



Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 9*

130th General Assembly
(As Reported by S. Civil Justice)

Reps. Stautberg, Celebrezze, Hayes, Letson, Pillich, Winburn, J. Adams, R. Adams, Antonio, Barborak, Beck, Blair, Boose, Brown, Buchy, Budish, Burkley, Butler, Carney, Damschroder, Derickson, Duffey, Foley, Green, Hackett, McClain, Milkovich, O'Brien, Patterson, Pelanda, Perales, Rogers, Romanchuk, Rosenberger, Schuring, Sears, Slaby, Slesnick, Smith, Sprague, Szollosi, Batchelder

BILL SUMMARY

- Modifies current law prohibiting any party, attorney, or person interested in an action from being appointed receiver except by consent of the parties by providing that the consent be of all of the parties to the action and all other persons holding a recorded ownership interest in or a recorded or filed lien on the property that is subject to the action.
- Modifies one of the conditions for appointing a receiver in foreclosure actions by providing that either the property is probably insufficient to discharge the mortgage debt (existing law) or the mortgagor has consented in writing to the appointment of a receiver.
- Provides that a receiver may be appointed to enforce a contractual assignment of rents and leases.
- Requires that a receiver appointed in specified types of actions be appointed only with respect to the particular property that is the subject of the action.
- Requires the powers of a receiver to be specified in the order of the court that appointed the receiver as those powers may be modified by the court or otherwise approved by the court upon application of the receiver or a party to the action.

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

- Expands the powers of receivers to include the execution of deeds, leases, or other documents of conveyance of real or personal property and to open and maintain deposit accounts in the receiver's name.
- Specifically authorizes a receiver to enter into contracts, including sale, lease, or, so long as existing lien rights will not be impacted, contracts for construction and for the completion of construction work, and requires that funds expended in entering or performing the contracts be taxed as court costs or otherwise treated as an administrative expense of the proceeding.
- Specifies that a receiver may sell and make transfers of real or personal property and prescribes the requirements for a sale of real property, including an application by the receiver or the first mortgage holder for authority to sell the property and written notice and an opportunity to be heard given to the property owners, parties to the action, and all other persons with a recorded or filed lien encumbering the real property.
- Specifies that, subject to the court's approval and supervision and the bill's requirements, a receiver may sell property free and clear of liens by private sale, by private auction, by public auction, or by any other method determined by the court to be fair to the owners and parties with an interest in the property, reasonable, and will maximize the return to the receivership estate.
- Authorizes a court to order that real property be sold free and clear of all liens, other than a lien for real estate taxes and assessments, if so requested in the receiver's application for authority to sell and upon a finding by the court after notice and an opportunity to be heard that it is in the best interest of the receivership estate that the real property be sold free and clear of those liens.
- Requires that the court order approving the receiver's or first mortgage holder's application for authority to sell real property set a reasonable time, but not less than three days, after the date of the order approving the sale or sale process for the owner and all parties possessing an equity of redemption in the property to exercise that equity or to have it forever barred.
- Until the date the court sets for the termination of a fee owner's time to redeem the real property, permits a fee owner to redeem the property from the sale by paying the receiver the greater of the sale price or an amount equal to the total of all liens that were to be canceled by virtue of the sale, including principal, interest, costs, and other amounts secured by the liens.

