

Legislative Analysis



RECEIVERSHIP ACT

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House Bill 5336 (proposed substitute H-2)

Sponsor: Rep. Brandt Iden

Committee: Judiciary

Complete to 2-24-20

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

SUMMARY:

House Bill 5336 would amend the Uniform Commercial Real Estate Receivership Act¹ to rename it the Receivership Act and to make several revisions throughout.

Receivership under the act

Currently, the act applies to a receivership for an interest in real property and any personal property related to or used in operating the real property. The bill would add “fixtures” to this provision. The definition of “property” under the act would be revised to include “fixtures.”

The bill would also amend the act to apply to a receivership for an interest in personal property.

(Black’s Law Dictionary defines **real property** as land and anything growing on, attached to, or erected on it, including buildings or easements, but not including anything that can be severed without injuring the land, such as **fixtures**. **Personal property** is any movable or intangible thing that is subject to ownership and not classified as real property.)

Court authority and receivership conditions

Under the act, the procedure for the selection, appointment, removal, and compensation of a receiver is as established by Michigan Supreme Court rule.

The bill would state that, *except as provided in the act*, the procedure for the selection, appointment, removal, and compensation of a receiver, *or a professional hired by a receiver*, is as established by the **court rules**.

Court rules would mean the rules adopted by the Michigan Supreme Court under section 5 of Article VI of the State Constitution of 1963.

A court may currently appoint a receiver under a variety of conditions, including, under certain circumstances, in connection with a foreclosure or other enforcement of a mortgage.

The bill would replace terms in the act related to “mortgage” with language referring to “security agreements or liens.” The definition for **security agreement** would be revised to include a mortgage.

¹ 2018 PA 16: <http://legislature.mi.gov/doc.aspx?2017-HB-4471>

Eligible receivers

Currently under the act, the court cannot appoint a person as receiver unless the person submits to the court a statement under penalty of perjury that the person is not disqualified. The act also allows a person seeking appointment of a receiver to nominate a person to serve as receiver, but stipulates that the court is not bound by the nomination.

The bill would retain current provisions that prescribe the conditions that disqualify a person from appointment as a receiver. However, the bill would eliminate the provisions described in the above paragraph and instead require a court to select a receiver in accordance with the act if the court has determined that there is good cause to appoint one. A receiver selected by the court would have to have sufficient competence, qualifications, and experience to administer the receivership estate.

The party moving for the appointment of a receiver could request, or the parties could stipulate to, the selection of a receiver. The moving party would have to describe how the nominated receiver meets the requirements of the act.

If the nonmoving party did not file an objection to the nominated receiver within 14 days after the complaint or motion was served, or if the parties stipulated to the selection, then the court would have to appoint the nominated receiver unless it determined that a different receiver should be appointed. All of the following would apply to an objection to a receiver:

- The party filing an objection to a nominated receiver would have to submit an alternative nominee and serve the objection on all parties, as required by the court rules, with a notice of hearing.
- If the court appointed a different receiver, any party could file an objection to the receiver and submit an alternative nominee within 14 days after the appointment.
- An objecting party under either situation above would have to describe how the alternative nominee met the requirements of the act.
- The court could, in its discretion, with or without motion or notice, reduce the period for objection to a receiver, but it would have to identify and show good cause for the reduction.

If the court appointed a different receiver, or if a party objected to a receiver and nominated an alternative, the court or objecting party would have to state its rationale for selecting that particular receiver after considering all of the following factors:

- The receiver's experience in the operation or liquidation of the type of assets to be administered.
- The receiver's relevant business, legal, or receivership knowledge.
- The receiver's ability to obtain the required bonding if more than a normal bond is required.
- Whether the receiver is disqualified under the act.
- Any other factors the court determines to be appropriate.

Receiver bond or alternative security

Currently under the act, if there is a claim against a receiver's bond or alternative security, it must be made within one year after the date the receiver is discharged.

The bill would shorten this time period to within 90 days after the date the receiver is discharged.

Sanction for failure to turn over receivership property

Currently under the act, the court may sanction as *civil* contempt a person's failure to turn receivership property over when required.

The bill would remove the word *civil* from the above provision, so that the court could give a civil or criminal contempt sanction.

Receiver powers and duties

The act provides the powers and duties of a receiver, which may be expanded, modified, or limited by court order. The bill would provide that they could be expanded, modified, or limited by court order upon *reasonable notice as determined by the court*.

The bill would also provide that, notwithstanding any other provision of the act, at any time, upon request of a person that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the receiver, the court must prohibit or condition the use, sale, or lease as is necessary to provide ***adequate protection*** of the value of the interest.

