



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2018 Midwest Regional Bankruptcy Seminar

*Consumer Session*

## **A Full Run-Down of the Shut Down: How to Close a Corporate Entity**

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CONCURRENT SESSION

2018

## CONSUMER SESSION

### A FULL RUN DOWN OF THE SHUT DOWN: HOW TO CLOSE A CORPORATE ENTITY

This panel will do a run through of closing a corporate entity, touching on the pros and cons of bankruptcy, ABC, and receivership; the tax implications of all and who pays; the new Ohio receivership law; and who you represent.

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## WHAT is a Receiver?

*Generally speaking:* **a Receiver is a disinterested person appointed by a court for the protection, maintenance and preservation of property**

Statutory in Ohio and Kentucky  
O.R.C. 2735  
KRS 425.600

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## WHO can be a Receiver?

**It varies from state to state and really depends on each state's law**

- Some states allow a corporation to be appointed, in which case, your company can be appointed as a Receiver
- Many states, however, require that an individual be appointed as a Receiver
- Some courts' local rules even require that a receiver be a resident of that county

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## The Receiver's AUTHORITY

**A RECEIVER'S POWER OF AUTHORITY COMES FROM TWO PLACES**

- The Order entered by the Court that Appoints the Receiver
- The state's law where the lawsuit is pending. Each state has its own laws that govern how a Receiver is to conduct his or her services. (O.R.C. 2735 & KRS 425.600)

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## Receivership **PROCESS**

- 1. The Filing:** A foreclosure suit is filed or is anticipated
- 2. The Invitation:** Generally the Lender in a foreclosure asks the a person or party to act as a Receiver. (This request can come before or after the foreclosure action is filed.)
- 3. The Motion:** The party seeking to have a Receiver appointed will file a request with the Court call “a motion to appoint a Receiver.” There can be agreements to appoint a Receiver or another party may vigorously oppose a Receiver’s appointment.

If the motion is granted, the Court will enter an **Order Appointing a Receiver.**



## Receivership **PROCESS**

### **Essential Provisions to the Order Appointing a Receiver**

1. Authorization for receiver to take immediate possession of the property and bank accounts, and collect rents etc. (should state exclusive control)
2. Require borrowers to turn over books, records, information.
3. A provision enjoining others from disposing of or interfering with the property



## Receivership **PROCESS**

*(continued)*

### **Essential Provisions to the Order Appointing a Receiver**

4. Authorization to employ managers, agents, employees and other professionals to assist him in his duties
5. Authorization to make payments and disbursements to preserve property (normally a threshold \$ limit where lender approval required)
6. Authority to Sell and Lease Property
  - Sell free and clear of liens.



## Receivership **PROCESS**

*(continue  
d)*

### **Essential Provisions to the Order Appointing a Receiver**

7. Receiver's fee.
8. Authorization to retain Receiver's own legal counsel at the expense of the property.
9. Expenses of Receiver must be expenses of the property. Important for lender and receiver to agree on how expenses will be handled.
10. State if a Receiver's Bond is required and amount.



## Receivership **PROCESS**

### **Before anyone can dive in and rescue a Property...**

- Many jurisdictions require the Receiver to post a bond.
- Most Courts will require that you sign a Receiver's Oath and file it with the Court.



## You've Been Appointed Receiver, **NOW WHAT?**

### **FIRST 30-90 DAYS ARE VERY INTENSE**

#### **Find the Money**

locate all bank accounts and sources of revenue  
(leases, security deposits, accounts receivables, etc.)

#### **Verify Insurance**

make sure that the property's insurance is in place  
(If it is not in place, get it)

#### **Obtain copies**

leases, loan documents and vendor contracts and give notice to tenants, lenders and vendors

#### **Possibly inventory personal property**

An inventory may be required  
(depends on the Order Appointing Receiver)

#### **Be ready to report to the Court**

Make sure you have a suitable report form for required periodic reports to the Court  
(generally monthly)



## You've Been Appointed Receiver, **NOW WHAT?**

**The Order Appointing the Receiver will give the Receiver the authority to make some decisions without Court approval**

(opening bank accounts, certain expenditures etc.)

**Other decisions may require Court approval, such as signing leases, sales contracts, or other contracts that may extend past the Receivership**

(large dollar capital improvements, etc.)

