

Part 6 Claims

31A-27a-601 Filing of claims.

- (1)
 - (a) Subject to the other provisions of this Subsection (1), proof of a claim shall be filed with the liquidator in the form required by Section 31A-27a-602 on or before the last day for filing specified in the notice required under Section 31A-27a-406.
 - (b) The last day for filing specified in the notice may not be later than 18 months after the day on which the order of liquidation is entered unless the receivership court, for good cause shown, extends the time.
 - (c) Proof of a claim for the following does not need to be filed unless the liquidator expressly requires filing of proof:
 - (i) cash surrender value in life insurance and annuities;
 - (ii) investment value in life insurance and annuities other than cash surrender value; and
 - (iii) any other policy insuring the life of a person.
 - (d) Only upon application of the liquidator, the receivership court may allow alternative procedures and requirements for the filing of proof of a claim or for allowing or proving a claim.
 - (e) Upon application, if the receivership court dispenses with the requirements of filing a proof of claim by a person, class, or group of persons, a proof of claim for that person, class, or group is considered as being filed for all purposes, except that the receivership court's waiver of proof of claim requirements may not impact guaranty association proof of claim filing requirements or coverage determinations to the extent that the guaranty association statute or filing requirements are inconsistent with the receivership court's waiver of proof.
- (2) The liquidator may permit a claimant that makes a late filing to share ratably in distributions, whether past or future, as if the claim were not filed late, to the extent that the payment will not prejudice the orderly administration of the liquidation, under the following circumstances:
 - (a) the eligibility to file a proof of claim was not known to the claimant, and the claimant files a proof of claim within 90 days after the day on which the claimant first learns of the eligibility;
 - (b)
 - (i) a transfer to a creditor is:
 - (A) avoided under Section 31A-27a-503, 31A-27a-504, 31A-27a-506, or 31A-27a-507; or
 - (B) voluntarily surrendered under Section 31A-27a-509; and
 - (ii) the filing satisfies the conditions of Section 31A-27a-509; or
 - (c) the valuation of security held by a secured creditor under Section 31A-27a-610 shows a deficiency and the claim for the deficiency is filed within 30 days after the valuation.
- (3) If a reinsurer's reinsurance contract terminates pursuant to Section 31A-27a-513:
 - (a) a claim filed by the receiver which arises from the termination may not be considered late if the claim is filed within 90 days of the day on which the reinsurance contract terminates; and
 - (b) the reinsurer shall receive a ratable share of distributions, whether past or future, as if the claim described in Subsection (3)(a) is not late.
- (4) Notwithstanding any other provision of this chapter, the liquidator may petition the receivership court, subject to Section 31A-27a-107, to set a date certain after which no further claims may be filed.
- (5) A Class 1 claim pursuant to Subsection 31A-27a-701(2)(a) is not subject to the claim filing provisions of this section.

Amended by Chapter 138, 2016 General Session

31A-27a-602 Proof of claim.

- (1) Proof of claim shall consist of a statement signed by the claimant or on behalf of the claimant that includes all of the following that are applicable:
 - (a) the particulars of the claim including the consideration given for the claim;
 - (b) the identity and amount of the security on the claim;
 - (c) the payments made on the debt, if any;
 - (d) that the sum claimed is justly owing and there is no setoff, counterclaim, or defense to the claim;
 - (e) any right of priority of payment or other specific right asserted by the claimant;
 - (f) the name and address of the claimant and the attorney, if any, who represents the claimant; and
 - (g) the claimant's Social Security number or federal employer identification number.
- (2) The liquidator may require that:
 - (a) a prescribed form be used under this section; and
 - (b) other information and documents be included.
- (3) At any time the liquidator may:
 - (a) require the claimant to present information or evidence supplementary to that required under Subsection (1);
 - (b) take testimony under oath;
 - (c) require production of one or more affidavits or depositions; or
 - (d) otherwise obtain additional information or evidence.
- (4)
 - (a) An affected guaranty association may file a single omnibus proof of claim for all claims of the affected guaranty association in connection with payment of claims of the insurer.
 - (b) The omnibus proof of claim may be periodically updated by the affected guaranty association without regard to the deadline specified in Subsection 31A-27a-601(1).
 - (c) An affected guaranty association may be required to submit a reasonable amount of documentation in support of the claim.

Enacted by Chapter 309, 2007 General Session

31A-27a-603 Allowance of claims.