- Requires a receiver to execute and deliver a receiver's deed to the purchaser of the real property if the sale is conducted in accordance with the terms of the court order and, if the receiver received a specific offer for sale, to file with the court and serve upon all of the parties and persons receiving the notice of the application for authority to sell a certificate and report of sale.
- Modifies the laws pertaining to attachment proceedings and the examination of a judgment debtor in proceedings in aid of execution to provide that a receiver appointed in those proceedings, under the control of the appointing judge, may exercise the same powers specified in the bill and in existing law.
- Provides that the electric distribution utility may alter, refuse, or discontinue service if the receiver, within five days after the date of the appointment of the receiver, does not furnish adequate assurance of payment for service after that date in an amount that is agreeable to the electric distribution utility.
- Requires the receiver to make distributions from the receivership in a specified order of priority and specifies the meaning of "administrative expenses" with respect to the distributions.
- Requires an electric distribution utility to which a customer owes unpaid charges for retail electric service to continue to provide noncompetitive retail electric service to the customer under certain specified circumstances.
- Requires the Public Utilities Commission to adopt rules necessary to implement several of the bill's provisions no later than 90 days after the effective date of the bill.
- Specifies that the rules adopted by the Public Utilities Commission cannot prohibit the denial or disconnection of nonresidential service for reasons other than nonpayment for services provided prior to the date of the appointment of the receiver.
- Specifies that all leases, licenses, and assignments thereof, or any interest therein, given or made concerning lands or tenements in Ohio, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum, or either, or pertaining thereto, create an interest in real estate.
- Specifies that the record of leases, memoranda of leases, and supplements, modifications, and amendments of leases and memoranda of leases that a county recorder must keep includes a lease by which any right is granted to operate or to sink or drill wells for natural gas and petroleum or either.

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CONTENT AND OPERATION

Appointment of receiver

The bill modifies the Receivership Law by providing that a receiver may be appointed by the Supreme Court or a justice of that Court, the court of appeals or a judge of that court in the district, the court of common pleas or a judge of that court in the county, or the probate court, in causes pending in those courts respectively, in the following types of cases (modified language is italicized):¹

(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or their proceeds, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(2) In an action by a mortgagee, for the foreclosure of the mortgagee's mortgage and sale of the *mortgaged* property, when it appears that the mortgaged property is in danger of being lost, removed, materially injured, *diminished in value, or squandered*, or that the condition of the mortgage has not been performed, and *either of the following applies*: (a) the property is probably insufficient to discharge the mortgage debt, or (b) *the mortgagor has consented in writing to the appointment of a receiver*.

¹ R.C. 2735.01(A).



(3) *To enforce a contractual assignment of rents and leases;*

(4) After judgment, to carry the judgment into effect;

(5) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

(6) When a corporation, *limited liability company, partnership, limited partnership, or other entity* has been dissolved, is insolvent, is in imminent danger of insolvency, or has forfeited its corporate, *limited liability company, partnership, limited partnership, or other entity* rights;

(7) In all other cases in which receivers have been appointed by the usages of equity.

The bill requires that a receiver appointed under paragraph (1), (2), (3), or (5) above be appointed only with respect to the particular property that is the subject of the action in which the appointment of a receiver is sought. A receiver appointed under paragraph (6) may be appointed to manage all the affairs of the corporation, limited liability company, partnership, limited partnership, or other entity with respect to which the appointment of a receiver is sought. A receiver appointed under paragraph (4) or (7) above may be appointed to manage all the affairs of the corporation, limited liability company, partnership, limited partnership, or other entity, or only with respect to particular property as determined by the court.²

Current law prohibits the appointment of certain persons as a receiver. The bill modifies current law as described in this paragraph (modified language is italicized). It prohibits any party, attorney *for a party*, or person interested in an action from being appointed receiver *in the action* except by consent of *all of the parties to the action and all other persons holding a recorded ownership interest in or a recorded or filed lien on the property that is subject to the action*. No person except a resident of Ohio can be appointed or act as receiver of a (the bill deletes "railroad or other") corporation, *partnership, limited liability company, or other entity created under the laws of this state*. *In selecting a receiver, priority consideration must be afforded to any of the qualified persons nominated by the party seeking the receivership. No nomination of qualified persons for the receivership is binding upon the court.*³

² R.C. 2735.01(B), (C), and (D).

³ R.C. 2735.02.



Powers of receiver

The Receivership Law also specifies the powers of receivers. The bill requires the powers of a receiver to be set forth in the order of the court that appointed the receiver as those powers may be modified by the court or as otherwise approved by the court upon application of the receiver or a party to the action.⁴ The bill modifies the powers by providing that, under the control of the court that appointed the receiver, the receiver may do any of the following (modified language is italicized):⁵

(1) Bring and defend actions in the receiver's own name as receiver;

(2) Take and keep possession of *real or personal* property;

(3) *Collect* (instead of "receive") rents and *other obligations* (the bill removes "compound for") and compromise demands;

(4) *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;*

(5) *Sell and make transfers of real or personal* property;

(6) *Execute deeds, leases, or other documents of conveyance of real or personal* property;

(7) *Open and maintain deposit accounts in the receiver's name;*

(8) Generally do any other acts (the bill deletes "respecting the property") that the court authorizes.

