

## Part 5 Asset Recovery

### 31A-27a-501 Turnover of assets.

- (1)
  - (a) If the receiver determines that funds or property in the possession of another person are rightfully the property of the estate, the receiver shall deliver to the person a written demand for immediate delivery of the funds or property:
    - (i) referencing this section by number;
    - (ii) referencing the court and docket number of the receivership action; and
    - (iii) notifying the person that any claim of right to the funds or property by the person shall be presented to the receivership court within 20 days of the day on which the person receives the written demand.
  - (b)
    - (i) A person who holds funds or other property belonging to an entity subject to an order of receivership under this chapter shall deliver the funds or other property to the receiver on demand.
    - (ii) If the person described in Subsection (1)(b)(i) alleges a right to retain the funds or other property, the person shall:
      - (A) file an objection with the receivership court setting out that right within 20 days of the day on which the person receives the demand that the funds or property be delivered to the receiver; and
      - (B) serve a copy of the objection on the receiver.
    - (iii) The objection described in Subsection (1)(b)(ii) shall inform the receivership court as to:
      - (A) the nature of the claim to the funds or property;
      - (B) the alleged value of the property or amount of funds held; and
      - (C) what action has been taken by the person to preserve any funds or to preserve and protect the property pending determination of the dispute.
  - (c) The relinquishment of possession of funds or property by a person who receives a demand pursuant to this section is not a waiver of a right to make a claim in the receivership.
- (2)
  - (a) If requested by the receiver, the receivership court shall hold a hearing to determine where and under what conditions the funds or property shall be held by a person described in Subsection (1) pending determination of a dispute concerning the funds or property.
  - (b) The receivership court may impose the conditions the receivership court considers necessary or appropriate for the preservation of the funds or property until the receivership court can determine the validity of the person's claim to the funds or property.
  - (c) If funds or property are allowed to remain in the possession of the person after demand made by the receiver, that person is strictly liable to the estate for any waste, loss, or damage to or diminution of value of the funds or property retained.
- (3) If a person files an objection alleging a right to retain funds or property as provided in Subsection (1), the receivership court shall hold a subsequent hearing to determine the entitlement of the person to the funds or property claimed by the receiver.
- (4) If a person fails to deliver the funds or property or to file the objection described by Subsection (1) within the 20-day period, the receivership court may issue a summary order:
  - (a) upon:
    - (i) petition of the receiver; and

- (ii) a copy of the petition being served by the petitioner to that person;
  - (b) directing the immediate delivery of the funds or property to the receiver; and
  - (c) finding that the person waived all claims of right to the funds or property.
- (5) The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation.

Amended by Chapter 32, 2020 General Session

**31A-27a-502 Recovery from affiliates.**

- (1)
- (a) If a receivership order is entered under this chapter, the receiver appointed under the receivership order may recover on behalf of the insurer from an affiliate as defined in Subsection 31A-1-301(5) the value received by the affiliate at any time during the five years preceding the filing date of the delinquency proceedings.
  - (b) A person disputing that person's status as an affiliate shall prove by clear and convincing evidence the person's nonaffiliate status.
  - (c) Recovery from an affiliate is subject to the limitations of Subsections (2) and (6).
- (2) If the insurer is a stock corporation, a stock dividend distribution to an affiliate is not recoverable if the recipient shows by a preponderance of the evidence that:
- (a) when paid, the stock dividend distribution to an affiliate is lawful and reasonable;
  - (b) the department had notice to and approved the stock dividend; and
  - (c) the insurer did not know and could not reasonably have known that the stock dividend distribution to the affiliate might adversely affect the solvency of the insurer.
- (3) The maximum amount recoverable under this section is the amount needed to pay all claims under the receivership:
- (a) in excess of all other available recoverable assets; and
  - (b) reduced for each recipient affiliate by any amount that the recipient affiliate pays to any receiver under similar laws of other states.
- (4)
- (a) A person who is an affiliate at the time value is received is liable up to the amount of value received by the affiliate.
  - (b) If two or more affiliates are liable regarding the same value received, they are jointly and severally liable.
- (5) If any affiliate liable under Subsection (4) is insolvent or unable to pay within one year, all affiliates at the time the value is received are jointly and severally liable for any resulting deficiency in the amount that would have been recovered from the nonpaying affiliate.
- (6) This section does not enlarge the personal liability of a director under existing law.
- (7) An action or proceeding under this section may not be commenced after the earlier of:
- (a) six years after the day on which a receiver is appointed; or
  - (b) the day on which the receivership is terminated.

Amended by Chapter 297, 2011 General Session

**31A-27a-503 Unauthorized postpetition transfers.**

- (1) Except as otherwise provided in this section, the receiver may avoid a transfer of an interest of the insurer in property, or an obligation incurred by the insurer, that is:
- (a) made or incurred after the day on which a petition for receivership is filed; and
  - (b) not authorized by the receiver and approved by the receivership court.

- (2) Except to the extent that a transfer or obligation voidable under this section is otherwise voidable under this chapter, a transferee or obligee of a transfer or obligation described in Subsection (1) has a lien on or may retain, at the option of the receivership court, an interest transferred or may enforce an obligation incurred, as the case may be:
- (a) if the transferee or obligee takes it for value and in good faith; and
  - (b) to the extent that the transferee or obligee gave value to the insurer in exchange for the transfer or obligation.

Enacted by Chapter 309, 2007 General Session

**31A-27a-504 Voidable preferences and liens.**

- (1)
- (a) A preference may be avoided by the rehabilitator or liquidator, if:
    - (i) the insurer is insolvent at the time of the transfer;
    - (ii) the transfer is made within four months before the day on which the petition is filed;
    - (iii) with reference to the transfer, one of the following at the time the transfer is made has reasonable cause to believe that the insurer is or is about to become insolvent:
      - (A) a creditor receiving the transfer;
      - (B) a creditor to be benefitted by the transfer; or
      - (C) an agent of a creditor described in this Subsection (1)(a)(iii); or
    - (iv) the creditor receiving the transfer is an officer, employee, attorney, or other person who is in fact in a position of comparable influence on the insurer to:
      - (A) an officer of the insurer;
      - (B) a shareholder holding directly or indirectly more than 5% of any class of equity security issued by the insurer; or
      - (C) any other person with whom the insurer did not deal at arm's length.
  - (b)
    - (i) Subject to the other provisions of this Subsection (1)(b), if a preference is voidable, the rehabilitator or liquidator may recover the property or, if the property is converted, the property's value, from any person who receives or converts the property.
    - (ii) Notwithstanding Subsection (1)(b)(i), the rehabilitator or liquidator may not recover from a bona fide purchaser or lienor of the debtor's transferee for present fair consideration.
    - (iii) If a bona fide purchaser or lienor gives less than fair consideration, the bona fide purchaser or lienor has a lien upon the property to the extent of the consideration actually given by the bona fide purchaser or lienor.
  - (c) If a preference by way of lien or security title is voidable, the court may, on due notice, order the lien or title to be preserved for the benefit of the estate, in which event the lien or title passes to the liquidator.
  - (d) A payment to which Subsection 31A-5-415(2) applies is a preference and is voidable under Subsection (1)(a):
    - (i) if it is made within the time period specified in Subsection 31A-27a-102(29); and
    - (ii) except that a payment made by an insurer for the purchase of insurance under Section 16-10a-302 is not a preference.
- (2) Section 31A-27a-506 applies to the perfection of a transfer.
- (3) Section 31A-27a-506 applies to a lien by a legal or equitable proceeding.
- (4) The receiver may not avoid a transfer of property under this section for or because of:
- (a) new and contemporaneous consideration;
  - (b) the payment, within 45 days after the day on which a debt is incurred, of a debt incurred:

- (i) in the ordinary course of the business of the insurer; and
    - (ii) according to normal business terms;
  - (c) a transfer of a security interest in property:
    - (i) to enable the insurer to acquire the property; and
    - (ii) which is perfected within 10 days after the day on which the security interest attaches;
  - (d) a transfer to or for the benefit of a creditor:
    - (i) to the extent that after the transfer the creditor gives new value not secured by an unavoidable security interest; and
    - (ii) on account of which the insurer did not make an unavoidable transfer to or for the benefit of the creditor; or
  - (e) a transfer of a perfected security interest in inventory, a receivable, or the proceeds of either, except to the extent that the aggregate of all of those types of transfers to the transferee cause a reduction of the amount by which the debt secured by the security interest exceeds the value of the security interest four months before the date of liquidation or any time subsequent to the liquidation.
- (5)
- (a) The receiver may avoid a transfer of property of the insurer transferred to secure reimbursement of a surety that furnishes a bond or other obligation to dissolve a judicial lien that would have been avoidable by the receiver under Subsection (1)(a).
  - (b) The liability of the surety under the bond or obligation described in Subsection (5)(a) shall be discharged to the extent of the value of the property recovered by the receiver or the amounts paid to the receiver.
- (6)
- (a) Subject to Subsection (6)(b), the property affected by a lien that is considered voidable under Subsections (1)(a) and (5):
    - (i) is discharged from the lien; and
    - (ii) passes to the rehabilitator or liquidator with any of the indemnifying property transferred to or for the benefit of a surety.
  - (b) Notwithstanding Subsection (6)(a), the court may:
    - (i) on due notice, order the lien to be preserved for the benefit of the estate; and
    - (ii) direct that a conveyance be executed that is adequate to evidence the title of the rehabilitator or liquidator.
- (7)
- (a) The court has jurisdiction of any proceeding by the rehabilitator or liquidator, to hear and determine the rights of any parties under this section.
  - (b) Reasonable notice of any hearing in a proceeding described in Subsection (7)(a) shall be given to all parties in interest, including the obligee of a releasing bond or other similar obligation.
  - (c) If an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien:
    - (i) the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien; and
    - (ii) if the value of the property or lien is less than the amount for which the property is an indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court:
      - (A) to the rehabilitator or liquidator; and
      - (B) within a reasonable time fixed by the court.