- (1)
 - (a) Except as provided in Subsections (11) and (12), the liquidator shall:
 - (i) review all claims filed in the liquidation proceeding in accordance with this chapter; and
 - (ii) further investigate a claim, as the liquidator considers necessary.
 - (b) Consistent with this chapter, the liquidator may allow, disallow, or compromise a claim that will be recommended to the receivership court unless the liquidator is required by law to accept the claim as settled by a person, including an affected guaranty association, subject to a statutory or contractual right of the affected reinsurers to participate in the claims allowance process.
 - (c) Notwithstanding any other provision of this chapter, a claim under a policy of insurance may not be allowed for an amount in excess of the applicable policy limits.
- (2)

- (a) Pursuant to the review required by Subsection (1), the liquidator shall provide notice of the claim determination to the claimant or the claimant's attorney.
 - (b) The notice required by this Subsection (2) shall set forth:
 - (i) the amount of the claim allowed by the liquidator, if any;
 - (ii) the priority class of the claim as established in Section 31A-27a-701; and
 - (iii) if the claim is denied, the reason for the denial.
 - (c) In regard to a claim to be allowed pursuant to Section 31A-27a-605, preliminary notice of the amount of the claim determination shall be provided to any reinsurer that is or may be liable in respect to the claim at least 45 days before the day on which notice is provided to the claimant pursuant to this Subsection (2).
 - (d) In regard to a claim being allowed other than pursuant to Section 31A-27a-605, the notice sent to the claimant may be provided to any reinsurer that is or may be liable in respect to the claim.
 - (e) If no timely objection is submitted, the claim determination is binding on the reinsurer upon allowance.
- (3)
- (a) Within 45 days after the day on which the notice described in Subsection (2) is mailed, the claimant noticed may submit a written objection to the liquidator.
 - (b) An objection provided for under this Subsection (3) shall clearly set out:
 - (i) all facts and the legal basis, if any, for the objection; and
 - (ii) the reasons why the claim should be allowed at a different amount or in a different priority class.
 - (c) If no timely objection is submitted, the claimant may not further object, and the determination is final.
 - (d) The liquidator may accelerate the allowance of a claim by obtaining a waiver of an objection.
- (4)
- (a) A claim that is not mature as of the coverage termination date established under Section 31A-27a-402 may be allowed as if it were mature, except the claim shall be discounted to present value.
 - (b) A claim is not mature if payment on the claim is not yet due.
- (5) The following is not required to be considered as evidence of liability or of the amount of damages:
- (a) a judgment or order against an insured or the insurer entered:
 - (i) after the day on which a successful petition for receivership is initially filed; or
 - (ii) within 120 days before the day on which the petition is initially filed; or
 - (b) a judgment or order against an insured or the insurer entered at any time by default or by collusion.
- (6) A claim under an employment contract by a director, officer, or person in fact performing similar functions or having similar powers is limited to payment for services rendered before an order of receivership, unless explicitly approved in writing by:
- (a) the commissioner before an order of receivership;
 - (b) the rehabilitator before the day on which the order of liquidation is entered; or
 - (c) the liquidator after the day on which the order of liquidation is entered.
- (7) The total liability of the liquidator to all claimants arising out of the same act or policy shall be no greater than the insurer's total liability would have been were the insurer not in liquidation.
- (8)
- (a) The liquidator shall disallow a claim that is for or determined to be for a de minimis amount.

- (b) A de minimis amount is an amount equal to or less than a maximum de minimis amount approved by the receivership court as being reasonable and necessary for administrative convenience.
- (9) A claim that does not contain all the applicable information required by Section 31A-27a-602:
 - (a) does not need to be further reviewed or adjudicated; and
 - (b) may be denied or disallowed by the liquidator subject to the notice and objection procedures in this section.
- (10)
 - (a) The liquidator may reconsider a claim on the basis of additional information and amend the recommendation to the receivership court.
 - (b) The claimant shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in the claim's initial determination.
 - (c) The receivership court may amend the receivership court's allowance or disallowance as appropriate.
- (11)
 - (a) The liquidator is not required to process claims for any class until it appears reasonably likely that property will be available for a distribution to that class.
 - (b) If there are insufficient assets to justify processing all claims for a class listed in Section 31A-27a-701, the liquidator shall:
 - (i) report the facts to the receivership court; and
 - (ii) make appropriate recommendations for handling the remainder of the claims.
- (12) A claim of a lessor for damages resulting from the termination of a lease of real property shall be disallowed to the extent that the claim exceeds the sum of:
 - (a) the rent reserved by the lease, without acceleration, for the greater of one year, or 15%, not to exceed three years, of the remaining term of the lease, following the earlier of:
 - (i) the day on which the petition is filed; and
 - (ii) the day on which the lessor repossessed, or the lessee surrendered, the leased property; and
 - (b) any unpaid rent due under the lease, without acceleration, on the earlier of the dates specified in Subsection (12)(a).

Enacted by Chapter 309, 2007 General Session

31A-27a-604 Claims under an occurrence policy, surety bond, surety undertaking.