Power to enter into contracts

The bill requires that any funds that are 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 paragraph (4), above, including those for the completion of construction work authorized by the court, be taxed as court costs or otherwise treated as an administrative expense of the action. The court may require an additional deposit to cover funds that would be expended by the

⁴ R.C. 2735.04(A).

⁵ R.C. 2735.04(B).



receiver under a contract entered into under paragraph (4), above, only from the parties that have requested or expressly consented to the receiver incurring those expenses.⁶

Power to sell property; manner of sale; valuation of property

The bill provides that subject to the approval and supervision of the court and the bill's requirements, a receiver may sell property free and clear of liens by private sale pursuant to a written contract between the receiver and the prospective purchaser, by private auction, by public auction, or by any other method that the court determines is fair to the owner of the property and all other parties with an interest in the property, is reasonable under the circumstances, and will maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property. Before entering an order authorizing the sale of the property by the receiver, the court may require that the receiver provide evidence of the value of the property. That valuation may be provided by any evidence that the court determines is appropriate. In a public or private auction, the court may establish a minimum bid.⁷

If the receiver requests authority to sell the property pursuant to a prospective purchase contract and if warranted by the circumstances, the court may require that the receiver solicit and consider additional offers. If the receiver ultimately sells the property to a party other than the original proposed purchaser, if approved by the court, the receiver may pay to the unsuccessful original proposed purchaser a reasonable amount of costs and expenses from the sale proceeds in an amount determined by the court to compensate that proposed purchaser for participation in the sale process to the extent that participation brought value to the receivership.⁸

Application for authority to sell real property

The bill requires that any sale of real property as described in paragraph (5), above, be made only after all of the following occur:⁹

(1) An application is made by the receiver or the first mortgage holder requesting that the receiver be granted the authority to sell the specific real property and setting forth either of the following: (a) if the receiver has not received a specific offer for sale that the receiver desires to accept, the proposed procedures for the conduct of the sale,

⁶ R.C. 2735.04(C).

⁷ R.C. 2735.04(D)(1)(a) and (b).

⁸ R.C. 2735.04(D)(1)(c).

⁹ R.C. 2735.04(D)(2).

or (b) if the receiver has received a specific offer for sale that the receiver desires to accept, the identity of the buyer and the proposed terms of the sale.

(2) At least ten days' prior written notice is 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 R.C. 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 receiver's application for authority to sell the real property that otherwise complies with the requirements of R.C. 2329.191, unless the lien or interest is barred by *lis pendens* pursuant to R.C. 2703.26.

(3) An opportunity is given for a hearing at which all of the parties and persons to whom the notice is given as described above may be heard, provided that if no such party or person objects to the proposed sale or requests a hearing within the period provided pursuant to paragraph (2), above, the court may proceed without a hearing.

(4) The court issues an order of sale of the real property that sets forth the required procedure for or the terms of the sale. The order of sale is the final appealable order with respect to the matters contained in the order.

Sale of real property free and clear of liens

The bill provides that if requested in the receiver's application for authority to sell the real property, upon a finding by the court after notice and an opportunity for a hearing as described above that it is in the best interest of the receivership estate that the real property be sold free and clear of liens, the court may order that the real property be sold free and clear of all liens other than the lien of the treasurer of the county in which the real property is located for real estate taxes and assessments. In the event of a sale free and clear of liens, upon the recording of the deed from the receiver to the purchaser, those liens must be canceled as to the real property and be 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 sold.¹⁰

Nonapplicability of R.C. Chapter 2329.