- (8) The liability of a surety under a releasing bond or other similar obligation is discharged to the extent of the value of:
- (a) the indemnifying property recovered;
  - (b) the indemnifying lien nullified and avoided; or
  - (c) if the property is retained under Subsection (7), the amount paid to the rehabilitator or liquidator.
- (9) If a creditor is preferred and afterward in good faith gives the insurer further credit, without security of any kind, for property that becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition shall be set off against the preference which would otherwise be recoverable from the creditor.
- (10)
- (a) If an insurer, directly or indirectly, pays money or transfers property within four months before the day on which a successful petition for rehabilitation or liquidation is filed under this chapter or at any time in contemplation of a proceeding to rehabilitate or liquidate the insurer, to an attorney for services rendered or to be rendered, the transaction:
    - (i)
      - (A) may be examined by the court on its own motion; or
      - (B) shall be examined by the court on petition of the rehabilitator or liquidator; and
    - (ii) shall be held valid only to the extent that the transfer is a reasonable amount as determined by the court.
  - (b) The amount in excess of the amount held valid under Subsection (10)(a), may be recovered by the rehabilitator or liquidator for the benefit of the estate.
  - (c) If the attorney meets the description in Subsection (1)(a)(iv), Subsection (1)(a)(iv) applies in place of this Subsection (10).
- (11)
- (a) Every officer, manager, employee, shareholder, member, subscriber, attorney, or any other person acting on behalf of the insurer who knowingly participates in giving a preference when that person has reasonable cause to believe that the insurer is or is about to become insolvent at the time of the preference, is personally liable to the rehabilitator or liquidator for the amount of the preference.
  - (b) It is permissible to infer that there is "reasonable cause to so believe" if the transfer is made within four months before the date on which a successful petition for rehabilitation or liquidation is filed.
  - (c) A person receiving any property from the insurer or for the benefit of the insurer as a preference which is voidable under Subsection (1)(a) is:
    - (i) personally liable for that transfer and property; and
    - (ii) bound to account to the rehabilitator or liquidator.
  - (d) This Subsection (11) does not prejudice any other claim by the rehabilitator or liquidator against any person.

Enacted by Chapter 309, 2007 General Session

**31A-27a-505 Avoidance of property title transfers.**

- (1) The rehabilitator or liquidator has the creditor's rights described in this Subsection (1), without regard to any knowledge of the rehabilitator or liquidator or any creditor.
- (a)
    - (i) The rehabilitator or liquidator is considered to:

- (A) have extended credit to the insurer on the day on which the rehabilitation or liquidation petition is filed; and
  - (B) have obtained on the day described in Subsection (1)(a)(i) a judicial lien on all the insurer's property on which a creditor under a contract could obtain a judicial lien.
- (ii) The rehabilitator or liquidator:
- (A) may avoid a transfer that would be avoidable by the type of creditor described in this Subsection (1)(a); and
  - (B) has all the other rights and powers of the type of creditor described in this Subsection (1)(a).
- (b)
- (i) The rehabilitator or liquidator is considered to:
- (A) have extended credit to the insurer on the day on which the rehabilitation or liquidation petition filed; and
  - (B) have obtained on the day described in this Subsection (1)(b)(i), with respect to that credit extension, an execution against the insurer on that same date that is returned unsatisfied.
- (ii) The rehabilitator or liquidator:
- (A) may avoid a transfer that would be avoidable by the type of creditor described in this Subsection (1)(b); and
  - (B) has all the other rights and powers of the type of creditor described in this Subsection (1)(b).
- (c) The rehabilitator or liquidator:
- (i) is considered to be a bona fide purchaser of the insurer's real property on the day on which the rehabilitation or liquidation petition is filed; and
  - (ii) has the rights and powers of a bona fide purchaser to avoid other transfers of the insurer's realty.
- (2)
- (a) The rehabilitator or liquidator may avoid a transfer of an interest of the insurer in property or an obligation incurred by the insurer that is voidable under applicable law by a creditor holding an unsecured claim.
  - (b) This Subsection (2) does not apply to secured claims.
- (3)
- (a) Except as provided in Subsections (3)(b) and (c), the rehabilitator or liquidator may avoid a transfer of property of the estate that:
    - (i) occurs after the day on which the petition for rehabilitation or liquidation is filed; and
    - (ii) is not authorized under this chapter or by the court.
  - (b)
    - (i) Subject to Subsection (3)(b)(ii), a transfer is valid against the rehabilitator or liquidator to the extent of any value, including services if it occurs:
      - (A) after the day on which the petition is filed; and
      - (B) before the day on which the order for rehabilitation or liquidation is entered.
    - (ii) The value described in Subsection (3)(b)(i) does not include the satisfaction or securing of a debt:
      - (A) that arises before the day on which the petition is filed;
      - (B) which is given after the date described in this Subsection (3)(b) in exchange for the transfer; and
      - (C) notwithstanding the transferee's knowledge or lack of knowledge of the petition.
  - (c)

- (i) Subject to Subsection (3)(c)(ii), the rehabilitator or liquidator may not avoid a transfer of real property under Subsection (3)(a) to:
    - (A) a good faith purchaser:
      - (I) if the good faith purchaser is without knowledge of the petition for rehabilitation or liquidation; and
      - (II) for present fair consideration; or
    - (B) a purchaser at a judicial sale.
  - (ii) Notwithstanding Subsection (3)(c)(i), the rehabilitator or liquidator may avoid a transfer of real property under Subsection (3)(a) if a copy of the petition is filed in the office of the county recorder before the transfer is so far perfected that a bona fide purchaser of the property against whom applicable law permits that type of transfer to be perfected cannot acquire an interest that is superior to the interest of the good faith purchaser or judicial sale purchaser.
  - (iii) Unless a copy of the petition is filed before the transfer is perfected, a good faith purchaser of real property under a transfer which the rehabilitator or liquidator may avoid under this section has a lien on the property transferred:
    - (A) if the good faith purchaser:
      - (I) is without knowledge of the petition for rehabilitation or liquidation at the time of the transfer; and
      - (II) pays less than present fair consideration; and
    - (B) to the extent of the present consideration given.
- (4) An action or proceeding under Subsection (1) or (2) may not be commenced after the earlier of:
- (a) two years after the day on which a rehabilitator is appointed under Section 31A-27a-301 or a liquidator is appointed under Section 31A-27a-401; or
  - (b) the day on which the rehabilitation is terminated under Subsection 31A-27a-304(3) or the liquidation is terminated under Section 31A-27a-802.
- (5) An action or proceeding under Subsection (3) may not be commenced after the earlier of:
- (a) two years after the day on which the transfer sought to be avoided is made; or
  - (b) the day on which the rehabilitation is terminated under Subsection 31A-27a-304(3) or the liquidation is terminated under Section 31A-27a-802.

Enacted by Chapter 309, 2007 General Session

**31A-27a-506 Fraudulent transfers and obligations.**

- (1) For purposes of this section:
- (a) A "transfer":
    - (i) is made when the transfer is so perfected that a bona fide purchaser from the insurer against whom applicable law permits the transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in the property of the transferee; or
    - (ii) if the transfer is not perfected as provided in Subsection (1)(a)(i) before the commencement of the delinquency proceeding, is considered made immediately before the day on which the initial filing of the petition commencing delinquency proceedings is filed.
  - (b) "Value" means property or satisfaction or securing of a present or antecedent debt of the insurer.
- (2)
- (a) If the conditions of Subsection (2)(b) are met, the receiver may avoid the following:
    - (i) a transfer of an interest of the insurer in property;
    - (ii) a reinsurance transaction; or

- (iii) an obligation incurred by an insurer.
- (b) Subsection (2)(a) applies if:
  - (i) the transfer or obligation is made or incurred on or within two years before the day on which the initial filing of a petition commencing delinquency proceedings is filed under this chapter; and
  - (ii) the insurer voluntarily or involuntarily:
    - (A) makes the transfer or incurs the obligation with actual intent to hinder, delay, or defraud a person to which the insurer is or becomes indebted on or after the day on which the transfer is made or the obligation is incurred; or
    - (B) receives less than a reasonably equivalent value in exchange for the transfer or obligation.
- (3) Except to the extent that a transfer or obligation voidable under this section is voidable under other provisions of this chapter, a transferee or obligee of a transfer or obligation voidable under this section that takes for value and in good faith:
  - (a) as the case may be:
    - (i) has a lien on or may retain any interest transferred; or
    - (ii) may enforce any obligation incurred; and
  - (b) to the extent that the transferee or obligee gave value to the insurer in exchange for the transfer or obligation.
- (4) If a reinsurance transaction is avoided under this section:
  - (a) the receiver shall tender to the reinsurer the value of any consideration transferred to the insurer in connection with the transaction less the amount of matured and liquidated liabilities owing by the reinsurer to the estate; and
  - (b) the parties shall be returned to their relative positions before the implementation of the transaction avoided.