- (1) Subject to Section 31A-27a-603, an insured may file a claim for the protection afforded under the insured's policy, irrespective of whether a claim is known at the time of filing, if the policy is an occurrence policy.
- (2) Subject to Section 31A-27a-603, an obligee may file a claim for the protection afforded under a surety bond or a surety undertaking issued by the insurer as to which the obligee is the beneficiary, irrespective of whether a claim is known at the time of filing.
- (3) After a claim is filed under Subsection (1) or (2), when a specific claim is made by or against the insured or by the obligee:
 - (a) the insured or the obligee shall supplement the claim; and
 - (b) the receiver shall treat the claim as a contingent or unliquidated claim under Section 31A-27a-605.

Enacted by Chapter 309, 2007 General Session

31A-27a-605 Allowance of contingent and unliquidated claims.

- (1) As used in this section, "claim" means a demand for payment pursuant to Section 31A-27a-601 under the terms and conditions of a contract issued by the insurer as a result of a known accident, casualty, disaster, loss, event, or occurrence.
- (2)
 - (a) A claim of an insured or third party may be allowed under Section 31A-27a-603, regardless of the fact that it is contingent or unliquidated if:
 - (i) any contingency is removed in accordance with Subsection (3); and
 - (ii) the value of the claim is determined in accordance with Subsection (4).
 - (b) A claim is contingent if:
 - (i) the accident, casualty, disaster, loss, event, or occurrence insured, reinsured, or bonded against occurs on or before the date fixed under Section 31A-27a-401; and
 - (ii) the act or event triggering the insurer's obligation to pay has not occurred as of that date.
 - (c) A claim is unliquidated if the insurer's obligation to pay is established, but the amount of the claim has not been determined.
- (3)
 - (a) Unless the receivership court directs otherwise, a contingent claim may be allowed if:
 - (i) the claimant presents proof of the insurer's obligation to pay reasonably satisfactory to the liquidator; or
 - (ii) subject to Subsection (3)(b), the claim is based on a cause of action against an insured of the insurer, and:
 - (A) it may be reasonably inferred from proof presented upon the claim that the claimant would be able to obtain a judgment; and
 - (B) the person furnishes suitable proof.
 - (b) A contingent claim may not be allowed under Subsection (3)(a)(ii)(B) if the receivership court for good cause shown shall otherwise direct that no further valid claims can be made against the insurer arising out of the cause of action other than those already presented.
- (4)
 - (a) An unliquidated claim may be allowed if its amount has been determined.
 - (b) If the amount of an unliquidated claim filed pursuant to Section 31A-27a-601 remains undetermined, the valuation of the unliquidated claim may be made by estimate whenever the liquidator determines that:
 - (i) liquidation of the claim would unduly delay the administration of the liquidation proceeding; or
 - (ii) the administrative expense of processing and adjudicating the claim or group of claims of a similar type would be unduly excessive when compared with the property that is estimated to be available for distribution with respect to the claim.
 - (c) Any estimate shall be based on an accepted method of valuing a claim with reasonable certainty at the claim's net present value, such as an actuarial evaluation.
- (5)
 - (a) Notwithstanding the other provisions of this section, a claim for the value or breach of a life insurance policy, disability income insurance policy, long-term care insurance policy, or annuity may not result in or serve as the basis of any liability of a reinsurer of the insurer.
 - (b) A reinsurer's liability to the insurer shall be determined exclusively on the basis of its contracts of reinsurance and Section 31A-27a-513.
- (6)
 - (a) The liquidator may petition the receivership court to set a date certain before which all claims under this section shall be final.

- (b) In addition to the notice requirements of Section 31A-27a-107, the liquidator shall give notice of the filing of the petition to all claimants with claims that remain contingent or unliquidated under this section.

Amended by Chapter 138, 2016 General Session

31A-27a-606 Special provisions for third party claims.

