is by filing the document with a county recorder and

priority is determined by the same first to file rule that applies to competing security interests under the Uniform Commercial Code and other lien statutes. The bill also states that a security interest in rents includes identifiable cash proceeds as is the case with UCC security interests which are addressed in law in N.D.C.C. Ch. 41-09.

Finally, so there are no gaps or question about arrangements already in place, the bill provides that it applies to existing assignments of rent as well as those that are entered after its effective date. I wouldn't expect this to be controversial because the rules set forth in the bill are those that most of us already assumed to be the rules.

I became aware that assumption could be subject to challenge when I read a decision in a bankruptcy case in which the IRS, claiming priority for its tax lien, challenged a bank's right to rents under an assignment of rents within a recorded mortgage that was taken in connection with a commercial loan. The federal appeals court, discussing real estate/mortgage law, sided with the bank, and in a comment suggested the decision was consistent with laws in more than 30 states, one of which was North Dakota. After a search of the code, I couldn't find any reference to assignments of rent .

This bill rectifies that situation. Please give it a strong Do Pass.

TESTIMONY OF MARILYN FOSS  
(NORTH DAKOTA BANKERS ASSOCIATION)

HB 1191

Mr. Chairman, members of the committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. I am appearing today to support HB 1191 which is "a version" of the Uniform Assignment of Rents Act. The bill recognizes an assignment of rents as a type of contractual security interest in North Dakota statutes and establishes a statutory system for public notice and perfection of the security interest by filing and lien priority under a first to file standard . These are the same things that UCC Article 9 does for security interests in other types of collateral. As you know, UCC Article 9 is codified in North Dakota as N.D.Cent. Code Chapter 41-09.

A typical assignment of rents provides is given by the owner of real property when the owner borrows money. The assignment of rents is taken to "secure" payment of the owner's debt. It typically remains inactive unless there is a default . However, if there is a default and assignment of rents gives the creditor the right to receive the rents from the real estate and to apply those rents to the repayment of the debt.

HB 1191 provides an assignment of rents may be enforced in any way now permitted by law, and sets out the rules that apply when there is a dispute about the priority of a creditor's security interest in the rents or proceeds from the rents. Security interests in rents are common in North Dakota. Virtually all mortgages include an assignment of rents that gives the lender a security interest in rents and they are also given to secure repayment of commercial loans that are not secured by a mortgage.

When it comes to assignments of rents North Dakota statutes are silent. This silence can create uncertainty about a creditor's rights when there is a default and more than one creditor claims the rents.

The uncertainty doesn't usually involve the parties to the assignment of rents because the rights and obligations of the parties to the assignment are contractual as they are with a UCC Article 9 security interest. This bill doesn't change that: between the assignor and assignee of rents, the contractual terms of the assignment continue in force and may be enforced in any way that is now permissible including requiring the borrower pay the rents to the lender, having tenants pay rent directly to the lender, or having a receiver appointed to collect and distribute rents.

What the bill does do that is new is to explicitly address the competing security interests in rents. This occurs when there are either multiple assignments of rents to different lenders or, more commonly, competing claims by a lender and by the IRS under a tax lien. These situations involve questions of perfection and priority. With the bill the applicable rules for resolving such disputes are stated, rather than being left to argument: perfection of an assignment of rents is by filing the document with a county recorder and priority is determined by the same first to file rule that applies to competing security interests under the Uniform Commercial Code and other lien statutes. The bill also states that a security interest in rents includes identifiable cash proceeds as is the case with UCC security interests which are addressed in law in N.D.C.C. Ch. 41-09.

Finally, so there are no gaps or question about arrangements already in place, the bill provides that it applies to existing assignments of rent as well as those that are entered after its effective date. I wouldn't expect this to be controversial because the rules set forth in the bill are those that most of us already assumed to be the rules.

I became aware that assumption could be subject to challenge when I read a decision in a bankruptcy case in which the IRS, claiming priority for its tax lien, challenged a bank's right to rents under an assignment of rents within a recorded mortgage that was taken in connection with a commercial loan. The federal appeals court, discussing real estate/mortgage law, sided with the bank, and in a comment suggested the decision was consistent with laws in more than 30 states, one of which was North Dakota. After a search of the code, I couldn't find any reference to assignments of rent.

This bill rectifies that situation. Please give it a strong Do Pass.