The bill provides that the sale of real property under its provisions is in lieu of a sale pursuant to R.C. Chapter 2329. (execution against property), and except as described above ("**Application for authority to sell real property**") with respect to the applicability of R.C. 2329.191 and as described below ("**Delivery of deed; receiver's**

¹⁰ R.C. 2735.04(D)(3).

certificate and report of sale") with respect to the applicability of R.C. 2329.37, the provisions of R.C. Chapter 2329. do not apply to a sale of real property under the bill's provisions.¹¹

Approval of sale

The bill provides that if the contemplated sale of real property is as described above in (b) in paragraph (1) under "**Application for authority to sell real property**," the court may finally approve the sale, and no separate confirmation order is required. If the contemplated sale of real property is as described above in (a) in paragraph (1) under "**Application for authority to sell real property**," following the sale or auction process described in the application, the receiver or first mortgage holder must seek an order confirming the sale process and approving the proposed sale.¹²

Redemption rights

The bill requires the court's order approving the receiver's or first mortgage holder's application for authority to sell real property to 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 the owner and all other parties possessing an equity of redemption in the real property to exercise their equity of redemption or to have that equity of redemption forever barred. R.C. 2329.33 (redemption by judgment debtor in execution proceedings against property) does not apply to a sale by a receiver under the bill.¹³

Until the date the court sets for the termination of the fee owner's time to redeem the real property, any fee owner of the real property proposed to be sold 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, or (b) an amount equal to the total of all liens upon the real property that were to be canceled as liens upon the real property by virtue of the sale, including all principal, interest, costs, and other amounts secured by those liens through the date of payment to the receiver. The amount determined above may include 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 the payment of the full amount to the receiver. Upon receipt of this amount, the receiver must advise the court and all of the parties to whom notice was given as described above of the receipt of that amount and must set aside the sale. The fee title to the real property must remain in the name of the

¹¹ R.C. 2735.04(D)(4).

¹² R.C. 2735.04(D)(5) and (6).

¹³ R.C. 2735.04(D)(7).



owner of the real property, and the liens upon the real property, except as described above in "**Sale of real property free and clear of liens**," must be transferred in the same order of priority to the proceeds received by the receiver from the owner of the real property.¹⁴

Delivery of deed; receiver's certificate and report of sale

If the sale of the real property by the receiver as described above is conducted in accordance with the terms of the court's order authorizing the sale, upon closing of the sale the receiver must execute and deliver a receiver's deed for the real property sold to the purchaser. The receiver's deed has the effect provided for in R.C. 2329.37 (deed is prima facie evidence of the legality and regularity of the sale).¹⁵

If the contemplated sale of the real property is as described in (b) in paragraph (1) under "**Application for authority to sell real property**," above, as soon as is reasonably possible following the delivery of the deed to the purchaser as described above, the receiver must file with the court and serve upon all of the parties and persons to whom the notice of the application for the authority to sell the real property was given a certificate and report of sale in which the receiver certifies 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.¹⁶

Proceedings in aid of execution

Under current law, in proceedings for the examination of a judgment debtor concerning the debtor's property, income, or other means of satisfying a judgment, the judge by order may appoint the sheriff of the proper county or other suitable person a receiver of the property of the judgment debtor. The judge also, by order, may forbid a transfer, or other disposition of or interference with, the property of the judgment debtor not exempt by law. The bill provides that, under the control of the judge who appointed a receiver and except as ordered by the judge as described in the preceding

¹⁴ R.C. 2735.04(D)(8).

¹⁵ R.C. 2735.04(D)(9).

¹⁶ R.C. 2735.04(D)(10).

sentence, the receiver may do any of the acts described above under "**Powers of receiver.**"¹⁷

Attachment proceedings

Continuing law provides that an attachment against the property, other than personal earnings, of a defendant may be had in a civil action for the recovery of money, at or after its commencement, upon any one of specified statutory grounds.¹⁸ On application of the plaintiff and for good cause shown, a court may appoint a receiver who must take an oath and give a bond as is provided in other cases.¹⁹ Current law requires the appointed receiver to take possession of all notes, due bills, books of account, accounts, and other evidences of debt that have been taken by the levying officer as the property of the defendant in attachment and proceed to settle and collect them. For that purpose, the receiver may commence and maintain actions in the receiver's own name as receiver but no right of defense in the action can be impaired or affected. The bill provides that, under the control of the court that appointed the receiver, the receiver may do any of the acts described above in "**Powers of receiver.**"²⁰

Electric distribution utility service if adequate assurance of payment not furnished

The bill provides that the electric distribution utility may alter, refuse, or discontinue service if the receiver, within five days after the date of the appointment of the receiver, does not furnish adequate assurance of payment for service after that date in an amount that is agreeable to the electric distribution utility.²¹ "Assurance of payment" means one or more of (1) a cash deposit, (2) a letter of credit, (3) a certificate of deposit, (4) a surety bond, (5) a prepayment of utility consumption, or (6) another form of security that is mutually agreed on between the public utility and the receiver which may include a provision for services provided by the public utility prior to the date of the appointment of the receiver.²²

¹⁷ R.C. 2333.22.