- (1) Whenever a third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator on or before the last day for filing claims.
- (2) Whether or not the third party files a claim, the insured may file a claim on the insured's own behalf in the liquidation.
- (3)
 - (a) The liquidator may make recommendations to the receivership court for the allowance of an insured's claim after consideration of:
 - (i) the probable outcome of any pending action against the insured on which the claim is based;
 - (ii) the probable damages recoverable in the action; and
 - (iii) the probable costs and expenses of defense.
 - (b) After allowance by the receivership court, the liquidator shall withhold any distribution payable on the claim, pending the outcome of litigation and negotiation between the insured and the third party.
 - (c) The liquidator may reconsider the claim as provided in Subsection 31A-27a-603(10).
 - (d) As a claim against the insured is settled or barred, the insured or third party, as appropriate, shall be paid, from the amount withheld, the same percentage distribution as is paid on other claims of like priority, on the basis of the lesser of:
 - (i) the amount actually due from the insured by action or paid by agreement plus the reasonable costs and expense of defense; or
 - (ii) the amount allowed on the claim by the receivership court.
 - (e) After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed property of the insurer.
- (4)
 - (a) If several claims founded upon one policy are timely filed, whether by third parties or as claims by the insured under this section, and the aggregate amount of the timely filed allowed claims exceeds the aggregate policy limits, the liquidator may:
 - (i) apportion the policy limits ratably among the timely filed allowed claims; or
 - (ii) give notice to the insured, known third parties, and affected guaranty associations that the aggregate policy limits have been exceeded.
 - (b) Thirty days after the day on which the liquidator's notice is given under this Subsection (4):
 - (i) no further amounts shall be allowed;
 - (ii) the policy limits shall be apportioned ratably among the timely filed allowed claims; and
 - (iii) any additional claims shall be rejected.
 - (c) A claim by the insured shall be evaluated as in Subsection (3). If an insured's claim is subsequently reduced under Subsection (3), the amount freed shall be apportioned ratably among the claims that have been reduced under this Subsection (4).
- (5) A claim may not be allowed under this section to the extent the claim is covered by a guaranty association.
- (6) A claimant may withdraw a proof of claim with the liquidator's approval. The liquidator may approve the withdrawal:
 - (a) after giving notice of the withdrawal to the insured; and

- (b) only upon a showing of good cause.
- (7) The filing of a proof of claim in connection with a claim against an insured shall have the following effect on the rights of the claimant and the insured:
 - (a) By filing a proof of claim, a claimant:
 - (i) waives any right to pursue the personal assets of the insured with respect to the claim, to the extent of the coverage or policy limits provided by the insurer; and
 - (ii) except as provided in this section, agrees that, to the extent of the coverage or policy limits provided by the insurer, the claimant shall seek satisfaction of the claim against the insured solely from:
 - (A) distributions paid by the liquidator on the claim; and
 - (B) any payments that an affected guaranty association may pay on account of the claim.
 - (b) The waiver provided under this section:
 - (i) is conditioned upon the cooperation of the insured with:
 - (A) the liquidator in the defense of the claim; and
 - (B) any applicable guaranty association in defense of the claim; and
 - (ii) does not operate to:
 - (A) discharge the guaranty association from any of its responsibilities and duties;
 - (B) release the insured with respect to any claim in excess of the coverage or policy limits provided by the insurer or any other responsible party; or
 - (C) release the insured to the extent of the guaranty association's claim for reimbursement from the insured under a guaranty association statutory provision instituting a right to recover from high net worth insureds.
 - (c) The waiver provided under this section is void if:
 - (i) a claimant withdraws the claimant's proof of claim under Subsection (6); or
 - (ii) the liquidator avoids insurance coverage in connection with a proof of the claim.
 - (d) The liquidator shall provide, where applicable, notice of the election of remedies provision in this section on any proof of claim form it distributes that shall:
 - (i) be inserted above the claimant's signature line in typeface:
 - (A) no smaller than the typeface of the rest of the notice; and
 - (B) in no event smaller than font size 14; and
 - (ii) include a statement substantially similar to the following: "I understand by filing this claim in the estate of the insurer I am waiving any right to pursue the personal assets of the insured to the extent that there are policy limits or coverage provided by the now insolvent insurer."

Enacted by Chapter 309, 2007 General Session

31A-27a-607 Disputed claims.

- (1)
 - (a) When a claim is disallowed in whole or in part by the liquidator, written notice of the determination and of the right to object shall be given promptly to the claimant or the claimant's attorney of record, if any, by first-class mail at the addresses shown in the proof of claim.
 - (b)
 - (i) Within 45 days from the day on which the notice required by Subsection (1)(a) is mailed, the claimant may file an objection with the liquidator.
 - (ii) If an objection is not filed within the period provided in Subsection (1)(b)(i), the claimant may not further object to the determination.
- (2)

- (a) If an objection is filed in accordance with Subsection 31A-27a-603(3)(a) and the liquidator does not alter the liquidator's ruling, the liquidator shall ask the court for a hearing as soon as practicable.
 - (b) If the liquidator asks for a hearing under Subsection (2)(a), the court shall issue an order setting a date as early as possible.
 - (c) At the request of the liquidator, the court may establish procedures for the objections hearing.
 - (d) The liquidator shall give notice of a hearing under this Subsection (2) by first-class mail to:
 - (i) the claimant or the claimant's attorney; and
 - (ii) any other persons directly affected.
 - (e) A hearing under this Subsection (2):
 - (i) shall be heard without a jury; and
 - (ii) may be heard by:
 - (A) the court; or
 - (B) a court appointed referee.
 - (f) A hearing under this Subsection (2) shall be limited to the evidence upon which the liquidator made the determination of the claim.
 - (g) If a referee is appointed under this Subsection (2), the referee shall submit to the court:
 - (i) findings of fact;
 - (ii) recommendations; and
 - (iii) a transcript of the hearing.
 - (h) The court shall review the referee's findings of fact and recommendations for correctness by reviewing the record, including the hearing transcript.
 - (i) Consistent with Section 31A-27a-608, the court may approve, disapprove, or modify:
 - (i) the liquidator's determination of a claim; or
 - (ii) a referee's recommendations on a claim.
- (3) A court order issued after a hearing and pursuant to this section may be appealed as a final order for purposes of Rule 54, Utah Rules of Civil Procedure.
- (4) This section is not applicable to a dispute with respect to a coverage determination by an affected guaranty association as part of the affected guaranty association's statutory obligations.

