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House Bill 5336 (Substitute H-4 as passed by the House)
Sponsor: Representative Brandt Iden
House Committee: Judiciary
Senate Committee: Judiciary and Public Safety

Date Completed: 6-17-20

CONTENT

The bill would rename the "Uniform Commercial Real Estate Receivership Act" as the "Receivership Act", and would amend the Act to do the following:

- Expand the scope of the Act to apply to a receivership for an interest in personal property and fixtures.
- Delete a provision prohibiting a court from appointing a person as a receiver unless the person submits to the court a statement that he or she is not disqualified and, instead, require a court to select a receiver through a prescribed process if it determined there was good cause to appoint a receiver.
- Allow the party moving for the appointment of a receiver to request, or allow the parties to stipulate to, the selection of a receiver.
- Require the court to appoint the receiver nominated by the party or parties if the nonmoving party did not file an objection to the moving party's nominated receiver within 14 days or if the parties stipulated to the selection of the receiver, unless the court determined that a different receiver should be appointed.
- Decrease, from one year to 90 days, the time period in which a claim against a receiver's bond or alternative security would have to be made.
- Require an owner to deliver to a receiver, within seven days after the entry of an order appointing the receiver, a list containing the name and address of all creditors and other known interested parties of the receivership estate, in addition to currently prescribed duties.
- Allow a receiver to transfer receivership property with court approval and after notice and an opportunity for a hearing was given to all creditors and other known interested parties unless the court ordered otherwise for cause.
- Require a receiver to file required interim report quarterly, except as otherwise ordered by a court for cause.
- Allow a court to order payment of any fees and expenses of a professional engaged to assist the receiver in performing a duty or exercising a power.
- Specify 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 also would not impose any duty on the secured party under Section 9207 of the Uniform Commercial Code (UCC),
- Modify various terms.

Scope of the Act

Except as otherwise provided, the Act applies to a receivership for an interest in real property and any personal property related to or used in operating real property. Under the bill, the Act also would apply to a receivership for an interest in personal property and to a receivership for an interest in fixtures. (A fixture is personal property that is attached to land or a building and that is regarded as an irremovable part of the real property.)

The Act defines "property" as all of a person's right, title, and interest, both legal and equitable, in real and personal property, tangible and intangible, wherever located and however acquired. Instead, under the bill, "property" would mean all of a person's right, title, and interest, both legal and equitable, in real property, personal property, and fixtures tangible and intangible, wherever located and however acquired.

Notice & Opportunity for Hearing

Under the Act, except as otherwise provided below, a court may issue an order under the Act only after notice and opportunity for a hearing appropriate in the circumstances. The court may issue an order as follows:

- Without prior notice if the circumstances require issuance of an order before notice is given.
- After notice and without a prior hearing if the circumstances require issuance of an order before a hearing is held.
- After notice and without a hearing if no interested party timely requests a hearing.

The bill would refer to "if cause exists", instead of "the circumstances".

Power of the Court & Appointment of Receiver

The procedure for the selection, appointment, removal, and compensation of a receiver under the Act is as established by Supreme Court rules. Under the bill, the procedure for the selection, appointment, removal, and compensation of a professional engaged to assist the receiver in performing a duty or exercising a power also would be established by Supreme Court rules.

Under the Act, in connection with the foreclosure or other enforcement of a mortgage, the court may appoint a receiver for the mortgaged property under any of the following circumstances:

- Appointment is necessary to protect the property from waste, loss, transfer, dissipation, or impairment.
- The mortgagor agreed in a signed record to appointment of a receiver on default.
- The owner agreed, after default and in a signed record, to appointment of a receiver.
- The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation.
- The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect.
- The holder of a subordinate lien obtains appointment of a receiver for the property.

The bill would refer to "security agreement or lien", instead of "mortgage", and would refer to "person that granted a lien in the property", instead of "mortgagor". The bill also would refer to "secured party", instead of "mortgagee". "Secured party" would mean a person

entitled to enforce a secured obligation or lien. Additionally, the bill would delete a reference to "any other collateral".

The Act defines "rents" as all of the following:

- Sums payable for the right to possess or occupy, or for the actual possession or occupation of, real property of another person.
- Sums payable to a mortgagor under a policy of rental-interruption insurance covering real property.
- Claims arising out of a default in the payment of sums payable for the right to possess or occupy real property of another person.
- Sums payable to terminate an agreement to possess or occupy real property of another person.
- Sums payable to a mortgagor for payment or reimbursement of expenses incurred in owning, operating, and maintaining real property or constructing or installing improvements on real property.
- Other sums payable under an agreement relating to the real property of another person that constitute rents under Michigan law other than the Act.

The bill would refer to real *or personal* property.

