

## Ohio's receivership laws receive dramatic changes



Scott N. Opincar | Tuesday, March 24, 2015

For the first time in 60 years, the state of Ohio has new receivership statutes, effective March 23, 2015. The revised receivership rules act to clarify existing law, and substantially reform and define the powers of a receiver.

Specifically, on January 30, 2013, H.B. No. 9 was introduced to the 130th Ohio General Assembly. H.B. No. 9 proposed amendments to Sections 2333.22, 2715.21, 2735.02 and 2735.04 of the Ohio Revised Code to add to and clarify the powers of a court-appointed receiver, and provide new procedures for the sale of real property by a receiver free and clear of existing liens, claims, and interests. On December 14, 2014, the Governor of the State of Ohio signed H.B. No. 9 into law. This special report provides a summary of the most significant provisions of the new receivership laws.

### **Judge may appoint receiver and prohibit transfer of property: Sec. 2333.22**

This section is part of Chapter 2333 of the Ohio Revised Code (“ORC”) – Proceedings in Aid of Execution. The primary change is the addition of section 2333.22(C), which provides that where a judge appoints a receiver of the property of a judgment debtor in proceedings under sections 2333.09 to 2333.27, the receiver has the powers of a receiver as enumerated in section 2735.04.

### **Powers and duties of receiver: Sec. 2715.21**

This section is part of ORC Chapter 2715 – Attachment. Similar to the change in section 2333.22, the

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significant change in section 2715.21 is the addition of section 2715.21(B), which provides that a receiver appointed under 2715.20 to settle and collect accounts has the powers of a receiver as enumerated in section 2735.04.

### **Appointment of receiver: Sec. 2735.01**

ORC Section 2735.01(A) sets forth the circumstances under which a receiver can be appointed. Under new section 2735.01(A)(2), the reasons permitting a mortgagee to obtain a receiver have been increased to include where the property is in danger of diminishing in value or of being squandered. Additionally, where the mortgagee seeks to have a receiver appointed because there is a default under the mortgage, the mortgagee must demonstrate either that the property is probably less than the debt owed or that the mortgagor has consented in writing to the appointment of a receiver. This latter clause codifies case law which has upheld the enforceability of provisions in a mortgage authorizing the appointment of a receiver as a remedy upon default.

Section 2735.01(A)(3) has been added to allow the appointment of a receiver to enforce an assignment of rents and leases.

Sections 2735.01(B), (C) and (D) are new and address the receiver's role or scope of the receiver's duties in different types of cases.

- 2735.01(B) provides that where the basis for appointment is 2735.01(A)(1), (2), (3) or (5), the scope of the receiver's appointment is limited to the particular property which is the subject of the action in which the receiver is sought.
- 2735.01(C) states that if the basis for appointing a receiver is that a corporation or other legal entity has been dissolved, is insolvent, is in imminent danger of becoming insolvent, or has forfeited its corporate (or other entity) rights, as provided in section 2735.01(A)(6), then the receiver may be appointed to manage all of the affairs of the entity.
- 2735.01(D) states that if the basis for appointing a receiver is to carry a judgment into effect (see 2735.01(A)(4)) or where receivers have been appointed "by the usages of equity" (see 2735.01(A)(7)), then the court may determine that the receiver may be appointed to manage all of the affairs of the entity or only with respect to certain property.

### **Qualifications of a receiver: Sec. 2735.02**

There are two primary changes in this section. The first part of the subsection has been revised to clarify that in order to have a party, an attorney for a party, or an interested person be appointed as receiver, which is very rarely requested, all persons holding a recorded interest or lien must consent. Of greater significance is the addition of the last two sentences of this section. The penultimate sentence provides that "priority consideration" should be given to receiver candidates proposed by the party requesting a receiver. However, the last sentence provides that just because a certain receiver is requested, the court is not bound to choose that candidate.

Only time will tell how the judges will view this provision and whether it will make any difference when they decide whom to appoint as receiver.

### **Powers of receiver: Sec. 2735.04**

#### **Sec. 2735.04(A)**

This new section emphasizes the importance of the provisions in the order appointing the receiver. These

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provisions will define the scope of the receiver's powers, subject to subsequent modification as authorized by the court.

### **Sec. 2735.04(B)**

#### **Other New Powers: § 2735.04(B)**

The former text of this section empowered a receiver to “bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes.”

New section 2735.04 retains all of the items formerly enumerated on the list of acts within a receiver's authority, and adds additional powers, particularly with respect to the sale of real property and the construction of improvements thereon.

Under the new legislation, receivers have the authority to do any of the following, in addition to those already set forth in the existing law:

- Enter into contracts, including, but not limited to contracts of sale, lease, or, so long as existing lien rights will not be impacted, contracts for construction and for the completion of construction work. §2735.04(B)(4).
- Sell and make transfers of real or personal property. §2735.04(B)(5).
- Execute deeds, leases, or other documents of conveyance of real or personal property. §2735.04(B)(6).
- Open and maintain deposit accounts in the receiver's name. §2735.04(B)(7).

Receivers still retain the ability to do any other acts as the court authorizes, and the new legislation strikes the phrase “respecting the property,” so it now allows the receiver to “generally do any other acts that the court authorizes.” §2735.04(B)(8).