Enacted by Chapter 309, 2007 General Session

31A-27a-608 Liquidator's recommendations to the receivership court.

- (1) The liquidator shall, from time to time as determined by the liquidator, present to the receivership court for approval, reports of claims settled or determined by the liquidator under Section 31A-27a-603.
- (2) A report required by this section shall include information identifying:
 - (a) the claim;
 - (b) the amount of the claim; and
 - (c) the priority class of the claim.
- (3)
 - (a) A claim included in a report described in this section and approved by the receivership court is a liability of the estate.
 - (b) An insurer's insolvency does not affect the amount of a liability described in Subsection (3)(a), regardless of any provision in an agreement to the contrary.

Amended by Chapter 319, 2018 General Session

31A-27a-609 Claims of codebtor.

If a creditor does not timely file a proof of the creditor's claim, the following may file a proof of the claim:

- (1) a person who is liable to the creditor together with the insurer; or
- (2) a person who has secured the creditor.

Enacted by Chapter 309, 2007 General Session

31A-27a-610 Secured creditor's claims.

- (1) The value of a security held by a secured creditor shall be determined in one of the following ways:
 - (a) by converting the security into money according to the terms of the agreement pursuant to which the security is delivered to the creditor; or
 - (b) by agreement or litigation between the creditor and the liquidator.
- (2)
 - (a) The receiver has the first priority to use collateral to reimburse a prepetition loss or expense if:
 - (i) a surety pays a loss or loss adjustment expense under its own surety instrument before any petition for a delinquency proceeding;
 - (ii) the principal posts collateral that remains available to reimburse the loss, the loss adjustment expense, or both; and
 - (iii) at the time of the petition, the collateral posted under this Subsection (2)(a) has not been credited against the payments made.
 - (b) If the principal under a surety bond or a surety undertaking pledges collateral, including a guaranty or a letter of credit, to secure the principal's reimbursement obligation to the insurer, the claim of an obligee or, subject to the discretion of the receiver, completion contractor under the surety bond or surety undertaking shall be satisfied first out of the collateral or the collateral's proceeds.
 - (c) In making a distribution to an obligee or completion contractor, the receiver shall retain a sufficient reserve for any other potential claim against the collateral under Subsection (2)(b).
 - (d) If the collateral is insufficient to satisfy in full all potential claims against it under Subsections (2)(b) and (f):
 - (i) the claims shall be paid on a pro rata basis; and
 - (ii) the obligees or completion contractor shall have claims, subject to allowance pursuant to Section 31A-27a-603, for any deficiency.
 - (e) If the time to assert a claim against a surety bond or a surety undertaking expires and all claims have been satisfied in full, any remaining collateral for the surety bond or surety undertaking shall be returned to the principal.
 - (f)
 - (i) To the extent that a guaranty association has made a payment relating to a claim against a surety bond, the guaranty association shall first be reimbursed for the payment and related expenses out of the available collateral or proceeds related to the surety bond.
 - (ii) To the extent the collateral is sufficient, the guaranty association will be reimbursed for 100% of the guaranty association's payment.
 - (iii) If the collateral is insufficient to satisfy in full all potential claims against it under this Subsection (2)(f) and Subsection (2)(b), the one or more guaranty associations that pay claims on a surety bond:

- (A) are entitled to a pro rata share of the available collateral in accordance with Subsection (2)(d); and
 - (B) have claims against the general assets of the estate in accordance with Section 31A-27a-603 for any deficiency.
 - (iv) A payment made to a guaranty association from the collateral may not be considered early access or otherwise considered a distribution out of the general assets or property of the estate.
 - (v) A guaranty association shall subtract any payment from the collateral from the guaranty association's final claims against the estate.
- (3)
- (a) The amount determined pursuant to Subsection (1) shall be credited upon the secured claim, and the claimant may file a proof of claim, subject to the other provisions of this chapter, for any deficiency, which shall be treated as an unsecured claim.
 - (b) If the claimant surrenders the claimant's security to the liquidator, the entire claim shall be treated as if unsecured.
- (4) The liquidator may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, the property to the extent of any benefit to the holder of the allowed secured claim.

