Jeff Grim *Legislative Service Commission*

Sub. S.B. 262*

124th General Assembly
(As Reported by S. Agriculture)

Sen. Mumper

BILL SUMMARY

Financial responsibility of licensed auctioneers

- Revises the financial responsibility requirements, beginning July 1, 2003, for persons who are licensed under the Auctioneers Law.
- Exempts certain persons who were licensed under that Law prior to that date from the new requirements.

Creation of Auction Recovery Fund

- Creates the Auction Recovery Fund to be administered by the Director of Agriculture, and, on and after July 1, 2003, requires moneys in the Fund to be used to make payments to persons who obtain final judgment in a court of competent jurisdiction against persons licensed under the Auctioneers Law who violate specified provisions of that Law.
- Revises the requirement that all fees and charges collected under the Auctioneers Law be deposited into the Auctioneers Fund to require that a portion of the license fees be deposited into the Auction Recovery Fund; provides other funding sources, including a possible assessment on licensees, for the new Fund; and requires the Director of Budget and Management to make a one-time transfer of $500,000 from the Auctioneers Fund to the Auction Recovery Fund by June 30, 2002.

---

* *This analysis was prepared before the report of the Senate Agriculture Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

Procedures for obtaining payment from Auction Recovery Fund

- Specifies that the procedures established under the bill for obtaining payment from the Fund take effect on July 1, 2003.

- Authorizes a person who obtains a final judgment in a court of competent jurisdiction against a person licensed under the Auctioneers Law, on specified grounds, to file an application in a court of common pleas for an order for a direct payment from the Auction Recovery Fund, and requires the application to include specified information.

- Requires the person filing for an application to notify the Director of Agriculture of the application, and authorizes the Director to take measures to defend the Fund in such an action.

- Specifies that if the application involves a violation of the Real Estate Brokers Law, the applicant must file for direct payment from the Real Estate Recovery Fund and exhaust all remedies involving that Fund prior to applying for payment from the Auction Recovery Fund.

- Establishes requirements that an applicant must meet in order to receive payment from the Auction Recovery Fund, and prohibits certain persons from receiving payment from the Fund.

- Establishes limits on the amount of money that may be paid from the Fund for losses involving violations committed by any one licensee.

- Requires the license of the person who is the subject of an application for payment from the Fund to be automatically suspended when payment from the Fund is made, requires the Director to provide the judgment debtor licensee an opportunity for an administrative hearing on the suspension, and prohibits the Director from reactivating the suspended license until the judgment debtor licensee satisfies specified criteria.

- Establishes other means by which the Director may recover payment from the judgment debtor licensee.

CONTENT AND OPERATION

Effective dates

Various provisions of the bill become effective at different times. The provisions discussed under "***Auction Recovery Fund***," below, become effective 90 days after the bill becomes law. The provisions requiring the Director of Budget and Management to make a one-time transfer from the Auctioneers Fund to the Auction Recovery Fund created under the bill take immediate effect (see "***Auctioneers Fund***," below) (Section 8). All other provisions of the bill become effective on July 1, 2003 (Sections 3 and 4).

Proof of financial responsibility

Under current law, each application for an auctioneer's, apprentice auctioneer's, or auction company license must be accompanied by a $10,000 bond except under specified circumstances. The Department of Agriculture is prohibited from issuing an auctioneer's, apprentice auctioneer's, or auction company license until a bond has been filed. (Sec. 4707.11.)

The bill repeals these provisions and instead requires that each application for a license issued under the Auctioneers Law be accompanied by proof of financial responsibility if applicable (see below) (secs. 4707.07(A), 4707.072(G), 4707.09(E), and 4707.11). The financial responsibility must be in the form of either an irrevocable letter of credit or a cash bond or a surety bond in the amount of $25,000. If the applicant gives a surety bond, it must be executed by a surety company authorized to do business in Ohio. A bond must be made to the Department and must be conditioned that the applicant must comply with the Auctioneers Law and rules adopted under it, including refraining from conduct described in current law that is grounds for license suspension or revocation. All bonds must be on a form approved by the Director of Agriculture. (Sec. 4707.11(A).)

The bill requires a licensee to maintain proof of financial responsibility for three years following the date of initial licensure. After the three years, a licensee who has not engaged in conduct that could cause the licensee's license to be suspended or revoked and has not otherwise violated the Auctioneers Law or rules adopted under it during that period is no longer required to maintain proof of financial responsibility. However, a licensee whose license expires without being renewed under current law or is suspended under the bill (see "***Repayment to Auction Recovery Fund***," below) must give proof of financial responsibility in order to obtain reinstatement or reactivation of the license. (Sec. 4707.11(A).)