### **Sec. 2735.04(C)**

#### **Compensation as an Administrative Expense of the Receivership Estate: § 2735.04(C)**

The amendments provide that any funds expended by or on behalf of the receiver, including receivership fees, fees for professionals assisting the receivership, and those expended in entering into or performing contracts under proposed division (B)(4) (allowing sale, lease, and construction contracts) shall be taxed as court costs or otherwise treated as administrative expenses of the action. Under the former law, only certain fees of the receivership are expressly treated as court costs. Now the court is able to require an additional deposit to cover funds that would be expended by the receiver under a contract entered into under division (B)(4) only from the parties that requested or expressly consented to the receiver incurring those expenses.

### **Sec. 2735.04(D)**

#### **Sales by a receiver free and clear of liens.**

ORC section 2735.04(D) is entirely new and deals with receiver sales. There are many new provisions in this section, perhaps the most significant being sales “free and clear” of junior liens and other interests. The ten subsections of §2735.04(D) are summarized below:

- Subsection (1) authorizes a receiver, subject to the approval and supervision of the court, to sell property “free and clear” of liens by private sale pursuant to a written contract, by private auction, by

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public auction, or by any other method that the court determines to be reasonable under the circumstances, and will maximize the return from the property to the receivership estates, taking into account the potential cost of holding and operating the property.

- The court may require the receiver to provide evidence of the value of the property. The valuation may be provided by any evidence that the court determines is appropriate. There is no statutory requirement for an independent appraisal, but the court may require it.
- The court may determine a minimum bid for the property in a public or private auction.
- If the receiver requests authority to sell the property pursuant to a written contract, and if warranted by the circumstances, the court may require that the receiver solicit and consider other offers. If the receiver sells to another competing bidder, the original bidder, subject to court approval, may be entitled to a stalking horse break-up fee, in an amount to be determined by the court to compensate the original bidder for its participation in the sale process to the extent that such participation brought value to the receivership.

### • Subsection (2) authorizes a receiver's sale of **real** property upon:

“ (a) an application to sell (by either the receiver or first mortgage holder), including proposed sale procedures or, in the event of a known proposed buyer, the identity of the buyer and proposed sale terms;

(b) at least 10 days' prior written notice to be given in accordance with the Rules of Civil Procedure to all of the owners of the real property, all parties to the action, and all other persons with a recorded or filed lien encumbering the real property to be sold, as those persons are identified in a preliminary judicial report or a commitment for an owner's policy of title insurance previously filed with the court pursuant to section 2329.191, or, if not previously filed, in a preliminary judicial report or a commitment for an owner's policy of title insurance filed with the application of the receiver for the authority to sell the real property that otherwise complies with the requirements of section 2329.191, unless the lien or interest is barred by *lis pendens* pursuant to section 2703.26;

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“ (c) an opportunity for a hearing, unless no objections or requests for a hearing are filed or received within the period provided (at least 10 days), in which case a hearing is not required; and

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“ (d) the court issues an order of sale of the real property that sets forth the required procedure or

terms of the sale (final appealable order).

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- Subsection (3) authorizes a receiver to sell **real** property free and clear, except for the lien of the treasurer of the county in which the real property is located for real estate taxes and assessment. Upon the recording of the deed from the receiver to the purchaser, the liens on the real property are cancelled and transferred to the proceeds of the sale in the hands of the receiver with the same priority as those liens previously attached to the real property being sold.
- Subsection (4) provides that sheriff's sale requirements (ORC 2329) are not applicable.
- Subsection (5) provides that a separate confirmation order is not required in a sale to a specific buyer, if the court finally approves the sale.
- Subsection (6) requires a separate confirmation order if sale procedures are used (competitive bidding process or auction).
- Subsection (7) provides that the court's order approving the application by a receiver or first mortgage holder for authority to sell real property shall establish a reasonable time, **but not less than three days**, after the date of the order approving the specific sale or the sale process, for an owner and all other parties possessing an equity of redemption in the real property to exercise that equity of redemption. If a party fails to exercise their equity of redemption in such time period, that equity of redemption is forever barred.
- Subsection (8) provides that until the court sets the date for the termination of the equity of redemption set forth in subsection (7), any fee owner may redeem the real property from the sale by paying to the receiver by cashier's check or other form of

immediately available funds an amount equal to the greater of the following:

“ (a) the sale price at which the real property was sold, plus interest on the amount of the sale price at a rate that may be fixed by the court, from the date of the sale to the date of payment in full to the receiver;

(b) an amount equal to the total of all liens upon the real property that were to be canceled, including all principal, interest, costs, and other amounts secured by those liens through the date of payment of the full amount to the receiver.

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- Subsection (9) provides that a receiver’s deed shall be issued at the closing of the sale of the real property.
- Subsection (10) provides that the receiver shall file with the court and serve upon all parties and persons required to receive notice of the application to sell, a certificate and report of sale, in which the receiver must certify all of the following:

“ (a) that the sale was conducted in accordance with the order authorizing the sale;

(b) the date of the sale;

(c) the name of the purchaser;

(d) the purchase price;

(e) the amount of the net proceeds of the sale after payment of all expenses associated with the sale;

(f) a copy of the closing statement, if a closing statement was prepared; and

(g) any other information that the court may require.

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For more information, please contact the attorney listed below.



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Team member bio