Enacted by Chapter 309, 2007 General Session

31A-27a-611 Qualified financial contracts.

(1) As used in this section:

- (a)
 - (i) "Actual direct compensatory damages" does not include:
 - (A) punitive or exemplary damages;
 - (B) damages for lost profit or lost opportunity; or
 - (C) damages for pain and suffering.
 - (ii) "Actual direct compensatory damages" includes:
 - (A) normal and reasonable costs of cover; or
 - (B) other reasonable measures of damages used in the derivatives, securities, or other market for the contract or agreement claim.
- (b) "Business day" means a day other than:
 - (i) a Saturday;
 - (ii) a Sunday; or
 - (iii) day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.
- (c) "Contractual right" includes:
 - (i) a right set forth:
 - (A) in a rule or bylaw of:
 - (I) a derivatives clearing organization, as defined in the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
 - (II) a multilateral clearing organization, as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. Sec. 4421;
 - (III) a national securities exchange;
 - (IV) a national securities association;
 - (V) a securities clearing agency;

- (VI) a contract market designated under the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
 - (VII) a derivatives transaction execution facility registered under the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.; or
 - (VIII) a board of trade, as defined in the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq.;
- or
- (B) in a resolution of the governing board of an entity described in Subsection (1)(c)(i)(A); and
- (ii) a right, whether or not evidenced in writing, arising:
 - (A) under statutory or common law;
 - (B) under law merchant; or
 - (C) by reason of normal business practice.
- (d) For purposes of Subsection (3), "walkaway clause" means a provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist:
 - (i) solely because of:
 - (A) the party's status as a nondefaulting party in connection with the insolvency of an insurer that is subject to this chapter and a party to the contract; or
 - (B) the appointment of or the exercise of rights or powers by a receiver of an insurer that is subject to this chapter and a party to the contract; and
 - (ii) not as a result of a party's exercise of any right to offset, setoff, or net obligations that exist under:
 - (A) the contract;
 - (B) any other contract between those parties; or
 - (C) applicable law.
- (2) Notwithstanding any other provision of this chapter, including any provision of this chapter permitting the modification of a contract, or other law of a state:
 - (a) a person may not be stayed or prohibited from exercising:
 - (i) a contractual right to cause the termination, liquidation, acceleration, or close out of an obligation under or in connection with a netting agreement or qualified financial contract with an insurer because of:
 - (A) the insolvency, financial condition, or default of the insurer at any time, if the right is enforceable under applicable law other than this chapter; or
 - (B) the commencement of a formal delinquency proceeding under this chapter;
 - (ii) a right under any of the following relating to one or more netting agreements or qualified financial contracts:
 - (A) a pledge agreement or arrangement;
 - (B) a security agreement or arrangement;
 - (C) a collateral agreement or arrangement;
 - (D) a reimbursement agreement or arrangement;
 - (E) a guarantee agreement or arrangement;
 - (F) any other similar security agreement or arrangement; or
 - (G) other credit enhancement; or
 - (iii) subject to Subsection 31A-27a-510(2), a right to set off or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more qualified financial contracts where the counterparty or its guarantor is organized under the laws of:
 - (A) the United States;
 - (B) a state; or

- (C) a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting; or
- (b) if a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a proceeding under this chapter terminates, liquidates, closes out, or accelerates the master netting agreement or qualified financial contract:
 - (i) damages shall be measured as of the date or dates of termination, liquidation, close out, or acceleration; and
 - (ii) the amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with Subsection (7).
- (3)
 - (a) Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a nondefaulting party to an insurer against which an application or petition is filed under this chapter shall be transferred to or on the order of the receiver for the insurer:
 - (i) even if the insurer is the defaulting party; and
 - (ii) notwithstanding any walkaway clause in the netting agreement or qualified financial contract.
 - (b)
 - (i) A limited two-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that defaults is considered to be a full two-way payment or second method provision as against the defaulting insurer.
 - (ii) Property or an amount described in this Subsection (3)(b) shall, except to the extent it is subject to one or more secondary liens or encumbrances or rights of netting or setoff, be a general asset of the insurer.
- (4) In making a transfer of a netting agreement or qualified financial contract of an insurer subject to a proceeding under this chapter, the receiver shall either:
 - (a) transfer to one party, other than an insurer subject to a proceeding under this chapter, all netting agreements and qualified financial contracts between a counterparty or an affiliate of the counterparty and the insurer that is the subject of the proceeding, including:
 - (i) all rights and obligations of each party under each netting agreement and qualified financial contract; and
 - (ii) all property, including any guarantees or other credit enhancement, securing any claims of each party under each netting agreement and qualified financial contract; or
 - (b) transfer none of the netting agreements, qualified financial contracts, rights, obligations, or property referred to in Subsection (4)(a) with respect to the counterparty and an affiliate of the counterparty.
- (5) If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, the receiver shall use its best efforts to notify any person who is party to the netting agreements or qualified financial contracts of the transfer by 12 noon, the receiver's local time, on the business day following the transfer.
- (6)
 - (a) Notwithstanding any other provision of this chapter and except for Subsection (6)(b), a receiver may not avoid a transfer of money or other property arising under or in connection with any of the following that is made before the commencement of a formal delinquency proceeding under this chapter:
 - (i) a netting agreement;
 - (ii) a qualified financial contract; or
 - (iii) one of the following relating to a netting agreement or qualified financial contract:
 - (A) a pledge agreement;