The bill establishes two exceptions to the new financial responsibility requirements. First, a licensee whose license was issued prior to July 1, 2003, is not required to furnish that financial responsibility if the licensee's license continues to be renewed under the existing Auctioneers Law and is not suspended under that Law or the bill (see "***Repayment to Auction Recovery Fund***," below). Similarly, an apprentice auctioneer licensee whose license was issued prior to July 1, 2003, and who applies for an auctioneer's license on or after July 1, 2003, is not required to comply with the new requirements if the apprentice auctioneer's license is not suspended under the existing Auctioneers Law or the bill and, if necessary, continues to be renewed under that Law. (Sec. 4707.11(B).)

Auction Recovery Fund

Creation and purpose

The bill creates the Auction Recovery Fund, which must be administered by the Director of Agriculture. The Treasurer of State must credit all of the following to the Fund: any moneys transferred to it from the Auctioneers Fund created under current law (see below); except as otherwise provided under the bill, a portion, in an amount specified in rules adopted by the Director under the bill, of license fees collected under the Auctioneers Law (see below); any assessments levied under the bill (see below); repayments made to the Auction Recovery Fund under the bill by persons licensed under the Auctioneers Law (see below); and interest earned on the assets of the Fund. (Sec. 4707.25(A).)

Under the bill, moneys credited to the Fund must be used to make payments to persons who obtain a final judgment in accordance with the procedures established under the bill in a court of competent jurisdiction against a person licensed under the Auctioneers Law on grounds of conduct by the licensee that could cause the licensee's license to be suspended or revoked or that otherwise violates the Auctioneers Law or rules adopted under it and that is associated with an act or transaction that only a licensee lawfully may perform. The amount of the payments must be limited to any portion of the final judgment that remains unpaid. The amount of the payments also is subject to the dollar limitations established under the bill (see "***Liability of Fund***," below). (Sec. 4707.25(A).)

Director's administrative responsibilities

The bill requires the Director to adopt rules in accordance with the Administrative Procedure Act that establish the portion of license fees collected under the Auctioneers Law that are to be deposited into the new Fund rather than into the existing Auctioneers Fund (see below) (sec. 4707.19). The Director also is required to ascertain the balance of the new Fund on the first day of July each year. If the balance of the Fund is greater than $2 million, the Director may

utilize, during the fiscal year beginning on that first day of July, the portion of the Fund that is greater than $2 million to sponsor educational programs or to underwrite research that is beneficial to persons licensed under the Auctioneers Law and to the public. If the balance of the Fund is at least $4 million, the portion of license fees collected under the Auctioneers Law that otherwise would be credited to the Auction Recovery Fund under the bill must be credited to the Auctioneers Fund during the fiscal year beginning on that first day of July. (Sec. 4707.25(B).)

However, if the balance of the Auction Recovery Fund is less than $400,000, the Director must levy an assessment against each person who holds a valid license issued under the Auctioneers Law. The amount of the assessment must be determined by subtracting the balance of the Fund from $500,000 and dividing the resulting total by the number of persons recorded under current law as holding a valid license issued under the Auctioneers Law. All assessments that are collected must be credited to the Fund. (Sec. 4707.25(B).)

The bill requires the Director to collect from the Fund a service fee in an amount currently equal to 10% multiplied by the annual interest earned on the assets of the Fund to defray the expenses incurred by the Department in the administration of the Fund (sec. 4707.25(C)).

Auctioneers Fund

Under current law, all fees and charges collected by the Department under the Auctioneers Law must be paid into the state treasury to the credit of the Auctioneers Fund. As discussed above, the bill requires that a portion of the license fees collected under that Law, as established by rule, be deposited into the Auction Recovery Fund. In addition, at the end of each fiscal year, if the balance of the Auctioneers Fund is greater than $300,000, the Director of Agriculture must request the Director of Budget and Management to, and the Director of Budget and Management must, transfer 25% of the balance to the Auction Recovery Fund. (Sec. 4707.05.)

Under the bill, as soon as possible prior to June 30, 2002, the Director of Budget and Management must make a one-time cash transfer of $500,000 from the Auctioneers Fund to the Auction Recovery Fund (Sections 5, 6, and 7).

Procedures for obtaining payment from Auction Recovery Fund

Application

Under the bill, a person who obtains a final judgment in a court of competent jurisdiction against a person licensed under the Auctioneers Law, on

the grounds of conduct by the licensee that could cause the licensee's license to be suspended or revoked or that otherwise violates the Auctioneers Law or rules adopted under it and that is associated with an act or transaction that only a licensee lawfully may perform, may file a verified application in a court of common pleas for an order directing payment from the Auction Recovery Fund. The application may seek payment in an amount that is equal to the portion of the judgment that remains unpaid. (Sec. 4707.26.)