Enacted by Chapter 309, 2007 General Session

**31A-27a-507 Receiver as lien creditor.**

- (1) The receiver may avoid a transfer of or lien on the property of, or obligation incurred by, an insurer that the insurer or a policyholder, creditor, member, or stockholder of the insurer:
  - (a) may have avoided without regard to any knowledge of:
    - (i) the receiver;
    - (ii) the commissioner;
    - (iii) the insurer; or
    - (iv) a policyholder, creditor, member, or stockholder of the insurer; and
  - (b) whether or not a policyholder, creditor, member, or stockholder described in this Subsection (1) exists.
- (2) The receiver is considered a creditor without knowledge for purposes of pursuing claims under:
  - (a) Title 25, Chapter 6, Uniform Voidable Transactions Act; or
  - (b) similar provisions of state or federal law.

Amended by Chapter 204, 2017 General Session

**31A-27a-508 Liability of transferee.**

- (1) Except as otherwise provided in this section, to the extent that the receiver obtains an order pursuant to Section 31A-27a-501, or avoids a transfer under Section 31A-27a-502,



- 31A-27a-503, 31A-27a-504, 31A-27a-506, or 31A-27a-507, the receiver may recover the property transferred, or the value of the property, from:
- (a) the initial transferee of the transfer or the entity for whose benefit the transfer is made; or
  - (b) subject to Subsection (2), an immediate or mediate transferee of the initial transferee.
- (2) The receiver may not recover under Subsection (1)(b) from:
- (a) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt:
    - (i) in good faith; and
    - (ii) without knowledge of the voidability of the transfer avoided; or
  - (b) an immediate or mediate good faith transferee of the transferee.
- (3) A transfer avoided in accordance with this chapter is preserved for the benefit of the receivership estate, but only with respect to property of the insurer.
- (4) In addition to the remedies specifically provided in Sections 31A-27a-501, 31A-27a-502, 31A-27a-503, 31A-27a-504, 31A-27a-506, and 31A-27a-507 and Subsection (1), if the receiver is successful in establishing a claim to the property or any part of the property, the receiver may recover judgment for the following:
- (a) rental for the use of tangible property from the later of:
    - (i) the day on which the receivership order is entered; or
    - (ii) the date of the transfer; and
  - (b) in the case of funds or intangible property:
    - (i) the greater of:
      - (A) the actual interest;
      - (B) income earned by the property; or
      - (C) interest at the statutory rate for judgments; and
    - (ii) from the later of:
      - (A) the day on which the receivership order is entered; or
      - (B) the date of the transfer.
- (5) In an action pursuant to this section, the receivership court may allow the receiver to seek recovery of the property involved or its value.
- (6) In an action pursuant to Sections 31A-27a-501, 31A-27a-502, 31A-27a-503, 31A-27a-504, 31A-27a-506, 31A-27a-507, and 31A-27a-510:
- (a) the receiver has the burden of proving the avoidability of a transfer; and
  - (b) the person against whom recovery or avoidance is sought has the burden of proving the nature and extent of any affirmative defense.

Enacted by Chapter 309, 2007 General Session

**31A-27a-509 Claims of holders of void or voidable rights.**

- (1)
- (a) The receiver may disallow a claim of a creditor who receives or acquires a preference, lien, conveyance, transfer, assignment, or encumbrance voidable under this chapter, unless the creditor surrenders the preference, lien, conveyance, transfer, assignment, or encumbrance.
  - (b) If an avoidance is effected by a proceeding in which a final judgment is entered, a creditor's claim is not allowed unless the money is paid or the property is delivered to the receiver within 30 days from the day on which the final judgment is entered, except that the receivership court may allow further time if there is an appeal or other continuation of the proceeding.

- (2) A claim allowable under Subsection (1) by reason of an avoidance, whether voluntary or involuntary, or a preference, lien, conveyance, transfer, assignment, or encumbrance, may be filed as an excused late filing under Subsection 31A-27a-601(2) if filed within:
- (a) 30 days from the date of the avoidance; or
  - (b) the further time allowed by the receivership court under Subsection (1).

Enacted by Chapter 309, 2007 General Session

**31A-27a-510 Setoffs.**

- (1)
- (a) A mutual debt or mutual credit shall be set off and the balance only allowed or paid:
    - (i) whether arising out of one or more contracts between the insurer and another person in connection with an action or proceeding under this chapter; and
    - (ii) except as provided in Subsection (2) and Sections 31A-27a-513 and 31A-27a-514.
  - (b) An obligation arising out of the termination of a life, disability income, or long-term care reinsurance contract pursuant to Section 31A-27a-513 may be set off against other debts and credits arising out of a contract between the insurer and the reinsurer.
- (2)
- (a) A setoff is not allowed after the commencement of a delinquency proceeding under this chapter in favor of any person if:
    - (i) the claim against the insurer is disallowed;
    - (ii) the claim against the insurer is purchased by or transferred to the person:
      - (A) on or after the day on which the receivership petition is filed; or
      - (B) within 120 days preceding the day on which the receivership petition is filed;
    - (iii) the obligation of the insurer is owed to an affiliate or entity other than the person, absent written assignment of the obligation made more than 120 days before the day on which the petition for receivership is filed;
    - (iv) the obligation of the person is owed to an affiliate or entity other than the insurer, absent written assignment of the obligation made more than 120 days before the day on which the petition for receivership is filed;
    - (v) the obligation of the person is:
      - (A) to pay:
        - (I) an assessment levied against a member or subscriber of the insurer; or
        - (II) a balance upon a subscription to the capital stock of the insurer; or
        - (B) in any other way in the nature of a capital contribution;
      - (vi) an obligation between the person and the insurer arises out of a transaction by which either the person or the insurer:
        - (A) assumes a risk or obligation from the other party; and
        - (B) then cedes back to that party substantially the same risk or obligation;
      - (vii) the obligation of the person arises out of an avoidance action taken by the receiver; or
      - (viii) the obligation of the insured is for the payment of earned premiums or retrospectively rated earned premiums in accordance with Section 31A-27a-514.
  - (b) Notwithstanding Subsection (2)(a)(vi), the receiver may permit a setoff if, in the receiver's discretion, a setoff is appropriate because of specific circumstances relating to a transaction.
- (3) The receiver may avoid pursuant to Sections 31A-27a-504, 31A-27a-506, and 31A-27a-507 and subject to defenses under those sections, a setoff that occurs before the commencement of the delinquency proceeding under this chapter if the setoff would otherwise be disallowed pursuant to Subsection (2).

Enacted by Chapter 309, 2007 General Session

**31A-27a-511 Assessments.**

- (1) As soon as practicable but not more than four years from the day on which an order of receivership of an insurer issuing assessable policies is entered, the receiver shall make a report to the receivership court setting forth:
  - (a) the reasonable value of the assets of the insurer;
  - (b) the insurer's probable total liabilities;
  - (c) the probable aggregate amount of the assessment necessary to pay all claims of creditors and expenses in full, including expenses of administration and costs of collecting the assessment; and
  - (d) a recommendation as to:
    - (i) whether or not an assessment should be made; and
    - (ii) what amount of assessment.
- (2)
  - (a) Upon the basis of the report provided in Subsection (1), including any supplement or amendment to the report, the receivership court may approve, solely on application by the receiver, one or more assessments against all members of the insurer who are subject to assessment.
  - (b) An order approving an assessment under this Subsection (2) shall provide instructions regarding:
    - (i) notice of the assessment;
    - (ii) deadlines for payment; and
    - (iii) other instructions to the receiver for collection of the assessment.
- (3) Subject to any applicable legal limit on an ability to assess and with due regard given to assessments that cannot be collected economically, the aggregate assessment shall be for the amount by which the sum of the following exceeds the value of existing assets:
  - (a) probable liabilities;
  - (b) the expenses of administration; and
  - (c) the estimated cost of collection of the assessment.
- (4)
  - (a) After levy of an assessment under Subsection (2), the receiver shall petition the receivership court for an order directing each member who has not paid the assessment pursuant to the levy to show cause why a judgment for the failure to pay the assessment should not be entered.
  - (b) At least 20 days before the return day of the order to show cause described in Subsection (4)
    - (a), the receiver shall give notice of the order to show cause by:
      - (i) publication or by first-class mail to each member liable on the assessment mailed to the member's last-known address as it appears on the insurer's records; or
      - (ii) such other method of notification as the receivership court may direct.
    - (c) Failure of the member or subscriber to receive the notice of the assessment or of the order to show cause either within the time specified in the order or at all, is no defense in a proceeding to collect the assessment.
- (5) If a member does not appear and serve verified objections upon the receiver on or before the return day of the order to show cause under Subsection (4):
  - (a) the receivership court shall make an order adjudging the member liable for the sum of:
    - (i) the amount of the assessment against the member pursuant to Subsection (4); and

- (ii) the costs; and
- (b) the receiver has a judgment against the member for the amount described in Subsection (5)
  - (a).
- (6) If on or before the return day in the order to show cause described in Subsection (4) the member appears and serves verified objections on the receiver, the receivership court may:
  - (a)
    - (i) hear and determine the matter; or
    - (ii) appoint a referee to hear the matter; and
  - (b) make such order as the facts warrant.
- (7) The receiver may enforce an order or collect a judgment under Subsection (5) by any lawful means.
- (8) An assessment of a subscriber or member of an insurer made by the receiver is prima facie correct if it is pursuant to the order of receivership court:
  - (a) fixing the aggregate amount of the assessment against all members or subscribers; and
  - (b) approving the classification and formula made by the receiver under this section.
- (9) A claim filed by an assessee who fails to pay an assessment, after the conclusion of a legal action by the assessee objecting to the assessment, is considered a late filed claim under Section 31A-27a-701.

