



AMERICAN
BANKRUPTCY
INSTITUTE

Midwest Regional Bankruptcy Seminar

Business Session

Have It Your Way: Choosing from Among Chapter 11, ABCs and Receiverships

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*Assignment for the Benefit of Creditors,
Receiverships Subchapter V, and Chapter 11*

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Assignment for the Benefit of Creditors and Receiverships

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313)



- The Layout of Ohio's Assignment for the Benefit of Creditors statute is separated into four subsections: (1) General Provisions; Trustee (R.C. 1313.01 to R.C. 1313.20); (2) Powers and Duties of Trustee and Court (R.C. 1313.21 to R.C. 1313.38); Claims (R.C. 1313.39 to R.C. 1313.44); and Miscellaneous Provisions (R.C. 1313.45 to R.C. 1313.59).
- Layout for the General Provisions subsection:
 - 1313.01 - Assignee's Bond;
 - 1313.02 – Effective Time of Assignment;
 - 1313.03 – Appointment of a Trustee;
 - 1313.04 – Resignation, Removal or Death;
 - 1313.05 – Election of Trustee by Creditors;
 - 1313.06 – Proceedings;
 - 1313.07 – Removal of Assignee or Trustee;
 - 1313.08 – Application for Release by Surety; Hearing;
 - 1313.09 – Application by Trustee for Release of Surety; Hearing;
 - 1313.10 – Removal for Failure to Give New Bond;
 - 1313.11 – Trustee to Give Bond;
 - 1313.12 – Settlement on Resignation, Removal, or Death;
 - 1313.13 – Appointment and Qualification to Operate as a Conveyance;
 - 1313.14 – Notice of Appointment;
 - 1313.15 - Appointment of Appraisers;
 - 1313.16 – Real Property Without the State;
 - 1313.17 – Exempt Property Excepted from Assignment;
 - 1313.18 – Setting off of Exempt Property;
 - 1313.19 – Orders to Prevent Fraudulent Transfer;
 - 1313.20 – Examination of Assignor

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



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- Layout for the Trustee subsection:
 - 1313.21 – Duties of Assignee or Trustee of Insolvent Debtor;
 - 1313.22 – Sale of Real Property;
 - 1313.23 – Sale of Personal Property;
 - 1313.24 – Court May Order Private Sale of Property;
 - 1313.25 – Property to be Sold at Auction if Not Disposed of Privately;
 - 1313.26 – Compromise or Sale of Claims;
 - 1313.27 – Return and Confirmation of Sales;
 - 1313.28 – Sale of Notes;
 - 1313.29 – Dower Right of Spouse;
 - 1313.30 – Court May Order Sale of Mortgaged Real Property;
 - 1313.31 – Court May Order Business of Assignor Carried on;
 - 1313.32 – Payment of Liens;
 - 1313.33 – Questions of Title; Sale of Premises;
 - 1313.34 – Disposition of Proceeds of Sale;
 - 1313.35 – Application of Sections
 - 1313.36 – Exemption Not Impaired;
 - 1313.37 – Jurisdiction of Court in Action to Foreclose Mortgage or Quiet Title;
 - 1313.38 – Petition to Have Land Laid Out into Lots

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



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- Layout for the Claims subsection:
 - 1313.39 – Presentation of Claims;
 - 1313.40 – Report of Claims;
 - 1313.41 – Requisition to Have Claim Disallowed;
 - 1313.42 – Affidavit to be Filed with Claim;
 - 1313.43 – Preferred Claims;
 - 1313.44 – Liens and Securities

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



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- Layout for the Miscellaneous Provision subsection:
 - 1313.45 – Reports and Settlements;
 - 1313.46 – Notice of Filing Accounts;
 - 1313.47 – Examination of Accounts;
 - 1313.48 – Dividends;
 - 1313.49 – Dividends Reserved;
 - 1313.50 – Commissions of Assignees;
 - 1313.51 – Further Allowances; Counsel Fees;
 - 1313.52 – Fees of Probate Judge;
 - 1313.56 – Appointment of a Receiver;
 - 1313.57 – Knowledge of Fraudulent Intent Material; Mortgage in Good Faith;
 - 1313.58 – Creditor or Assignee to Bring Suit;
 - 1313.59 – Creditor May Bring Suit