The bill requires the application to specify the nature of the act or transaction on which the underlying judgment was based, the activities of the applicant in pursuit of remedies available under the law for the collection of judgments, and the actual and direct losses sustained by the applicant. The applicant must attach to the application a copy of each pleading and order in the underlying court action. In addition, the application must include proof of the applicant's actual and direct loss in the form of a receipt received from the licensee on the day of the sale or consignment on which the underlying judgment was based. The receipt must state the item that was sold or consigned, the price of the item, the estimated value of the item, and the names of the consignee and purchaser of the item. (Sec. 4707.26.)

Whenever possible, the court must require all applicants and prospective applicants whose claims to the Fund arose from an underlying judgment against the same licensee to be joined in one action so that the rights of all applicants may be equitably adjudicated and settled (sec. 4707.26).

Director's defense of Fund

Under the bill, a person who applies to a court of common pleas for an order directing payment from the Auction Recovery Fund must file notice of the application with the Director of Agriculture. The Director may defend any such action on behalf of the Fund and must have recourse to all appropriate means of defense and review, including examination of witnesses, verification of actual and direct losses, and challenges to the underlying judgment obtained from a court of competent jurisdiction to determine whether the underlying judgment is based on activity that only a person holding a valid license issued under the Auctioneers Law is authorized to perform. The Director may move the court of common pleas at any time to dismiss the application when it appears that there are no triable issues and the application is without merit, provided that the Director must give written notice to the applicant not fewer than ten days before the motion is made. The motion may be supported by affidavit of any person having knowledge of the facts and may be made on the basis that the application, including the underlying judgment referred to in it, does not form the basis for a meritorious recovery claim. Subject to court approval, the Director may compromise a claim based on the application of the aggrieved party. The Director cannot be bound by any prior

compromise or stipulation of the licensee who is the judgment debtor. (Sec. 4707.27.)

Payment from Real Estate Recovery Fund

If a final judgment that could be the basis for an application filed for payment from the Auction Recovery Fund involves a violation of the Real Estate Brokers Law, the person who obtained the judgment must file notice with the Superintendent of Real Estate and apply for an order directing payment from the Real Estate Recovery Fund in accordance with current law governing that Fund. Before the person files an application for payment from the Auction Recovery Fund, the person first must exhaust all remedies involving the Real Estate Recovery Fund that are available. The total aggregate amount that is paid to the person from both the Real Estate Recovery Fund and the Auction Recovery Fund cannot exceed the portion of the judgment that remains unpaid and that represents the actual and direct loss sustained by the person and is subject to the dollar limitations established under the bill (see "***Liability of Fund***," below). (Sec. 4707.27.)

Payment from Auction Recovery Fund

Under the bill, after receiving an application for payment from the Auction Recovery Fund that satisfies the requirements established under the bill, a court of common pleas must issue an order directing the Director to make payment from the Fund to an applicant who satisfies the criteria established under the bill (see below). The payment must consist of an amount that is equal to the portion of the final judgment that was obtained by the applicant against a person licensed under the Auctioneers Law and that remains unpaid. The amount of the payment is subject to the dollar limitations established under the bill (see "***Liability of Fund***," below). (Sec. 4707.28(A).)

The bill requires the court to issue an order directing payment to the applicant from the Auction Recovery Fund when the applicant has shown all of the following:

(1) The applicant has obtained a judgment in a court of competent jurisdiction against a person licensed under the Auctioneers Law on grounds of conduct that could cause the person's license to be suspended or revoked or that otherwise violates the Auctioneers Law or rules adopted under it and that is associated with an act or transaction that only a licensee lawfully may perform;

(2) All appeals from the judgment have been exhausted, and the applicant has filed notice with the Director in accordance with the bill's provisions and has otherwise complied with those provisions;

(3) The applicant is not either the spouse of the licensee who is the judgment debtor or the personal representative of the spouse;

(4) The applicant has diligently pursued the applicant's remedies against all judgment debtors and all other persons who are liable to the applicant in the underlying auction transaction for which the applicant seeks recovery from the Fund;

(5) The applicant filed the application not later than six months following the termination of all proceedings, including appeals, in connection with the judgment; and

(6) If the judgment debtor either provided an irrevocable letter of credit or gave bond in accordance with the bill, the applicant first sought recovery under the irrevocable letter of credit or the bond before applying for payment from the Fund. (Sec. 4707.28(A).)