Enacted by Chapter 309, 2007 General Session

**31A-27a-512 Reinsurer's liability.**

- (1)
  - (a) Except as otherwise provided in this chapter, the amount recoverable by the receiver from a reinsurer may not be reduced as a result of a delinquency proceeding with a finding of insolvency, regardless of any provision in the reinsurance contract or other agreement.
  - (b) An agreement, written, oral, or otherwise, may not be enforced to the extent it is in conflict, or not in strict compliance with this section.
  - (c) Except as expressly provided in this section, a person other than the receiver whether as a creditor, third party beneficiary, or otherwise does not have a direct right to reinsurance proceeds from any reinsurer of the insolvent insurer:
    - (i) on the basis of any written or oral agreement; or
    - (ii) pursuant to an action or cause of action seeking any equitable or legal remedy.
  - (d) This section applies to all the insurer's reinsurance contracts including:
    - (i) treaty reinsurance;
    - (ii) quota share reinsurance;
    - (iii) facultative reinsurance; or
    - (iv) a fronting or captive reinsurance arrangement.
- (2) Except as otherwise provided in Subsection (9), the amount recoverable by the liquidator from a reinsurer is payable under one or more contracts reinsured by the reinsurer on the basis of:
  - (a) proof of payment of the insured claim by an affected guaranty association, the insurer, or the receiver, to the extent of the payment; or
  - (b) the allowance of the claim pursuant to:
    - (i) Section 31A-27a-608;
    - (ii) an order of the receivership court; or
    - (iii) a plan of rehabilitation.
- (3) If the insurer takes credit for a reinsurance contract in a filing or submission made to the commissioner and the reinsurance contract does not contain the provisions required with

- respect to the obligations of reinsurers in the event of insolvency of the reinsured, the reinsurance contract is considered to contain the provisions required with respect to:
- (a) the obligations of reinsurers in the event of insolvency of the reinsured in order to obtain credit for reinsurance; or
  - (b) other applicable statutes.
- (4) A reinsurance contract that under Subsection (3) is considered to contain certain provisions, is considered to contain a provision that:
- (a) in the event of insolvency and the appointment of a receiver, the reinsurance obligation is payable to the ceding insurer or to its receiver without diminution because of the insolvency or because the receiver fails to pay all or a portion of the claim;
  - (b) payment shall be made upon either:
    - (i) to the extent of the payment, proof of payment of the insured claim by an affected guaranty association, the insurer, or the receiver; or
    - (ii) the allowance of the claim pursuant to:
      - (A) Section 31A-27a-608;
      - (B) an order of the receivership court; or
      - (C) a plan of rehabilitation; and
  - (c) if a reinsurer does not pay the amount billed by the receiver within 60 days after the mailing by the receiver, interest on the unpaid billed amount will begin to accrue at the statutory legal rate provided in Subsection 15-1-1(2), except that all or a portion of the interest may be waived as part of an arbitration proceeding.
- (5)
- (a) The receiver shall notify in writing, in accordance with the terms of the contract, each reinsurer obligated in relation to the claim or the pendency of a claim against the reinsured company.
  - (b) The receiver's failure to give notice of a pending claim pursuant to a provision in a reinsurance contract:
    - (i) does not excuse the obligation of the reinsurer unless the reinsurer is prejudiced by the receiver's failure; and
    - (ii) if the reinsurer is prejudiced, reduces the reinsurer's obligations only to the extent of the prejudice.
  - (c) A reinsurer may interpose, at its own expense, in a proceeding in which a claim is to be adjudicated, any one or more defenses that the reinsurer considers available to the reinsured company or its receiver.
- (6) The entry of an order of rehabilitation or liquidation:
- (a) may not be considered a breach or an anticipatory breach of a reinsurance contract; and
  - (b) is not grounds for retroactive revocation or retroactive cancellation of a reinsurance contract by the reinsurer.
- (7)
- (a) If a reinsurance payment to a receiver of a ceding insurer is later determined to be a payment in excess of the amounts actually due to the receiver, the excess shall be:
    - (i) credited against future payments due to the receiver; or
    - (ii) repaid to the reinsurer as an administrative expense of the estate pursuant to Subsection 31A-27a-701(2)(g).
  - (b) A repayment under this Subsection (7) may be limited on the basis of the property remaining in the estate.
- (8)
- (a) Subject to Subsection (1):

- (i) except as provided in Subsection (8)(a)(ii):
    - (A) a payment made by the reinsurer directly to an insured or other creditor does not diminish the reinsurer's obligation to the insurer's estate; and
    - (B) a payment made by the reinsurer shall be made directly to the ceding insurer or its receiver;
  - (ii) Subsection (8)(a)(i) does not apply when:
    - (A) the reinsurance contract or other written agreement to which the insured, ceding insurer, and reinsurer are all parties:
      - (I) specifically provides another payee, other than an affiliate of the ceding insurer or reinsurer, of the reinsurance in the event of the insolvency or receivership of the ceding insurer; and
      - (II) the provision described in this Subsection (8)(a)(ii)(A) is contained in:
        - (Aa) the reinsurance contract as it is written on the day on which the reinsurance contract is initially executed; or
        - (Bb) the other written agreement as it is written on the day on which the initial policy is issued;
    - (B) the reinsurance contract, as it is written on the day on which the reinsurance contract is initially executed, contains a provision where the assuming insurer with the consent of the direct insured and the ceding insurer assumes all policy obligations of the ceding insurer:
      - (I) as a direct obligation of the assuming insurer to the payees under the policies; and
      - (II) in substitution for the entire obligations of the ceding insurer to the payees; or
    - (C) a life and health insurance guaranty association makes the election to succeed to the rights and obligations of the insolvent insurer under a contract of reinsurance:
      - (I) in accordance with:
        - (Aa) Section 31A-27a-513; or
        - (Bb) the life and health guaranty association laws of its domiciliary state; or
      - (II) pursuant to other applicable law, rule, order, or assignment contract; and
  - (iii) in the circumstances described in Subsection (8)(a)(ii)(C), a payment shall be made directly to or at the direction of the guaranty association.
- (b) Both the receiver and the reinsurer are entitled to recover from a person, other than the receiver or a guaranty association, who unsuccessfully makes a claim directly against the reinsurer the following incurred in preventing any collection by that person:
  - (i) the person's attorney fees; and
  - (ii) expenses.
- (9) This chapter may not be construed to authorize the liquidator or any other entity to compel payment from a nonlife reinsurer:
  - (a) on the basis of estimated incurred but not reported losses, loss expenses, or case reserves for unpaid losses and loss expenses, except under Sections 31A-27a-515 and 31A-27a-516; and
  - (b) with respect to a claim allowed in accordance with Section 31A-27a-605.

Enacted by Chapter 309, 2007 General Session

**31A-27a-512.1 Indemnitor liability.**

- (1)
  - (a) Except as otherwise provided in this chapter, the amount recoverable by the receiver from an indemnitor may not be reduced as a result of a delinquency proceeding with a finding of insolvency, regardless of any provision in the indemnity contract or other agreement.

- (b) To the extent an agreement, written or oral, conflicts with or is not in strict compliance with this section, the agreement is unenforceable.
  - (c) Except as expressly provided in this section, a person who is not the receiver, including a creditor or third-party beneficiary, does not have a right to indemnity proceeds from any indemnitor of the insolvent insurer:
    - (i) on the basis of any agreement, written or oral; or
    - (ii) pursuant to an action or cause of action seeking any equitable or legal remedy.
  - (d) This section applies to all the insurer's indemnity contracts.
- (2) The amount recoverable by the liquidator from an indemnitor is payable under one or more contract of indemnity on the basis of:
- (a) proof of payment of the insured claim by an affected guaranty association, the insurer, or the receiver, to the extent of payment; or
  - (b) the allowance of the claim pursuant to:
    - (i) Section 31A-27a-608;
    - (ii) an order of the receivership court; or
    - (iii) a plan of rehabilitation.
- (3) If an insurer takes credit for an indemnity contract in a filing or submission made to the commissioner and the indemnity contract does not contain the provisions required with respect to the obligations of indemnitor in the event of insolvency of the principal, the indemnity contract is considered to contain the provisions required with respect to:
- (a) the obligations of indemnitors in the event of insolvency of the principal in order to obtain indemnity; or
  - (b) other applicable statutes.
- (4) An indemnity contract that under Subsection (3) is considered to contain certain provisions, is considered to contain a provision that:
- (a) in the event of insolvency and the appointment of a receiver, the indemnity obligation is payable to the indemnified insurer or to its receiver without diminution because of the insolvency or because the receiver fails to pay all or a portion of the claim;
  - (b) payment shall be made upon:
    - (i) to the extent of the payment, proof of payment of the insured claim by an affected guaranty association, the insurer, or the receiver; or
    - (ii) the allowance of the claim pursuant to:
      - (A) Section 31A-27a-608;
      - (B) an order of the receivership court; or
      - (C) a plan of rehabilitation; and
  - (c) if an indemnitor does not pay the amount billed by the receiver within 60 days after the mailing by the receiver, interest on the unpaid billed amount will begin to accrue at the statutory legal rate described in Section 15-1-1, except that all or a portion of the interest may be waived.
- (5)
- (a) The receiver shall notify in writing, in accordance with the terms of the indemnity contract, each indemnitor obligated in relation to an indemnified claim or the pendency of an indemnified claim against the indemnified company.
  - (b)
    - (i) The receiver's failure to give notice of a pending claim does not excuse the obligation of the indemnitor, unless the indemnitor is prejudiced by the receiver's failure.
    - (ii) If the indemnitor is prejudiced by the receiver's failure, the indemnitor's obligation is reduced only to the extent of the prejudice.