¹⁸ R.C. 2715.01(A), not in the bill.

¹⁹ R.C. 2715.20, not in the bill.

²⁰ R.C. 2715.21.

²¹ R.C. 2735.07(B).

²² R.C. 2735.07(A).

Priority of creditors in a receivership

The bill requires the receiver to make distributions from the receivership in the following order of priority:²³

(1) First, to holders of actual, necessary administrative expenses of the receivership, which must be paid in full in the ordinary course of business unless otherwise agreed to by the receiver and the provider of the necessary expenses;

(2) Second, to secured creditors that hold liens on the property subject to the receivership;

(3) Third, pro rata, to each public utility for services provided to the property subject to the receivership prior to the date of the appointment of the receiver;

(4) Fourth, unsecured claims arising against the owner of the property subject to the receivership prior to the date of the appointment of the receiver that are recognized under the law of Ohio or of the United States as having priority over other unsecured creditors;

(5) Fifth, pro rata, to all other unsecured creditors for claims arising against the owner of the property subject to the receivership prior to the date of the appointment of the receiver;

(6) Sixth, if all amounts payable under (1) to (5) have been paid in full by the receiver, any remaining property that is subject to the receivership must be returned to the person or entity that owned the property subject to the receivership.

"Administrative expenses" includes, but is not limited to, all of the following:²⁴

- The receiver's fees and expenses;
- Payment of receiver certificates;
- Expenses incurred by the receiver in operating the entity or property over which the receiver was appointed.

²³ R.C. 2735.08.

²⁴ R.C. 2735.08(A).



The expenses of operation include charges by a public utility for service after the date of the appointment of a receiver.²⁵

Provision of noncompetitive retail electric service

The bill requires an electric distribution utility to which a customer owes unpaid charges for retail electric service provided prior to the date the receiver was appointed to continue to provide noncompetitive retail electric service to the customer if both of the following apply:²⁶

(1) The customer or the property being serviced by the electric distribution utility is under the control of a receiver appointed by the court;

(2) The receiver obtains competitive retail electric service from another provider or providers of competitive retail electric service.

The bill requires the Public Utilities Commission to adopt rules necessary to implement the provisions described above and the provisions described above under "**Electric distribution utility service if adequate assurance of payment not furnished**" and "**Priority of creditors in receivership**" no later than 90 days after the effective date of the bill. The rules must not prohibit the denial or disconnection of nonresidential service for reasons other than nonpayment for services provided prior to the date of the appointment of the receiver.²⁷

A retail electric service component is a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the Public Utilities Commission. Otherwise, the service component is a noncompetitive retail electric service.²⁸

Lease of natural gas or petroleum

Existing law provides that all leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in Ohio, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, must be filed for record and recorded in such lease

²⁵ R.C. 2735.08(A).

²⁶ R.C. 4928.80(A).

²⁷ R.C. 4928.80(B).

²⁸ R.C. 4928.01(B), not in the bill.

record without delay, and cannot be removed until recorded. The bill specifies that these leases and licenses create an interest in real estate.²⁹

Under existing law, among the six separate records that a county recorder must keep are a record of leases, in which must be recorded all leases, memoranda of leases, and supplements, modifications, and amendments of leases and memoranda of leases. The bill specifies that this includes a lease by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either.³⁰

HISTORY

ACTION	DATE
Introduced	01-30-13
Reported, H. Judiciary	03-14-13
Passed House (98-0)	04-10-13
Reported, S. Civil Justice	---

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²⁹ R.C. 5301.09.

³⁰ R.C. 317.08(A)(5).