- (B) a security agreement;
 - (C) a collateral agreement;
 - (D) a guarantee agreement;
 - (E) any other similar security arrangement; or
 - (F) a credit support document.
- (b) A transfer may be avoided under Subsection 31A-27a-507(1) if the transfer is made with actual intent to hinder, delay, or defraud:
- (i) the insurer;
 - (ii) a receiver appointed for the insurer; or
 - (iii) an existing or future creditor.
- (7)
- (a) In exercising the rights of disaffirmance or repudiation of a receiver with respect to a netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:
- (i) disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or an affiliate of the counterparty and the insurer that is the subject of the proceeding; or
 - (ii) disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in Subsection (7)(a)(i) with respect to the person or an affiliate of the person.
- (b) Notwithstanding any other provision of this chapter, a claim of a counterparty against the estate arising from the receiver's disaffirmance or repudiation of a netting agreement or qualified financial contract that has not been previously affirmed in the liquidation or immediately preceding rehabilitation case shall be determined and shall be allowed or disallowed:
- (i) as if the claim arose before the day on which the petition for liquidation is filed; or
 - (ii) if a rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the day on which the petition for rehabilitation is filed.
- (c) The amount of a claim shall be the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified financial contract.
- (8) This section does not apply to a person who is an affiliate of the insurer that is the subject of the proceeding.
- (9) All rights of a counterparty under this chapter apply to a netting agreement or qualified financial contract entered into on behalf of the general account or separate accounts if the assets of each separate account are available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of that separate account.
- (10)
- (a) The definition of "qualified financial contract" in Section 31A-27a-102 shall be interpreted to be consistent with the definitions applicable under federal law in instances of insolvency of other types of financial institutions.
- (b) The definition of "qualified financial contract" and this section do not:
- (i) affect the scope of permissible investments of insurers or the valuation of those investments; or
 - (ii) modify any other regulatory framework applicable to investments or investment practices of insurers.

Enacted by Chapter 309, 2007 General Session

31A-27a-612 Administration of deductible policies and insured collateral.

(1) As used in this section:

- (a) "Collateral" means any of the following that secures an insured's obligation to pay or to reimburse the insurer for deductible claim payments and to reimburse or pay to the insurer other secured obligations:
 - (i) cash;
 - (ii) a letter of credit of the insured;
 - (iii) a surety bond posted by the insured; or
 - (iv) any other form of security posted by the insured.
- (b) "Deductible claim" means a claim, including a loss or allocated loss adjustment expense, under a deductible policy within the insured's obligation to pay a portion of a claim or claim expense that the insurer is obligated to pay to a person other than the insured by the deductible policy or by operation of law.
- (c)
 - (i) "Deductible limit" means a limit on an amount to be paid or reimbursed by the insured under a deductible policy that is equal to or greater than \$5,000.
 - (ii) A deductible limit may be any amount of the risk exposure before the insurer agrees to become liable for the insurance risk without a right of recoupment from the insured for the insurer's payment of claims or expenses related to a claim under the deductible policy.
- (d)
 - (i) "Deductible policy" means any combination of one or more policies, endorsements, contracts, or security agreements in which the insured agrees with the insurer to:
 - (A) pay directly:
 - (I) the initial portion of a claim under the policy, endorsement, contract, or agreement up to a specified dollar amount; or
 - (II) the expenses related to a claim; or
 - (B) reimburse the insurer for the insurer's payment of:
 - (I) a claim under the policy, endorsement, contract, or agreement up to a specified dollar amount; or
 - (II) the expenses related to a claim.
 - (ii) "Deductible policy" includes a policy, endorsement, contract, or agreement that contains an aggregate limit on the insured's liability for all deductible claims in addition to a deductible limit for each claim.
 - (iii) "Deductible policy" does not include:
 - (A) a policy, endorsement, contract, or agreement that provides that the initial portion of a covered claim shall be self-insured and the insurer has no payment obligation within the self-insured retention;
 - (B) a policy, endorsement, contract, or agreement that provides for retrospectively rated premium payments by the insured; or
 - (C) a reinsurance arrangement or agreement.
- (e) "Other secured obligation" means an obligation, such as a reinsurance or retrospective premium obligation, that is:
 - (i) payable by the insured to the insurer; and
 - (ii) secured by collateral that also secures a deductible obligation.
- (f) "Uncovered claim" means a deductible claim that is secured by collateral but that:
 - (i) is not defined as a covered claim under any relevant guaranty association statute;
 - (ii) the insured fails to fund or pay; and
 - (iii) is filed with the receiver pursuant to the receivership proof of claim process.