- (c) In a proceeding in which an indemnified claim is to be adjudicated, an indemnitor may interpose, at its own expense, any one or more defenses that the indemnitor considers available to the indemnified company or its receiver.
- (6) The entry of an order of rehabilitation or liquidation is not:
  - (a) a breach or an anticipatory breach of an indemnity contract; or
  - (b) grounds for retroactive revocation or retroactive cancellation of an indemnity contract by the indemnifier.

Enacted by Chapter 193, 2019 General Session

**31A-27a-513 Reinsurance continuation and termination.**

- (1) For purposes of this section:
  - (a) "Coverage date" is the day on which an order of liquidation is entered.
  - (b) "Election date" is the day on which an affected guaranty association elects to assume under this section the rights and obligations of a ceding insurer that relate to a policy or annuity covered, in whole or in part, by the affected guaranty association.
- (2) A contract reinsuring a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity issued by a ceding insurer that is placed in rehabilitation proceedings pursuant to this chapter shall be continued or terminated pursuant to:
  - (a) the terms or conditions of each contract; and
  - (b) this section.
- (3) A contract reinsuring a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity issued by a ceding insurer that is placed into liquidation pursuant to this chapter shall be continued, subject to this section, unless:
  - (a) the contract is terminated pursuant to the contract's terms before the coverage date; or
  - (b) the contract is terminated pursuant to the order of liquidation, in which case Subsection (10) applies.
- (4)
  - (a)
    - (i) At any time within 180 days of the coverage date, an affected guaranty association covering a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity, in whole or in part, may elect to assume the rights and obligations of the ceding insurer that relate to the policy or annuity covered, in whole or in part, by the affected guaranty association, under one or more reinsurance contracts between the insolvent insurer and the insolvent insurer's reinsurers selected by the affected guaranty association.
    - (ii) An assumption under this Subsection (4)(a) is effective as of the coverage date.
    - (iii) The election described in this Subsection (4)(a) is made by the affected guaranty association or a nationally recognized association of guaranty associations that is designated by the affected guaranty association to act on the affected guaranty association's behalf for purposes of this Subsection (4)(a) by sending written notice, return receipt requested, to the affected reinsurers.
  - (b)
    - (i) To facilitate the earliest practicable decision about whether to assume a contract of reinsurance and to protect the financial position of the estate, the receiver and each reinsurer of the ceding insurer shall make available the information described in Subsection (4)(b)(ii):
      - (A) upon request to an affected guaranty association; or



- (B) to a nationally recognized association of guaranty associations that is designated by the affected guaranty association to act on behalf of the affected guaranty associations for purposes of this Subsection (4) as soon as possible after commencement of formal delinquency proceedings.
- (ii) The information described in Subsection (4)(b)(i) is:
  - (A) copies of all in-force contracts of reinsurance;
  - (B) all records related to in-force contracts of reinsurance relevant to the determination of whether the in-force contracts of reinsurance should be assumed; and
  - (C) notice of:
    - (I) a default under the in-force contracts of reinsurance; or
    - (II) a known event or condition that with the passage of time could become a default under the in-force contracts of reinsurance.
- (c) Subsections (4)(c)(i) through (vi) apply to a reinsurance contract assumed by an affected guaranty association under this Subsection (4).
  - (i) The guaranty association is responsible for the following that relates to a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity covered, in whole or in part, by the guaranty association:
    - (A) all unpaid premiums due under a reinsurance contract, for the periods both before and after the coverage date; and
    - (B) the performance of all other obligations to be performed after the coverage date.
  - (ii) The affected guaranty association:
    - (A) may charge a policy of insurance or annuity covered in part by the affected guaranty association, through reasonable allocation methods, the costs for reinsurance in excess of the obligations of the affected guaranty association; and
    - (B) if it imposes a charge under this Subsection (4)(c)(ii), shall provide notice and an accounting of the charge to the liquidator.
  - (iii) The affected guaranty association is entitled to any amount payable by the reinsurer under the reinsurance contract with respect to a loss or event:
    - (A) that:
      - (I) occurs in a period on or after the coverage date; and
      - (II) relates to a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity covered, in whole or in part, by the affected guaranty association; and
    - (B) except that upon receipt of the amount, the affected guaranty association is obliged to pay to the beneficiary under the insurance policy or annuity on account of which the amount is paid a portion of the amount equal to the lesser of:
      - (I) the amount received by the affected guaranty association; and
      - (II) an amount calculated by:
        - (Aa) determining the excess of the amount received by the affected guaranty association over the amount equal to the benefits paid by the affected guaranty association on account of the policy or annuity; and
        - (Bb) subtracting the retention of the insurer applicable to the loss or event.
  - (iv)
    - (A) Within 30 days following the election date, the affected guaranty association and each reinsurer under a contract assumed by the affected guaranty association shall calculate the net balance due to or from the affected guaranty association under each reinsurance contract as of the election date with respect to a policy or annuity covered, in whole or in part, by the affected guaranty association.

- (B) The calculation required by Subsection (4)(c)(iv)(A) shall give full credit to all items paid by the insurer, the insurer's receiver, or the reinsurer before the election date.
  - (C) The reinsurer shall pay the receiver an amount due for a loss or event before the coverage date, subject to any setoff for premiums unpaid for periods before the coverage date.
  - (D) Within five days of the completion of the calculation required by Subsection (4)(c)(iv)(A), the affected guaranty association or reinsurer shall pay any balance due the other after completion of the calculation.
  - (E) A dispute over an amount due to either the affected guaranty association or the reinsurer shall be resolved by arbitration:
    - (I) pursuant to the terms of the affected reinsurance contract; or
    - (II) if the affected reinsurance contract contains no arbitration clause, as provided in Subsection (10)(d).
  - (v) If the receiver receives an amount due the affected guaranty association pursuant to Subsection (4)(c)(iii), the receiver shall remit that amount to the affected guaranty association as promptly as practicable.
  - (vi) If the affected guaranty association or the receiver on the affected guaranty association's behalf, within 60 days of the election date, pays the unpaid premiums due for periods both before and after the election date that relate to a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity covered, in whole or in part, by the affected guaranty association, the reinsurer may not:
    - (A) terminate the reinsurance contract for failure to pay premiums, insofar as the reinsurance contract relates to a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity covered, in whole or in part, by the affected guaranty association; and
    - (B) set off any unpaid amounts due under other contracts, or unpaid amounts due from parties other than the affected guaranty association, against amounts due the affected guaranty association.
- (5)
- (a) If pursuant to court approval under Section 31A-27a-402 a receiver continues a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity in force following an order of liquidation, and the policy of insurance or annuity is not covered in whole or in part by one or more affected guaranty associations, the receiver may elect to assume the rights and obligations of the ceding insurer under one or more of the reinsurance contracts that relate to the policy or annuity:
    - (i) within 180 days of the coverage date; and
    - (ii) if the contract is not terminated as set forth in Subsection (2).
  - (b) The election described in this Subsection (5) shall be made by sending written notice, return receipt requested, to the affected reinsurers.
  - (c) If the election described in this Subsection (5) is made:
    - (i) payment of premiums on the reinsurance contract for the policy or annuity, for periods both before and after the coverage date, shall be chargeable against the estate as a Class 1 administrative expense; and
    - (ii) amounts paid by the reinsurer on account of losses on the policy or annuity shall be to the estate of the insolvent insurer.
- (6) During the period beginning on the coverage date and ending on the election date:
- (a)