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



- Powers and Duties of the assignee:
 - “An assignee or trustee for the benefit of creditors shall convert the assets received . . . into money, and shall sell the real and personal property assigned, including stocks and such bonds, notes, and other claims as are not due and which probably cannot be collected within a reasonable time, at public auction, either for cash or upon such other terms as the probate court orders.” (R.C. 1313.21);
- The powers and duties of an assignee include:
 - Initiating an action in court to recover possession of improperly transferred property, or bringing suit against a party the assignor fraudulently conveyed property to in order to pay the assignor’s debts (R.C. 1313.58);
 - Taking possession of all of the assignor’s property;
 - Selling the assets at a public auction or private sale (R.C. 1313.24; R.C. 1313.25);
 - With the approval of the probate court, compromise or sell any claim or demand, due or owing to the assignor, which is difficult to collect, or to complete and enforce all sales of real property. (R.C. 1313.25).
 - If the court decides it would be advantageous to creditors, the probate court may order that the assignee carry on the assignor’s business. (R.C. 1313.31)
 - Such an order requires written application of three-fourths of the number and amount of creditors. (R.C. 1313.31)

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



- The powers and duties of an assignee also include:
 - “Each assignee or trustee . . . appointed on the failure of the assignee of a debtor to qualify, within thirty days after giving bond, must give notice of his appointment in some newspaper of general circulation in the county, for three consecutive weeks.” (RCR 1313.14);
 - Convert the assets received into money (RCR 1313.21);
 - Distribute the assets once sold to creditors;
 - “Taxes of every description assessed against the assignor upon personal property held by him before his assignment for the benefit of creditors must be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor.” (RCR 1313.43).
- Concerning Claims:
 - A creditor must present their claims within six months after publication of notice of appointment by the assignee. If rejected, the creditor may contest the assignee’s decision – but must be made within 30 days of rejection. (RCR 1313.39);
 - If the assignee does not disallow a claim, the assignor or creditors can make a filing with the probate court to disallow it. The assignor or creditor must enter into a bond with the assignee to cover all costs of contesting a creditor’s claim. Assignee must provide notice to the creditor whose claim is at issue. (RCR 1313.41).
- Due to the lack of use of assignments for the benefit of creditors, case law in Ohio is sparse.

Assignment for the Benefit of Creditors (Ohio Revised Code Chapter 1313), *cont.*



- Benefits of an Assignment for the Benefit of Creditors (“ABC”):
 - Can move fast (even prepackaged);
 - Can select assignee with expertise in the area of the business;
 - May operate the business with court approval and if in the best interests of creditors;
 - Appears to have a close-knit group of professionals which contains the potential for easier and quicker deals.
- Downsides to ABC:
 - There is no automatic stay;
 - Needs something of value to liquidate, so a no-asset case may be unworkable;
 - ABC’s in Ohio are sparsely used. Accordingly, there is very little case law interpreting it, which means there is more grey area and less predictability.

Receivership (Ohio Revised Code Chapter 2735)



- General receiverships are covered by R.C. 2735.01 to R.C. 2735.06.
- A general receiver may be appointed by the supreme court, the court of appeals, the court of common pleas, or the probate court. (R.C. 2735.01)
 - A receiver may be appointed in the following cases:
 - In an action by a creditor to vacate fraudulent purchase of property;
 - In a foreclosure action by the mortgagee when the property is either in danger or the mortgage “has not been performed,” and either (1) the property is insufficient to discharge the debt; or (2) the mortgagor has consented in writing;
 - To enforce a contractual assignment of rents and leases;
 - After judgment, to carry the judgment into effect or to dispose of or preserve property in accordance with the judgment or pending appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;
 - When a company is dissolved and is in danger of insolvency, or has forfeited its entity rights;
 - In all other cases when a receiver has been appointed by equity.
 - A receiver needs (1) the consent of all of the parties to the action; and (2) all other persons holding a recorded ownership interest in or a recorded or filed lien on the property subject to the action. If dealing with an Ohio entity, a receiver must be a resident of Ohio.

Receivership (Ohio Revised Code Chapter 2735), *cont.*



- The powers of a receiver include the ability to:
 - Bring and defend actions in the receiver's own name as receiver;
 - Take and keep possession of real or personal property;
 - Collect rents and other obligations and compromise demands;
 - Enter into contracts, including, but not limited to contracts of sale, lease, or, so long existing lien rights will not be impacted, contracts for construction and for the completion of the construction work;
 - Sell and make transfers of real or personal property;
 - Execute deeds, leases, or other documents of conveyance of real or personal property;
 - Open and maintain deposit accounts in the receiver's name;
 - Or do any other acts the court authorizes (R.C. 2735.04).
- A receiver can sell encumbered property free and clear of all liens through a private sale, private auction, public auction, or any other method the court determines, if such method is reasonable, fair to the owner and all other parties, and will maximize return. (R.C. 2735.04)
- The court's order approving the application to sale a property must set a reasonable time after the sale for an entity possessing an equity of redemption in real property to exercise the redemption, or have the redemption rights be forever barred. (R.C. 2735.04).