The Act prohibits a court from appointing a person as receiver unless the person submits to the court a statement under penalty of perjury that the person is not disqualified. The bill would delete this provision. Instead, under the bill, if a court determined that there was good cause to appoint a receiver, the court would have to select the receiver as described below. A receiver selected by the court would have to have sufficient competence, qualification, 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 met the Act's requirements.

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

- The party filing the objection to a nominated receiver would have to submit an alternative nominee for appointment as receiver 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, within 14 days after the appointment, any party could file an objection to the receiver and submit an alternative nominee for appointment as receiver.
- An objecting party would have to describe how the alternative nominee met the requirements for a receiver under the Act.
- The court could, in its discretion, with or without motion or notice, order the period for objection to a receiver reduced.

If the court exercised its discretion to reduce the period for objection to a receiver, it would have to identify and show good cause for the reduction.

If a court appointed a different receiver, or if a party objected to a receiver and nominated a new receiver, 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 nominal bond were required.
- Whether the receiver was disqualified under the Act.
- Any other factors the court determined to be appropriate.

The Act allows a person seeking appointment of a receiver to nominate a person to serve as receiver, but the court is not bound by the nomination. The bill would delete this provision.

Bond or Alternative Security

Under the Act, except as otherwise provided, a receiver must post with the court a bond that meets certain requirements. A claim against a receiver's bond or alternative security must be made within one year after the date the receiver is discharged. The bill would decrease, from one year to 90 days, the time period in which a claim against a receiver's bond or alternative security would have to be made.

Receiver Power and Duties

The Act prescribes the powers and duties of a receiver, and allows the powers and duties of a receiver to be expanded, modified, or limited by court order. Under the bill, the powers and duties of a receiver could be expanded, modified, or limited by court order *on reasonable notice as determined by the court*.

Owner's Duties

An owner must do all of the following:

- Assist and cooperate with the receiver in the administration of the receivership and the discharge of the receiver's duties.
- Preserve and turn over to the receiver all receivership property in the owner's possession, custody, or control.
- Identify all records and other information relating to the receivership property, including a password, authorization, or other information needed to obtain or maintain access to or control of the receivership property, and make available to the receiver the records and information in the owner's possession, custody, or control.
- On subpoena, submit to examination under oath by the receiver concerning the acts, conduct, property, liabilities, and financial condition of the owner or any matter relating to the receivership property or the receivership.
- Perform any duty imposed by court order, the Act, or Michigan law other than the Act.

("Owner" means the person for whose property a receiver is appointed.)

Under the bill, except as otherwise ordered by the court for cause, an owner also would have to deliver to a receiver, within seven days after the entry of an order appointing the receiver, a list containing the name and address of all creditors and other known interested parties of the receivership estate.

Stay or Injunction

Except as otherwise provided or ordered by the court, an order appointing a receiver operates as a stay, applicable to all entities, of an act, action, or proceeding to do any of the following:

- Obtain possession of, exercise control over, or enforce a judgment against receivership property.
- Enforce a lien against receivership property to the extent the lien secures a claim against the owner that arose before entry of the order.

Except as otherwise provided, the court may enjoin an act, action, or proceeding against or relating to receivership property if the injunction is necessary to protect the property or facilitate administration of the receivership.

An order described above does not operate as a stay or injunction of any of the following:

- An act, action, or proceeding to foreclose or otherwise enforce a mortgage by the person seeking appointment of the receiver.
- An act, action, or proceeding to perfect, or maintain or continue the perfection of, an interest in receivership property.
- Commencement or continuation of a criminal proceeding.
- Commencement or continuation of an action or proceeding, or enforcement of a judgment other than a money judgment in an action or proceeding, by a governmental unit to enforce its police or regulatory power.

Instead of "mortgage", the bill would refer to "security agreement". The Act defines "security agreement" as an agreement that creates or provides for a lien. Under the bill, the term would include a mortgage.

Engagement of Professional

Under the Act, with court approval, a receiver may engage an attorney, accountant, appraiser, auctioneer, broker, or other professional to assist the receiver in performing a duty or exercising a power of the receiver. The receiver must disclose all of the following to the court:

- The identity and qualifications of the professional.
- The scope and nature of the proposed engagement.
- Any potential conflict of interest.
- The proposed compensation.

A person is not disqualified from engagement solely because of the person's engagement by, representation of, or other relationship with the receiver, a creditor, or a party. The Act does not prevent the receiver from serving in the receivership as an attorney, accountant, auctioneer, or broker when authorized by law. The bill would delete these provisions.

Transfer of Property Not in the Ordinary Course of Business

The Act allows a receiver to transfer, with court approval, receivership property other than in the ordinary course of business by sale, lease, license, exchange, or other disposition. Under the bill, a receiver could transfer receivership property with court approval and after notice and an opportunity for a hearing was given to all creditors and other known interested parties unless the court ordered otherwise for cause.