- (i) neither the affected guaranty association nor the reinsurer has any rights or obligations under a reinsurance contract that the affected guaranty association has the right to assume under Subsection (4), whether for a period before or after the coverage date;
  - (ii)
    - (A) with respect to the period after the coverage date, neither the receiver nor the reinsurer has any rights or obligations under a reinsurance contract that the receiver has the right to assume under Subsection (5); and
    - (B) with respect to the period before the coverage date, the rights and obligations of the affected guaranty association and the reinsurer remain unchanged; and
  - (iii) the reinsurer, the receiver, and an affected guaranty association shall, to the extent practicable, provide each other data and records reasonably requested; and
  - (b) once the affected guaranty association or the receiver, as the case may be, elects or declines to elect to assume a reinsurance contract, the parties' rights and obligations are governed by Subsection (4), (5), or (10), as applicable.
- (7)
- (a) If an affected guaranty association does not elect to assume a reinsurance contract by the election date pursuant to Subsection (4), the affected guaranty association has no rights or obligations, in each case for periods both before and after the coverage date, with respect to the reinsurance contract.
  - (b) If a receiver does not elect to assume a reinsurance contract by the election date pursuant to Subsection (5), the receiver and the reinsurer:
    - (i) retain their respective rights and obligations with respect to the reinsurance contract for the period before the coverage date; and
    - (ii) have no rights or obligations to each other for the period after the coverage date, except as provided in Subsection (10).
  - (c)
    - (i) If an affected guaranty association or the receiver, as the case may be, does not elect to assume a reinsurance contract by the election date, the reinsurance contract terminates retroactively effective on the coverage date.
    - (ii) A reinsurance contract covering a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity that is terminated pursuant to Section 31A-27a-402 terminates effective on the coverage date.
    - (iii) Subsection (10) applies to a reinsurance contract described in Subsection (7)(c)(i) or (ii).
- (8)
- (a) Subject to Subsection (8)(b), when a life insurance policy, disability income insurance policy, long-term care insurance policy, an annuity, or guaranty association obligation with respect to that policy or annuity is transferred to an assuming insurer, reinsurance on the policy or annuity may also be transferred:
    - (i) by the affected guaranty association, in the case of a contract assumed under Subsection (4); or
    - (ii) by the receiver, in the case of a contract assumed under Subsection (5).
  - (b) A transfer under Subsection (8)(a), is subject to the following:
    - (i) unless the reinsurer and the assuming insurer agree otherwise, the reinsurance contract transferred may not cover a new policy of insurance or new annuity in addition to those transferred;
    - (ii) the obligations described in Subsections (4) and (5) do not apply with respect to matters arising after the effective date of the transfer; and

- (iii) notice shall be given in writing, return receipt requested, by the transferring party to the affected reinsurer not less than 30 days before the effective date of the transfer.
- (9)
- (a) This section shall, to the extent provided in this chapter, supersede a law or an affected reinsurance contract that provides for or requires a payment of reinsurance proceeds on account of a loss or event:
    - (i) that occurs in a period after the coverage date; and
    - (ii) to the receiver of the insolvent insurer or to any other person.
  - (b) The receiver shall remain entitled to any amounts payable by the reinsurer under the reinsurance contract with respect to a loss or event that occurs in a period before the coverage date, subject to this chapter including applicable setoff provisions.
- (10) If a contract reinsuring a life insurance policy, disability income insurance policy, long-term care insurance policy, or an annuity is terminated pursuant to this chapter, the procedures of this Subsection (10) apply.
- (a) The reinsurer and the receiver shall, upon written notice to the other party to the reinsurance contract no later than 30 days after the receipt by the reinsurer of notice of termination, commence a mandatory negotiation and arbitration procedure in accordance with this Subsection (10).
  - (b)
    - (i) Each party shall appoint an actuary to determine an estimated sum due as a result of the termination of the reinsurance contract calculated in a way expected to make the parties economically indifferent as to whether the reinsurance contract continues or terminates, giving due regard to the economic effects of the insolvency.
    - (ii) The estimated sum described in this Subsection (10)(b) shall:
      - (A) take into account the present value of future cash flows expected under the reinsurance contract; and
      - (B) be based on a gross premium valuation of net liability using current assumptions:
        - (I) that reflect postinsolvency experience expectations, with no additional margins;
        - (II) that are net of any amounts payable and receivable; and
        - (III) with a market value adjustment to reflect premature sale of assets to fund the settlement.
  - (c)
    - (i) Within 90 days of the day on which the written request pursuant to Subsection (10)(a) is made, each party shall provide the other party with:
      - (A) its estimate of the sum due as a result of the termination of the reinsurance contract; and
      - (B) all relevant documents and other information supporting the estimate.
    - (ii) The parties shall make a good faith effort to reach agreement on the sum due.
  - (d)
    - (i) If the parties are unable to reach agreement within 90 days following the day on which the materials required in Subsection (10)(c) are submitted, either party may initiate arbitration proceedings:
      - (A) as provided in the reinsurance contract; or
      - (B) if the reinsurance contract does not contain an arbitration clause, pursuant to this Subsection (10)(d) by providing the other party with a written demand for arbitration.
    - (ii) Arbitration under Subsection (10)(d)(i)(B) shall be conducted pursuant to the following procedures:
      - (A) Venue for the arbitration shall be within the county of the court's jurisdiction or another location agreed to by the parties.

- (B) Within 30 days of the responding party's receipt of the arbitration demand, each party shall appoint an arbitrator who is:
  - (I) a disinterested active or retired officer or executive of a life insurance or reinsurance company; or
  - (II) other professional with no less than 10 years experience in or relating to the field of life insurance or life reinsurance.
- (C) The two arbitrators appointed under Subsection (10)(d)(ii)(B) shall appoint an independent, impartial, disinterested umpire who is an:
  - (I) active or retired officer or executive of a life insurance or reinsurance company; or
  - (II) other professional with no less than 10 years experience in the field of life insurance or life reinsurance.
- (D) If the arbitrators appointed under Subsection (10)(d)(ii)(B) are unable to agree on an umpire:
  - (I) each arbitrator shall provide the other with the names of three qualified individuals;
  - (II) each arbitrator shall strike two names from the other's list; and
  - (III) the umpire shall be chosen by drawing lots from the remaining individuals.
- (E) Within 60 days following the day on which the umpire is appointed, each party shall, unless otherwise ordered by the arbitration panel, submit to the arbitration panel:
  - (I) the party's estimates of the sum due as a result of the termination of the reinsurance contract; and
  - (II) all relevant documents and other information supporting the estimate.
- (F) The time periods set forth in this Subsection (10)(d)(ii) may be extended upon mutual agreement of the parties.
- (G) The arbitration panel has all powers necessary to conduct the arbitration proceedings in a fair and appropriate manner, including the power to:
  - (I) request additional information from the parties;
  - (II) authorize discovery;
  - (III) hold hearings; and
  - (IV) hear testimony.
- (H) The arbitration panel may, if the arbitration panel considers it necessary, appoint one or more independent actuarial experts, the expense of which shall be shared equally between the parties.
- (I) An arbitration panel considering the matters set forth in this Subsection (10)(d) shall:
  - (I) apply the standards set forth in Subsection (10)(b); and
  - (II) issue a written award specifying a net settlement amount due from one party or the other as a result of the termination of the reinsurance contract.
- (e) The supervising court shall confirm an award issued under Subsection (10)(d)(ii)(I) absent proof of statutory grounds for vacating or modifying arbitration awards under the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.
- (f)
  - (i) If the net settlement amount agreed or awarded pursuant to this Subsection (10) is payable by the reinsurer, the reinsurer shall pay the amount due to the estate subject to any applicable setoff under Section 31A-27a-510.
  - (ii) If the net settlement amount agreed or awarded pursuant to this Subsection (10) is payable by the insurer, the reinsurer is considered to have a timely filed claim against the estate for that amount, which claim shall be paid pursuant to the priority established in Subsection 31A-27a-701(2)(f).
  - (iii) A guaranty association:

- (A) is not entitled to receive the net settlement amount, except to the extent it is entitled to share in the estate assets as creditors of the estate; and
- (B) has no responsibility for the net settlement amount.

(11)

- (a) Except as otherwise provided in this section, this section does not alter or modify the terms and conditions of a reinsurance contract.
- (b) This section does not abrogate or limit any rights of a reinsurer to claim that it is entitled to rescind a reinsurance contract.
- (c) This section does not give a policyholder or beneficiary an independent cause of action against a reinsurer that is not otherwise set forth in the reinsurance contract.
- (d) This section does not limit or affect any guaranty association's rights as a creditor of the estate against the assets of the estate.
- (e) This section does not apply to a reinsurance agreement covering property or casualty risks.

Amended by Chapter 345, 2008 General Session

**31A-27a-514 Recovery of premiums owed.**

(1)

- (a) An insured shall pay any unpaid earned premium or retrospectively rated premium due the insurer:
  - (i) directly to the receiver; or
  - (ii) to an agent that pays or is obligated to pay the receiver on behalf of the insured.

(b)

- (i) Premium on surety business is considered earned at inception if no policy term can be determined.
- (ii) All premium other than that described in Subsection (1)(b)(i) is considered earned and is prorated equally over the determined policy term, regardless of any provision in the bond, guaranty, contract, or other agreement.

(2)

- (a) A person, other than the insured, responsible for the remittance of a premium, shall turn over to the receiver any unpaid premium due and owing as shown on the records of the insurer for the full policy term due the insurer at the time of the entry of the receivership order:
  - (i) including any amount representing commissions; and
  - (ii) whether earned or unearned based on the termination of coverage under Sections 31A-27a-402 and 31A-27a-403.
- (b) The unpaid premium due the receiver from any person other than the insured excludes any premium not collected from the insured and not earned based on the termination of coverage under Sections 31A-27a-402 and 31A-27a-403.