The bill prohibits all of the following from receiving payment from the Fund:

(1) A bonding company that was not a party in the underlying auction transaction;

(2) A person holding a valid license issued under either the Auctioneers Law or the Real Estate Brokers Law;

(3) A person who would be ineligible to receive payment from the Real Estate Recovery Fund; and

(4) A person who obtained a final judgment that arose from an act or transaction that only a licensed real estate broker or real estate salesperson is authorized to perform under the Real Estate Brokers Law and that did not involve a violation of the Auctioneers Law or rules adopted under it (sec. 4707.28(B)).

Under the bill, punitive damages, attorney's fees, court costs, and interest on a judgment are not recoverable from the Auction Recovery Fund (sec. 4707.28(C)).

Liability of Fund

The bill precludes the liability of the Auction Recovery Fund from exceeding $50,000 for losses involving violations committed by any one licensee, except that with respect to a licensee who provides either an irrevocable letter of credit or a bond in order to maintain proof of financial responsibility under the bill, the liability of the Fund cannot exceed $25,000 for losses involving violations

committed by the licensee. If a licensee's license is reactivated as provided under the bill (see "***Repayment to Auction Recovery Fund***," below), the liability of the Fund for the licensee must again be $50,000, or $25,000 if applicable, but only for transactions that occur subsequent to the time of reactivation. (Sec. 4707.29.)

If $50,000, or $25,000 if applicable, are insufficient to pay the valid claims of all persons who have applied for payment from the Fund with respect to losses involving violations committed by the same licensee, the money must be distributed among the persons in the ratio that their respective claims bear to the aggregate of valid claims or in another manner that the court determines to be equitable. Distribution of the money must be among the persons entitled to share in it without regard to the order of priority in which their respective judgments may have been decided or their applications for payment from the Fund may have been filed. (Sec. 4707.29.)

Repayment to Auction Recovery Fund

Under the bill, if the Director makes a payment from the Auction Recovery Fund to an aggrieved party and the license of the judgment debtor licensee has not been suspended or revoked under the existing statute that establishes grounds for license suspension or revocation, the license automatically is suspended on the date on which the payment is made. The Director must provide the judgment debtor licensee an opportunity for an administrative hearing on the suspension in accordance with the Administrative Procedure Act. (Sec. 4707.30(B).) The bill defines "aggrieved party" as a person who obtains a final judgment in a court of competent jurisdiction against a person licensed under the Auctioneers Law on grounds of conduct by the licensee that could cause the licensee's license to be suspended or revoked or that otherwise violates the Auctioneers Law or rules adopted under it and that is associated with an act or transaction that only a licensee lawfully may perform (sec. 4707.30(A)(1)). "Judgment debtor licensee" means a person licensed under the Auctioneers Law against whom an aggrieved party obtains a final judgment in a court of competent jurisdiction and whose failure to pay all or a portion of the judgment results in a payment to the aggrieved party from the Auction Recovery Fund (sec. 4707.30(A)(2)).

The bill prohibits the Director from reactivating the suspended license until the judgment debtor licensee has repaid in full, plus 8% interest annually as established in current law, the amount paid from the Fund to the aggrieved party. A discharge in bankruptcy does not relieve a judgment debtor licensee from these suspension provisions and requirements for reactivation of a license. (Sec. 4707.30(B).)

Under the bill, when, upon the order of a court of common pleas, the Director has paid from the Fund any sum to an aggrieved party, the Director must

be subrogated to all of the rights of the aggrieved party to the extent of the amount of the payment that the aggrieved party received from the Fund. The aggrieved party must assign all of the aggrieved party's right, title, and interest in the judgment to the Director to the extent of the amount of the payment. The Director must deposit into the Fund any amount and interest recovered by him on the judgment. (Sec. 4707.30(B).)

With respect to the amount of a payment that the Director has paid to an aggrieved party from the Fund and has not recovered, the bill requires the Director to have a priority lien in front of all other interested creditors against the assets of a judgment debtor licensee who files bankruptcy. The lien must be deemed to have taken effect on the date that the judgment debtor licensee entered into a contract with respect to the auction transaction on which the underlying judgment was based. (Sec. 4707.30(B).)

Disciplinary action taken under the bill against a judgment debtor licensee and the recovery of moneys from a judgment debtor licensee for deposit into the Fund do not excuse the judgment debtor licensee from any other disciplinary action to which the judgment debtor licensee may be subject under the Auctioneers Law or any other provision of the Revised Code or rules adopted under it (sec. 4707.30(B)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	04-30-02	p. 1741
Reported, S. Agriculture	---	---

s0262-rs.124/kl