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Receivership (Ohio Revised Code Chapter 2735), *cont.*



- The receiver must post a bond with a surety approved by the court before a receiver begins his duties (R.C. 2735.03).
- On application of a receiver or a creditor, the court can require any person, or officer or director of a corporation, or member of a partnership for which a receiver has been appointed, to attend and submit to an examination as to its property, trade, dealings with others, accounts, debts due, or all other matters concerning the property or estate. (R.C. 2735.05).
- Upon order of the court, funds in hands of a receiver may be invested upon interest—but it requires the consent of all parties to the action. (R.C. 2735.06).
- Ohio courts have held that the receivership statute contains broad enough powers to authorize the rejection of executory contracts. *See Norris v. Dudley*, 2007-Ohio-6646, 2007 WL 4340263 (Ohio Ct. App. 10th Dist. Franklin County 2007).
 - One court did not allow a receiver to reject an executory contract because the receiver did not carry its burden of proof that it would benefit the estate. *See Dispatch Printing Co. v. Recovery Ltd. Partnership*, 2015-Ohio-381, 28 N.E.3d 562 (Ohio Ct. App. 10th Dist. Franklin County 2015).
- The receivership statute does not provide for an automatic stay.
- A court can also appoint receivers in other circumstances:
 - Concerning assets where there has been a fraudulent conveyance;
 - Upon violations of the Ohio Securities Act;
 - To take possession and operate a mental health and addiction services center; and
 - To take charge of a building that has been declared a public nuisance or to enforce local building code.

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Subchapter V v. Chapter 11

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Benefits and Drawbacks of Filing Subchapter V (Bankruptcy Code Sections 1181-1195)



- An overview of the benefits of filing for Subchapter V:
 - Streamlined plan process;
 - Quicker plan process with no competing plans;
 - No disclosure statement;
 - Creditor consent not required.
 - Lower administrative costs and fees;
 - Assistance of a trustee without losing Debtor-in-Possession status;
 - No absolute priority rule;
 - Potential to be able to modify a mortgage on a primary residence if used in connection with debtor's business;
 - Potential to retain equity in business.
- Main Drawback:
 - Currently, the debt limit to file for Subchapter V is \$3,024,275, and congress has not yet acted to increase the limit back to the prior \$7,500,000.

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Differences Between Subchapter V and Chapter 11



- A debtor filing a Chapter 11 case must elect to proceed as a Subchapter V debtor by:
 - Electing to proceed as a small business debtor as defined in Section 101(51D);
 - Choosing to proceed under Subchapter V of Chapter 11. (11 U.S.C. 103(i)).
 - Currently, a person cannot qualify as a small business debtor unless its total debts do not exceed \$3,034,735. Further, at least 50% of the total debt must have arisen from commercial or business activities (excluding debts owed to insiders). (11 U.S.C. 101(51D)).
- In Chapter 11, trustees or examiners are only appointed at the request of a party in interest, and it happens infrequently. (11 U.S.C. 1104). In Subchapter V, the US Trustee always appoints a Subchapter V Trustee. The Subchapter V Trustee:
 - Is accountable for all property received. (11 U.S.C. 704(a)(2) and 1183(b)(1)).
 - Is responsible for providing oversight of the debtor-in-possession and to help facilitate negotiations among parties and to build a consensus.
 - Courts can expand the powers of a Subchapter V Trustee “for cause.” (11 U.S.C. 1185(a)).
 - Does not supplant debtor as debtor-in-possession.