(3)

- (a) A person, other than the insured, responsible for the remittance of a premium, shall turn over to the receiver any unearned commission of that person based on the termination of coverage under Sections 31A-27a-402 and 31A-27a-403.
- (b) A credit, setoff, or both may not be allowed to an agent, broker, premium finance company, or any other person for an:
  - (i) amount advanced to the insurer by the person on behalf of, but in the absence of a payment by, the insured; or
  - (ii) other amount paid by the person to any other person after the day on which the order of receivership is entered.

- (4) Regardless of any provision to the contrary in an agency contract or other agreement, a person that collects premium or finances premium under a premium finance contract, that is due the insurer in receivership is considered to:
  - (a) hold that premium in trust as a fiduciary for the benefit of the insurer; and
  - (b) have availed itself of the laws of this state.
- (5)
  - (a) A premium finance company is obligated to pay an amount due the insurer from a premium finance contract, whether the premium is earned or unearned.
  - (b) The receiver may collect an unpaid financed premium directly from:
    - (i) the premium finance company by taking an assignment of the underlying premium finance contract; or
    - (ii) the insured that is a party to the premium finance contract.
- (6) Upon satisfactory evidence of a violation of this section by a person other than an insured, the commissioner may pursue one or more of the following courses of action:
  - (a) suspend, revoke, or refuse to renew the license of an offending party;
  - (b) impose a penalty of not more than \$1,000 for each act in violation of this section by a party; and
  - (c) impose any other sanction or penalty allowed for by law.
- (7)
  - (a) Before the commissioner may take an action set forth in Subsection (6), written notice shall be given to the person accused of violating the law:
    - (i) stating specifically the nature of the alleged violation; and
    - (ii) fixing a time and place, at least 10 days after the day on which the notice is sent, when a hearing on the matter is to be held.
  - (b) After a hearing, or upon failure of the accused to appear at a hearing, the commissioner, if a violation is found, shall impose the penalties under Subsection (6) that the commissioner considers advisable.
  - (c) If the commissioner takes action under this Subsection (7), the party aggrieved may appeal from that action as provided in Title 63G, Chapter 4, Administrative Procedures Act.

Amended by Chapter 382, 2008 General Session

**31A-27a-515 Commutation and release agreements.**

- (1) For purposes of this section, "casualty claims" means the insurer's aggregate claims arising out of insurance contracts in the following lines:
  - (a) farm owner multiperil;
  - (b) homeowner multiperil;
  - (c) commercial multiperil;
  - (d) medical malpractice;
  - (e) workers' compensation;
  - (f) other liability;
  - (g) products liability;
  - (h) auto liability;
  - (i) aircraft, all peril; and
  - (j) international, for lines listed in Subsections (1)(a) through (i).
- (2)

- (a) Notwithstanding Section 31A-27a-512, the liquidator and a reinsurer may negotiate a voluntary commutation and release of all obligations arising from a reinsurance agreement in which the insurer is the ceding party.
- (b) A commutation and release agreement voluntarily entered into by the parties shall be commercially reasonable, actuarially sound, and in the best interests of the creditors of the insurer.
- (c)
  - (i) An agreement subject to this Subsection (2) that has a gross consideration in excess of \$250,000 shall be submitted pursuant to Section 31A-27a-107 to the receivership court for approval.
  - (ii) An agreement described in this Subsection (2)(c) shall be approved by the receivership court if it meets the standards described in this Subsection (2).
- (3) Without derogating from Section 31A-27a-512, if the liquidator is unable to negotiate a voluntary commutation with a reinsurer with respect to a reinsurance agreement between the insurer and that reinsurer, the liquidator may, in addition to any other remedy available under applicable law, apply to the receivership court, with notice to the reinsurer, for an order requiring that the parties submit commutation proposals with respect to the reinsurance agreement to a panel of three arbitrators:
  - (a) at any time after 75% of the actuarially estimated ultimate incurred liability for all of the casualty claims against the liquidation estate is reached by allowance of claims in the liquidation estate pursuant to Sections 31A-27a-603 and 31A-27a-605, calculated:
    - (i) as of the day on which the order of liquidation is entered by or at the instance of the liquidator; and
    - (ii) for purposes of this Subsection (3), not performed during the five-year period subsequent to the day on which the order of liquidation is entered; or
  - (b) at any time in regard to a reinsurer if that reinsurer has a total adjusted capital that is less than 250% of its authorized control level RBC as defined in Section 31A-17-601.
- (4) Venue for the arbitration is within the district of the receivership court's jurisdiction or at another location agreed to by the parties.
- (5)
  - (a) If the liquidator determines that commutation would be in the best interests of the creditors of the liquidation estate, the liquidator may petition the receivership court to order arbitration.
  - (b) If the liquidator petitions the receivership court under Subsection (5)(a), the receivership court shall require that the liquidator and the reinsurer each appoint an arbitrator within 30 days after the day on which the order for arbitration is entered.
  - (c) If either party fails to appoint an arbitrator within the 30-day period, the other party may appoint both arbitrators and the appointments are binding on the parties.
  - (d) The two arbitrators shall be active or retired executive officers of insurance or reinsurance companies, not under the control of or affiliated with the insurer or the reinsurer.
  - (e)
    - (i) Within 30 days after the day on which both arbitrators have been appointed, the two arbitrators shall agree to the appointment of a third independent, impartial, disinterested arbitrator.
    - (ii) If agreement to the disinterested arbitrator is not reached within the 30-day period, the third arbitrator shall be appointed by the receivership court.
  - (f) The disinterested arbitrator shall be a person who:



- (i) is or, if retired, has been, an executive officer of a United States domiciled insurance or reinsurance company that is not under the control of or affiliated with either of the parties; and
  - (ii) has at least 15 years experience in the reinsurance industry.
- (6)
  - (a) The arbitration panel may choose to retain as an expert to assist the panel in its determinations, a retired, disinterested executive officer of a United States domiciled insurance or reinsurance company having at least 15 years loss reserving actuarial experience.
  - (b) If the arbitration panel is unable to unanimously agree on the identity of the expert within 14 days of the day on which the disinterested arbitrator is appointed, the expert shall be:
    - (i) designated by the commissioner:
      - (A) by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and
      - (B) on the basis of recommendations made by a nationally recognized society of actuaries; and
    - (ii) a disinterested person that has knowledge, experience, and training applicable to the line of insurance that is the subject of the arbitration.
  - (c) The expert:
    - (i) may not vote in the proceeding; and
    - (ii) shall issue a written report and recommendations to the arbitration panel within 60 days after the day on which the arbitration panel receives the commutation proposals submitted by the parties pursuant to Subsection (7), which report shall:
      - (A) be included as part of the arbitration record; and
      - (B) accompany the award issued by the arbitration panel pursuant to Subsection (8).
  - (d) The cost of the expert is to be paid equally by the parties.
- (7) Within 90 days after the day on which the disinterested arbitrator is appointed under Subsection (5), each party shall submit to the arbitration panel:
  - (a) the party's commutation proposals; and
  - (b) other documents and information relevant to the determination of the parties' rights and obligations under the reinsurance agreement to be commuted, including:
    - (i) a written review of any disputed paid claim balances;
    - (ii) any open claim files and related case reserves at net present value; and
    - (iii) any actuarial estimates with the basis of computation of any other reserves and any incurred-but-not-reported losses at net present value.
- (8)
  - (a) Within 90 days after the day on which the parties submit the information required by Subsection (7), the arbitration panel:
    - (i) shall issue an award, determined by a majority of the arbitration panel, specifying the terms of a commercially reasonable and actuarially sound commutation agreement between the parties; or
    - (ii) may issue an award declining commutation between the parties for a period not to exceed two years if a majority of the arbitration panel determines that it is unable to derive a commercially reasonable and actuarially sound commutation on the basis of:
      - (A) the submissions of the parties; and
      - (B) if applicable, the report and recommendation of the expert retained in accordance with Subsection (6).