Adequate protection would mean one or more of the following:

- That the receiver is required to make a cash payment or periodic cash payments to a person to the extent that the use, sale, lease, or other disposition under the act, the stay under section 14 of the act, or the incurrence of debt under section 12(2)(a) of the act results in a decrease in the value of the person's interest in the property.
- That the person is provided a lien to the extent that the use, sale, lease, stay, or incurrence results in a decrease in the value of the person's interest in the property.
- Other relief that will result in the realization by the person of the indubitable equivalent of the person's interest in the property.

Owner responsibilities

The bill would add to the current list of owner duties a requirement that, except as otherwise ordered by the court for cause, within seven days after the entry of the order appointing the receiver, the owner must deliver to the receiver a list containing the names and addresses of all creditors and other known interested parties of the receivership estate.

Relief from a stay or injunction

Currently, a person whose act, action, or proceeding is stayed or enjoined under the act may apply to the court for relief from the stay or injunction for cause.

The bill would add that, for purposes of the provision above, “cause” would include the lack of adequate protection of an interest in property of the person.

Receiver may hire certain professionals

Currently under the act, the court has discretion to approve the engagement of a professional where the presence of existing relationships might be insignificant conflicts of interest, including if the professional is also the receiver. However, this only applies if the receiver is serving in the receivership as an attorney, accountant, auctioneer, or broker when authorized by law.

The bill would eliminate this provision.

Sale or transfer of receivership property

Currently, with court approval, a receiver can use and transfer receivership property other than in the ordinary course of business.

The bill would add that notice and an opportunity for a hearing would have to be given to all creditors and other known interested parties unless the court orders otherwise for cause before a receiver can transfer property.

Receiver immunity

The act currently entitles a receiver to all defenses and immunities provided under law in Michigan for an act or omission within the scope of the receiver’s appointment. However, a receiver still may be sued personally for an act or omission in administering receivership property, but only with approval of the court that appointed the receiver.

The bill would remove the last provision, specifying that a receiver can still be sued, and instead provide that leave of the appointing court would have to be obtained before any action or proceeding against a receiver or professional engaged by the receiver could be instituted.

Interim report

A receiver is currently allowed, but not required unless ordered by the court, to file an interim report. The bill would require a receiver to file a quarterly interim report unless the court ordered otherwise for cause.

Notice requirements

The bill would amend a current notice requirement by requiring the receiver to provide all creditors and any other known interested parties with notice and a copy of any order governing its appointment within seven days after the receipt by the receiver of the list containing the names and addresses of all creditors and other known interested parties of the receivership estate, as described above (under “Owner responsibilities”).

Notwithstanding this new requirement, the court could delay, limit, or eliminate the required notice upon a finding that cause exists for doing so.

The bill also would add that if the receiver concludes that receivership property is likely to be sufficient to provide a distribution to creditors other than those holding perfected lien on the property, the court would have to order that the receiver give notice to all creditors and any other known interested parties to which they need to submit claims.

Currently, if the court concludes that receivership property is likely to be insufficient to satisfy claims of each creditor holding a perfected lien on the property, the court may order both of the following:

- That the receiver need not give notice of the appointment to all of the owner's creditors, but only such creditors as the court directs.
- That unsecured creditors need not submit claims under this section.

The bill would eliminate this provision.

Fees and expenses

Currently, a court can order certain parties to pay reasonable and necessary fees and expenses of the receivership, including reasonable attorney fees and costs.

The bill would add to the list of acceptable fees any fees and expenses of professionals engaged in the process.

Effect on secured party

The act currently states that a request by a *mortgagee* for appointment of a receiver, the appointment of a receiver, or application by a *mortgagee* of receivership property or proceeds to the secured obligation, does not entail certain specified effects or consequences, such as making the mortgagee an agent of the owner, or making the secured obligation unenforceable.

The bill would amend this provision to replace *mortgagee* with ***secured party***.

Secured party would mean a person entitled to enforce a secured obligation or lien.

The bill would also add that a request by a secured party for appointment of a receiver, the appointment of a receiver, or application by a secured party of receivership property or proceeds to the secured obligation would not impose any duty on the secured party under section 9207 of the Uniform Commercial Code.

MCL 554.1011 et al.

FISCAL IMPACT:

House Bill 5336 would have an indeterminate fiscal impact on local court funding units. The fiscal impact would depend on the extent to which provisions of the bill affected caseloads and related administrative costs.

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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.