Defenses & Immunities

The Act specifies that a receiver is entitled to all defenses and immunities provided by Michigan law other than the Act for an act or omission within the scope of the receiver's appointment. A receiver may be sued personally for an act or omission in administering receivership property only with approval of the court that appointed the receiver. The bill would delete this provision. Under the bill, leave of the appointing court would have to be obtained before instituting any action or proceeding against a receiver or a professional engaged by the receiver.

Interim Report

Under the Act, a receiver may file or, if ordered by the court, must file an interim report that includes all of the following information.

- The activities of the receiver since appointment or a previous report.
- Receipts and disbursements, including a payment made or proposed to be made to a professional engaged by the receiver.
- Receipts and dispositions of receivership property.
- Fees and expenses of the receiver and, if not filed separately, a request for approval of payment of the fees and expenses.
- Any other information required by the court.

Instead, under the bill, except as otherwise ordered by the court for cause, a receiver would have to file quarterly interim reports that included all of the currently specified information.

Notice of Appointment

Except as otherwise provided, a receiver must give notice of appointment of the receiver to creditors of the owner by both of the following:

- Deposit for delivery through first-class mail or other commercially reasonable delivery method to the last known address of each creditor.
- Publication as directed by the court.

The bill would delete these requirements. Instead, within seven days after the receiver received the list containing the name and addresses of all creditors and other known interested parties of the receivership estate, the receiver would have to provide all creditors and other known interested parties with notice and a copy of any order governing its appointment. Notwithstanding the foregoing, the court could delay, limit, or eliminate the notice on finding that cause existed for doing so.

If the receiver concluded that the receivership property likely would be sufficient to provide a distribution to creditors other than those holding a perfected lien on the property, the court would have to order that the receiver give notice to all creditors and any other known parties that they needed to submit claims.

When notice was given, it would have to be given by both of the following:

- Deposit for delivery through first-class mail or other commercially reasonable delivery method to the last known address of each creditor.
- Publication as directed by the court.

Currently, if the court concludes that receivership property likely is to be insufficient to satisfy claims of each creditor holding a perfected lien on the property, the court may order both of the following: a) that the receiver need not give notice of the appointment to all creditors of the owner, but only such creditors as the court directs, and b) that unsecured creditors need not submit claims. The bill would delete this provision.

Fees & Expenses; Removal & Termination of Receivership

The Act allows a court to award a receiver from receivership property the reasonable and necessary fees and expenses of performing the duties of the receiver and exercising the powers of the receiver.

The court may order one or more of the following to pay the reasonable and necessary fees and expenses of the receivership, including reasonable attorney fees and costs:

- A person that requested the appointment of the receiver, if the receivership does not produce sufficient funds to pay the fees and expenses.
- A person whose conduct justified or would have justified the appointment of the receiver.

Under the bill, the court also could order either of the people specified above to pay any fees and expenses of a professional engaged to assist the receiver in performing a duty or exercising a power.

Effect of Enforcement by Mortgagee

The Act specifies 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 do any of the following:

- Make the mortgagee a mortgagee in possession of the real property.
- Make the mortgagee an agent of the owner.
- Constitute an election of remedies that precludes a later action to enforce the secured obligation.
- Make the secured obligation unenforceable.
- Limit any right available to the mortgagee with respect to the secured obligation.
- Constitute an action within the meaning of Section 3204(1)(b) of the Revised Judicature Act.

(Section 3204(1) of the Revised Judicature Act allows a party to foreclose a mortgage by advertisement if all of the circumstances listed in that section exist. Section 3204(1)(b) includes the condition that an action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage or, if an action or proceeding has been instituted, either the action or proceeding has been discontinued or an execution on a judgment rendered in the action or proceeding has been returned unsatisfied, in whole or in part. For these purposes, an action or proceeding for the appointment of a receiver is not an action or proceeding to recover a debt.)

Under the bill, 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 also would not impose any duty on the secured party under Section 9207 of the UCC, which generally prescribes rights and duties of a secured party having possession or control of collateral.

Also, the bill would refer to "secured party" instead of "mortgagee".

FISCAL IMPACT

The bill would have an indeterminate, though likely minor, fiscal impact on the State and local court systems. The bill would expand upon the 2018 codification of the appropriate procedure for the appointment and regulation of commercial receiverships. The bill would expand the statutory procedure to include noncommercial receivership matters, including those involving personal property, such as a personal vehicle. Before Public Act 16 of 2018, the appointment of receivers in commercial property disputes was governed by case law and court rules.

Testimony from the Michigan Judges Association indicated that the codification of these procedures likely has saved time and resources for courts and litigants. The bill would expand the application of these statutes to more receivership matters handled by courts, including those for personal property. This likely would standardize further the procedures by which receivers are appointed in property disputes.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.