- (b) Following the expiration of the two-year period described in Subsection (8)(a), the liquidator may again invoke arbitration in accordance with Subsection (2), in which event Subsections (2) through (9) apply to the renewed proceeding, except that the arbitration panel is obliged to issue an award under Subsection (8)(a).
- (9) Once an award is issued, the liquidator shall promptly submit the award to the receivership court for confirmation.
- (10)
  - (a) Within 30 days of the day on which the receivership court confirms the award, the reinsurer shall give notice to the receiver that the reinsurer:
    - (i) will commute the reinsurer's liabilities to the insurer for the amount of the award in return for a full and complete release of all liabilities between the parties, whether past, present, or future; or
    - (ii) will not commute the reinsurer's liabilities to the insurer.
  - (b) If the reinsurer's liabilities are not commuted under Subsection (10)(a), the reinsurer shall:
    - (i) establish and maintain in accordance with Section 31A-27a-516 a reinsurance recoverable trust in the amount of 102% of the award; and
    - (ii) pay the costs and fees associated with establishing and maintaining the trust established under this Subsection (10)(b).
- (11)
  - (a) If the reinsurer notifies the liquidator that it will commute the reinsurer's liabilities pursuant to Subsection (10)(a)(i), the liquidator has 30 days from the day on which the reinsurer notifies the liquidator to:
    - (i) tender to the reinsurer a proposed commutation and release agreement:
      - (A) providing for a full and complete release of all liabilities between the parties, whether past, present, or future; and
      - (B) that requires that the reinsurer make payment of the commutation amount within 14 days from the day on which the agreement is consummated; or
    - (ii) reject the commutation in writing, subject to receivership court approval.
  - (b) If the liquidator rejects the commutation subject to approval of the receivership court in accordance with Subsection (11)(a)(ii), the reinsurer shall establish and maintain a reinsurance recoverable trust in accordance with Section 31A-27a-516.
  - (c) The liquidator and the reinsurer shall share equally in the costs and fees associated with establishing and maintaining the trust established under Subsection (11)(b).
- (12) Except for the period provided in Subsection (8)(b), the time periods established in Subsections (6), (7), (8), (10), and (11) may be extended:
  - (a) upon the consent of the parties; or
  - (b) by order of the receivership court, for good cause shown.
- (13) Subject to Subsection (14), this section may not be construed to supersede or impair any provision in a reinsurance agreement that establishes a commercially reasonable and actuarially sound method for valuing and commuting the obligations of the parties to the reinsurance agreement by providing in the contract the specific methodology to be used for valuing and commuting the obligations between the parties.
- (14)
  - (a) A commutation provision in a reinsurance agreement is not effective if it is demonstrated to the receivership court that the provision is entered into in contemplation of the insolvency of one or more of the parties.

- (b) A contractual commutation provision entered into within one year of the day on which the liquidation order of the insurer is entered is rebuttably presumed to have been entered into in contemplation of insolvency.

Amended by Chapter 345, 2008 General Session

Amended by Chapter 382, 2008 General Session

**31A-27a-516 Reinsurance recoverable trust provisions.**

(1) As used in this section:

- (a) "Beneficiary" means the domiciliary insurance commissioner, as liquidator of the insurer for whose sole benefit a reinsurance recoverable trust is established.
- (b) "Grantor" means the reinsurer who has established a reinsurance recoverable trust for the sole benefit of the beneficiary.
- (c) "Qualified United States financial institution" means an institution that:
  - (i)
    - (A) is organized under the laws of the United States or any state of the United States; or
    - (B) in the case of a United States branch or agency office of a foreign banking organization, licensed under the laws of the United States or any state of the United States;
  - (ii) is granted authority to operate with fiduciary powers; and
  - (iii) is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies.
- (d) "Reinsurance recoverable trust" means a trust established pursuant to Section 31A-27a-515.

(2)

- (a) The trustee of a reinsurance recoverable trust shall be a qualified United States financial institution.
- (b) The trust agreement governing a reinsurance recoverable trust shall:
  - (i) be entered into by the beneficiary, the grantor, and a trustee;
  - (ii) create a trust account into which assets shall be deposited in accordance with Section 31A-27a-515;
  - (iii) provide that the beneficiary may withdraw assets from the trust only:
    - (A)
      - (I) on the basis of a filed claim allowed pursuant to Section 31A-27a-603 or 31A-27a-605;
      - (II) where the grantor is notified, in writing, of the allowance of the claim;
      - (III) to the extent that the amount to be withdrawn exceeds any setoff permitted by Section 31A-27a-510 due to the grantor; and
      - (IV) when 60 days expires during which the grantor fails to:
        - (Aa) pay the claim; or
        - (Bb) subject to and without derogation from Section 31A-27a-512, which at all times governs and remains binding on the reinsurer, file notice of a written dispute with respect to the claim under and in terms of the reinsurance agreement; or
    - (B) if the beneficiary complies with any different or other terms and conditions mutually agreed to by the beneficiary and the grantor in the trust agreement;
  - (iv) require the trustee to:
    - (A) receive assets and hold all assets at the trustee's office in the United States in a safe place;
    - (B) determine that all assets are in such form that the beneficiary, or the trustee upon direction by the beneficiary, may whenever necessary negotiate the assets, without consent or signature from the grantor or any other person;

- (C) furnish to the grantor and the beneficiary a statement of all assets in the trust account upon its inception and at intervals no less frequent than the end of each calendar quarter; and
- (D) notify the grantor and the beneficiary within 10 days of a deposit to or withdrawal from the trust account;
- (v) be made subject to and governed by the laws of this state;
- (vi) prohibit the invasion of the trust corpus for the purpose of paying compensation to, or reimbursing the expenses of, the trustee;
- (vii) provide that the trustee is liable for the trustee's negligence, willful misconduct, or lack of good faith;
- (viii) subject to Subsection (2)(c), provide that the trustee may resign upon delivery of a written notice of resignation, effective not less than 90 days after the day on which the beneficiary and grantor receive the notice;
- (ix) subject to Subsection (2)(c), provide that the trustee may be removed by the grantor by delivery to the trustee and the beneficiary of a written notice of removal, effective not less than 90 days after the day on which the trustee and the beneficiary receive the notice;
- (x) provide that the grantor has the full and unqualified right to vote any shares of stock in the trust account except that, subject to other provisions of this section, an interest or dividend paid on shares of stock or other obligation in the trust account shall remain in the trust;
- (xi) specify categories of investments reasonably acceptable to the beneficiary;
- (xii) authorize the trustee to invest funds and to accept substitutions, by the grantor, that the trustee determines are at least equal in market value to the assets withdrawn provided that no investment or substitution shall be made without prior approval from the beneficiary, which may not be unreasonably or arbitrarily withheld;
- (xiii) subject to Subsection (2)(d), provide that the beneficiary may at any time designate a party to which all or part of the trust assets are to be transferred;
- (xiv) specify the types of assets that may be included in the trust account:
  - (A) which shall consist only of:
    - (I) cash in United States dollars;
    - (II) certificates of deposit issued by a United States bank and payable in United States dollars;
    - (III) investments permitted by this state's insurance law; or
    - (IV) any combination of the types specified by this Subsection (2)(b)(xiv)(A);
  - (B) except that if investments in or issued by an entity controlling, controlled by, or under common control with either the grantor or the beneficiary of the trust, may not exceed 5% of total investments; and
  - (C) subject to the assets deposited in the trust account being valued according to the asset's current fair market value;
- (xv) give the grantor the right to seek approval from the beneficiary, which may not be unreasonably or arbitrarily withheld, to withdraw from the trust account all or any part of the trust assets and transfer those assets to the grantor, if:
  - (A) the grantor, at the time of withdrawal, replaces the withdrawn assets with other qualified assets so as to maintain at all times the deposit in the required amount; or
  - (B) after withdrawal and transfer, the market value of the trust account is no less than 102% of the award made pursuant to Subsection 31A-27a-515(8)(a);
- (xvi) provide for the return of any amount withdrawn in excess of the actual amounts required for:
  - (A) payment of reported allowed claims under Subsection (2)(b)(iii); and

- (B) interest payments at a rate not in excess of the prime rate of interest on the excess amounts withdrawn; and
  - (xvii) provide for termination of the reinsurance recoverable trust in accordance with Subsection (6).
  - (c) Notwithstanding Subsection (2)(b)(viii) or (ix), a resignation or removal may not be effective until:
    - (i) a successor trustee is appointed and approved by the beneficiary and the grantor; and
    - (ii) all assets in the trust are transferred to the new trustee.
  - (d) Notwithstanding Subsection (2)(b)(xiii), a transfer may be conditioned upon the trustee receiving, before or simultaneously with, other specified assets.
  - (e) Subsection (2)(b) may not be construed to alter the rights or obligations of the parties pursuant to contractual and statutory provisions providing for notice and the determination of a claim.
- (3) The grantor shall, before depositing assets with the trustee, execute assignments or endorsements in blank, or transfer legal title to the trustee of all shares, obligations, or any other assets requiring assignments, in order that the beneficiary, or the trustee upon the direction of the beneficiary, may whenever necessary negotiate these assets without consent or signature from the grantor or any other person.
- (4)
- (a) Without derogating Section 31A-27a-512, the grantor or the beneficiary may request that the receivership court review the amount held if:
    - (i) the grantor and beneficiary fail to reach agreement on the extent, if any, to which supplementation or reduction of a reinsurance recoverable trust should be occasioned;
    - (ii)
      - (A) the reinsurance recoverable trust is exhausted; or
      - (B) the reinsurance recoverable trust is insufficient to respond to claims allowed pursuant to Section 31A-27a-603 or 31A-27a-605; and
    - (iii) the grantor or the beneficiary believe that the amount held in the reinsurance recoverable trust is either deficient or overstated.
  - (b) The review described in this Subsection (4) shall be conducted applying procedures and terms as the receivership court shall, in its sole discretion, direct.
- (5) A reinsurance recoverable trust shall terminate upon the earlier of:
- (a) receivership court approval of a voluntary commutation between the grantor and the beneficiary pursuant to Subsection 31A-27a-515(2);
  - (b) the mutual agreement of the grantor and the beneficiary; or
  - (c) a finding by the receivership court that the grantor has discharged its liabilities to the beneficiary.
- (6) Upon termination of a reinsurance recoverable trust, all assets not previously withdrawn by the beneficiary, pursuant to Subsection (2)(b)(iii), shall, with written approval of the beneficiary, be delivered to the grantor.

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