**Know the Order Appointing you as Receiver**

**Know the state's law governing Receivers**



## THINGS A RECEIVER **SHOULD** NOTE

### **UNDERSTAND THE PROPERTY'S STRUCTURE**

How it is titled, are there conditions, covenants and restrictions that you need to be aware of?

### **HAVE THE FACTS STRAIGHT**

If there is a lease, accounting or other issue, do NOT guess, the Court may ask tough questions

### **Tax Returns - Federal, State, CAT Tax – WHO IS RESPONSIBLE?**



## Appointment of Receiver

### **Receiver of Specific Property:**

- (A)(1) Fraudulent Transfer
- (A)(2) Mortgage Foreclosure
- (A)(3) Assignment of Rents and Leases
- (A)(5) Judgment Execution

### **Receiver of Business:**

- (A)(4) Post Judgment
- (A)(6) Dissolve a Legal Entity
- (A)(7) Catch All

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## Priority of funds expended by Receiver

### **§2735.04(C) PROVIDES:**

- Receiver's fees, professional fees, and expenses (including expenses for completion of construction) are taxed as costs or otherwise treated as administrative expense claims (undefined in ORC but commonly understood in bankruptcy proceedings)
- Court may require that a party that requested or expressly consented to a contract entered under (B)(4) (construction) to deposit funds to cover the Receiver's expenses

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## Sale Procedure

### §2735.04(D) PROVIDES:

(1)(a) Receiver may sell property free and clear of liens. May be sold by private sale, at public auction, at private auction or by any other method that the Court determines to be fair to the parties

(1)(b) The Court may (but is not required to) require the Receiver to provide evidence of value of the property to be sold. This provision does not require an appraisal.

(1)(c) If the Court requires the Receiver to seek other bidders, the Receiver is permitted to pay the original contracting party (now a stalking horse) an amount to compensate the stalking horse for participating in the process.

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## Sale Requirements

### §2735.04(D)(2) PROVIDES:

(a) Receiver or first mortgage holder must apply to the Court for authority to sell.

(i) If the Receiver has not received an acceptable offer, he may request approval of the procedure for conducting the sale.

(ii) If the Receiver has received an acceptable offer, he must identify the buyer and the terms of sale.

(b) Must give 10 days prior written notice to all owners, lien holders (unless barred by lis pendens), and parties to the action.

- Notice must be served in accordance with the Civil Rules

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## Sale Requirements

### **§2735.04(D)(2) PROVIDES:**

(c) Notice must give opportunity for a hearing. No hearing is required by the statute (although a Court may require a hearing), unless one of the served parties either objects or requests a hearing.

(d) The Court must enter an order of sale that sets forth the procedures and terms of the sale.

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## Sale Requirements

### **§2735.04(D)(3)(A) PROVIDES:**

Expressly authorizes a sale free and clear of liens (except for the Treasurer's lien for taxes and assessments).

### **§2735.04(D)(3)(B) PROVIDES:**

Liens attach to the proceeds of sale.

### **§2735.04(D)(4) PROVIDES:**

Makes it clear that this process is in lieu of the foreclosure sale process.

### **§2735.04(D)(5) PROVIDES:**

Allows the Court to approve and confirm a private sale pursuant to an existing written contract.

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## Sale Requirements

### §2735.04(D)(2)(A)(II) PROVIDES:

Without the need for an additional confirmation order.

### §2735.04(D)(6) PROVIDES:

Sets out the confirmation process in other cases (see § 2735.04(D)(2)(a)(i)) to ensure the Receiver followed the procedures

### §2735.04(D)(7) AND (8) PROVIDES:

Redemption rights.

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## Assignment for Benefit of Creditors

- Filed in Probate Court
- Claims Process
- Role of Assignee
- Liability

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# BANKRUPTCY

## 3 WAYS TO SELL ASSETS IN A CHAPTER 11

- Sale under § 363 of the Bankruptcy Code
- Chapter 11 Plan of reorganization
- Post confirmation liquidating trust

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## 363 SALE

### Auction Process

Stalking Horse

Sale Motion

Bidding Procedures

Break-Up Fees

Bidding Increments

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# Q&A

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Thank You!

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