

**Ohio Court of Appeals Decides Courts May Authorize  
Receiver's Sales Free and Clear of Liens**

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Receiverships have emerged as a powerful tool in Ohio for facilitating commercial loan workouts and foreclosures in state court proceedings. Particularly in the context of real estate assets, the benefits are obvious. At the very least, a court-appointed receiver can step into the shoes of the owner of the collateral and maintain it during the course of a foreclosure. On tenant-occupied properties, a receiver can collect the rents and take care of normal repairs and maintenance so the income stream and the occupation rate are preserved. This is particularly useful if your borrower has basically gone broke and all but abandoned the collateral and its tenants.

More and more, however, receivers take on roles beyond that of a simple property manager. Ohio trial courts interpret Ohio's receivership statute, Chapter 2735 of the Ohio Revised Code, as providing receivers with authority to renegotiate contracts, borrow money, and even arrange for the private sale of the property free and clear of liens. In contrast to the lengthy and expensive sheriff's sale process, no one can dispute the value created where a receiver has an opportunity to properly market a commercial property and negotiate the terms of the deal with all parties involved.

Receiver sales free and clear of liens present issues, though, since Ohio has no statutory scheme directly governing them. O.R.C. Chapter 2735 is very general on the powers of receivers and provides limited guidance. O.R.C. 2735.04 states that receivers

may “make transfers,” but does not lay out any explicit procedure for a private sale of collateral free and clear of liens. In contrast, O.R.C. Chapter 2329, which governs the Sheriff’s sale process, requires a detailed and byzantine set of procedures for a sale free and clear of liens. It strictly mandates advertisements, appraisals, notices, minimum bids, sale location, and confirmation procedures. Despite the lack of guidance offered by the receivership statute verses the detailed step-by-step process in the Sheriff’s sale statute, courts in most of Ohio have authorized sales free and clear of liens and title companies have underwritten them. Such sales have become almost commonplace.

Despite how commonplace receivers’ sales have become, the Ohio Supreme Court has never made a decision upholding receiver’s sales free and clear of liens and, until recently, only the Second District Court of Appeals had opined on their enforceability. This lack of guidance gave uncooperative borrowers and junior lienholders a basis to object to such sales, usually for the purpose of either being obstreperous or to leverage a favorable settlement out of the first mortgage holder. One such case was recently decided by the Twelfth District Court of Appeals.

In *The Park National Bank v. Cattani, Inc.*<sup>1</sup>, a junior lienholder challenged a receiver’s sale free and clear of liens, arguing that the sheriff’s sale process is the exclusive means by which foreclosed property can be conveyed free and clear of liens. In *Cattani*, The Park National Bank held a \$1 million first mortgage on a property that consisted of a gas station, convenience store, and a Wendy’s Restaurant. Lykins Oil Company held a \$35,000 second mortgage on the property. In the case, the court appointed a receiver over the property without objection from Lykins Oil. The court-

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<sup>1</sup> Warren County Court of Common Pleas Case No. 2008 CV 72740, 12<sup>th</sup> District Court of Appeals Case No. CA2009-09-128, 2010-Ohio-\_\_\_\_\_.

appointed receiver overcame a number of challenges to the property which allowed him to enter into a Sale Contract for \$850,000 including, but not limited to, liquor permits that were not renewed due to non-payment of sales tax, BUSTR compliance, a shut off notice from Duke, delinquent real estate taxes, the need to renegotiate several lease terms with the Wendy's franchise and Wendy's claims that the landlord was in default under the lease. The trial court approved the receiver's sale over Lykins Oil's objection, and Lykins Oil appealed.

Lykins Oil's sole argument on appeal was essentially that the court does not have authority to authorize the receiver to sell the property free and clear of liens; rather, the property must go through the sheriff's sale process for Lykins Oil's mortgage to be extinguished. The Court rejected that argument, finding a trial court has authority to order a sale free and clear of liens under O.R.C. § 2735.04, which states that a receiver may "...make transfers, and generally do such other acts respecting the property as the court authorizes." The Court found that a receiver is 1) "appointed for the benefit of all creditors of the property" and 2) "an officer of the Court and at all times subject to its order and direction." Further that the "primary purpose of a receiver is to carry out the orders of the respective appointing court, for the appointing court defines the powers of a receiver and, therefore, controls his actions."<sup>2</sup> The Court noted that the Ohio Supreme Court has interpreted O.R.C. § 2735.04 "as enabling the trial court to exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate."<sup>3</sup> And, "Absent a showing that the trial court has abused that discretion, a reviewing court will

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<sup>2</sup> Id. At 3, citing *Natl. City Bank v. Semco, Inc.*, 183 Ohio App.3d 229,2009-Ohio-3319.

<sup>3</sup> *State ex rel. Celebreeze v. Gibbs* (1991) 60 Ohio St.3d 69, 74.

not disturb the trial court's judgment."<sup>4</sup> Simply, a trial court may authorize a receiver to sell a property free and clear of liens under O.R.C. § 2735.04, and that decision will be upheld absent an abuse of discretion. In finding no abuse of discretion by the trial court the Court noted that "Despite the nearly insurmountable obstacles, receiver, while acting for the benefit of all creditors of the property subject to the receivership, was able to find a buyer willing to pay \$850,000 for the troubled property." Further, contrary to Lykins Oil's position, sheriff's sales are not the exclusive means by which to sell a property free and clear of liens in Ohio.

The Court noted that its decision is in line with many court decisions outside of Ohio and scholarly commentary on the subject. Even the U.S. Supreme Court has stated that "the removal of alleged liens or incumbrances upon property, the closing up of affairs of insolvent corporations, and the administration and distribution of trust funds are subjects over which courts of equity have general jurisdiction."<sup>5</sup> Also, as previously stated, such sales are commonplace in Ohio and have been very successful in retaining value during a workout or commercial foreclosure. In this instance, the Court ratified a legal process that has clearly been working.

Future appellate courts will likely have to work out the details of a trial court's authority under O.R.C. § 2735.04. For instance, there is a question of what circumstances constitute an abuse of discretion and there are also due process considerations that trial courts must respect when authorizing a receiver's sale. However, the Twelfth District Court of Appeals has settled the question of whether a trial court has authority to authorize a receiver to sell property free and clear of liens without a sheriff's

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<sup>4</sup> *Gibbs*, 60 Ohio St.3d at 74.

<sup>5</sup> *Mellen v. Moline Malleable Iron Works* (1889), 131 U.S. 352, 367.

sale. With the Court's decision, a powerful tool for facilitating commercial loan workouts and foreclosures in Ohio remains in place.