Differences Between Subchapter V and Chapter 11, *cont.*



- Both Chapter 11 and Subchapter V debtors can be removed for cause, but Subchapter V debtors can also be removed for the failure to perform obligations of a debtor under a confirmed plan. (11 U.S.C. 1104; 11 U.S.C. 1185).
- For plans:
 - Anyone can file a plan in Chapter 11 once exclusivity ends, but only a debtor can file a plan in a Subchapter V case. (11 U.S.C. 1121(b); 11 U.S.C. 1189).
 - The debtor only has 90 days to file a plan in a Subchapter V case, which can be extended if the need for extension “is attributable to circumstances for which the debtor should not justly be held accountable.” (11 U.S.C. 1189).
 - In Chapter 11, a disclosure statement is required. (11 U.S.C. 1125(b)). No disclosure statements are required in a Subchapter V unless otherwise ordered by the court. (11 U.S.C. 1181(b)).
 - Unlike in Chapter 11, Subchapter V plans can be confirmed even if no impaired class accepts the plan, so long as the plan is fair and equitable and does not discriminate against rejecting classes. (11 U.S.C. 1191(b)).
 - If a Subchapter V is confirmed through 11 U.S.C. 1191(b), a Debtor does not receive a discharge until plan payments are completed.
 - All administrative expenses have to be paid on the effective date of the plan in a Chapter 11 case. In a Subchapter V, debtors have 3-5 years to pay administrative expenses as provided for by the plan. (11 U.S.C. 1129(a)(9)(A); 11 U.S.C. 1191(e)).
 - Unlike in Chapter 11, where mortgages cannot be modified by a plan, Subchapter V plans can modify mortgages on a debtor’s principal residence if: (1) the loan was not primarily used to acquire the residence; and (2) the value received was used for the debtor’s business. (11 U.S.C. 1123(b)(5); 11 U.S.C. 1190(3)).

Faculty

Peter R. Morrison is a partner with Squire Patton Boggs in Cleveland and has a broad and versatile corporate, litigation and finance practice built on extensive experience representing and counseling clients in the corporate insolvency, distressed lending and investing, restructuring and bankruptcy contexts, including in complex chapter 11 cases nationwide. His clients include debtors, creditors' committees, and secured and unsecured creditors in reorganizations and liquidations. He also represents receivers and secured creditors in receiverships and foreclosure proceedings. Ms. Morrison has significant bankruptcy litigation experience focused on dischargeability contests, declaratory judgment actions, director and officer liability suits, and the prosecution and defense of avoidance actions. His insolvency and restructuring practice is bolstered by his banking and debt-finance experience, which has included the negotiation, documentation and management of secured and unsecured loan transactions, including securitizations, syndicated credit facilities, unitranche facilities, split collateral pool transactions and bridge financings. Mr. Morrison received his B.A. in 2004 from the University of Wisconsin - Madison and his J.D. *cum laude* in 2009 from Case Western Reserve University, where he was a member of the Order of the Barristers and executive notes editor of the *Health Matrix - Journal of Law-Medicine*.

Eric J. Silver is a shareholder in the Business Restructuring department of Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A. in Miami and is a member of the firm's board of directors. He handles complex commercial restructuring and related litigation matters in both federal and state courts, and he regularly represents court-appointed fiduciaries, secured and unsecured creditors, and purchasers of distressed assets. Prior to joining the firm in 2010, Mr. Silver clerked for Hon. Robert A. Mark in the U.S. Bankruptcy Court for the Southern District of Florida. He is a member of ABI and was president of the Bankruptcy Bar Association of the Southern District of Florida for 2020-21. In addition, he was the Miami chair of its *Pro Bono* Committee from 2016-19 and *Pro Bono* Committee Liaison of the FLSB Bankruptcy Lawyers Advisory Committee from 2018-19, and is a member of The Florida Bar's Business Law Section. Mr. Silver was honored as one of ABI's 2021 "40 Under 40." He received his J.D. *magna cum laude* from the University of Miami School of Law jointly with his M.B.A. from the School of Business Administration.

Andrew M. Simon is a managing director with Oxford Restructuring Advisors in Cincinnati and is an experienced restructuring advisor who has been consulting troubled companies and their stakeholders for more than 20 years. He has practiced both as an attorney and as a certified public accountant in bankruptcy cases and other insolvency proceedings for debtors and creditors. Mr. Simon has particular experience representing buyers and sellers of distressed assets, as well as troubled companies, lenders, indenture trustees and creditor groups in both § 363 transactions and out-of-court asset sales. He recently represented a secured lender group in the successful appointment of a receiver for the repayment of a health care group's \$75 million loan. Additional recent engagements include advisory work to companies in the mining (three separate gold mining companies, including two publicly traded), oil and gas (E&P company with more than \$2 billion in debt), environmental services (privately held remediation company), food (multi-billion dollar cooperatively held beef and pork producer) and hospitality (privately held restaurant group) industries, among others. Mr. Simon

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