- (2)
 - (a) If an insurer agrees to allow an insured to fund or pay deductible claims directly or through a third party administrator, except as prohibited by applicable workers' compensation insurance law:
 - (i) the insured shall fulfill the insured's obligations notwithstanding a delinquency proceeding; and
 - (ii) the receiver shall allow the funding or payment agreements to continue notwithstanding a delinquency proceeding.
 - (b) To the extent the insured funds or pays a deductible claim, the insured's funding or payment of a deductible claim:
 - (i) bars any deductible claim in a delinquency proceeding including a claim by the insured or third party claimant; and
 - (ii) extinguishes the obligation, if any, of the receiver or an affected guaranty association to pay the deductible claim.
 - (c) The insured is responsible for providing timely notice to the receiver and to all affected guaranty associations for any claim that may exceed the deductible limit.
 - (d) A charge of any kind may not be made against a receiver or an affected guaranty association on the basis of an insured's funding or payment of a deductible claim.
 - (e) The failure of an insured to fulfill the insured's obligation pursuant to a funding agreement entitles the following to the full benefit of all collateral and other rights of recovery and reimbursement under the other provisions of this section:
 - (i) the receiver that pays a deductible claim; or
 - (ii) pursuant to Subsection (6)(b), an affected guaranty association that pays a deductible claim.
- (3) Any reimbursement owed to an insurer under a deductible policy issued by an insurer subject to a delinquency proceeding shall be administered as follows:
 - (a)
 - (i) A reimbursement from an insured for the payment of a deductible claim is a general asset of the estate to the extent that:
 - (A) the insolvent insurer is owed reimbursement for deductible payments made before the entry of a final order of liquidation; or
 - (B) the receiver is owed reimbursement for a deductible payment.
 - (ii) The receiver shall determine if a reimbursement is a general asset of the estate in accordance with this section.
 - (b) The receiver shall bill an insured for reimbursement of a deductible claim:
 - (i) paid by the insurer before the commencement of delinquency proceedings;
 - (ii) paid by an affected guaranty association upon receipt of notice of a reimbursable payment; or
 - (iii) paid or allowed by the receiver.
 - (c) The receiver may take all commercially reasonable actions necessary to collect a reimbursement owed if the insured does not make payment within:
 - (i) the time specified in the deductible policy; or
 - (ii) within 60 days after the day of billing if no time is specified in the deductible policy.
 - (d) The following is not a defense to the insured's reimbursement obligation under a deductible policy:
 - (i) the insolvency of the insurer;
 - (ii) the insurer's inability to perform any of the insurer's obligations under a deductible policy; or
 - (iii) an allegation of improper handling or payment of a deductible claim by:
 - (A) the insurer;

- (B) the receiver;
 - (C) an affected guaranty association; or
 - (D) any combination of Subsections (3)(d)(iii)(A) through (C).
- (4) The receiver shall adjust and pay uncovered claims as provided in Subsection (5). The receiver's obligation under this Subsection (4) terminates once all available collateral is exhausted. Once all available collateral is exhausted, any unpaid uncovered claims shall continue to be handled as a proof of claim in the receivership estate.
- (5)
- (a)
 - (i) Except where a deductible policy or other agreement conflicts with this section, any collateral held by an insurer subject to a delinquency proceeding under this chapter held under a deductible policy issued by the insurer, held for other secured obligations, or held under both shall be maintained and administered in accordance with:
 - (A) the deductible policy;
 - (B) any applicable security agreement;
 - (C) any agreement regarding other secured obligations; or
 - (D) any applicable combination of the deductible policy and other agreement.
 - (ii) This Subsection (5) applies to collateral regardless of whether the collateral is held by, for the benefit of, or assigned to the insurer under a deductible policy, agreement, or other secured obligation.
 - (b)
 - (i) Subject to this Subsection (5), collateral shall be used to secure the insured's obligation to fund or reimburse deductible claims or other secured obligations or other payment obligations under Subsection (8).
 - (ii) Collateral shall be considered as property of the receivership estate solely for the purpose of the receiver administering and handling the collateral.
 - (iii) Collateral may not be considered as a general asset of the estate, except as provided in Subsections (5)(c) and (8).
 - (c)
 - (i) Subject to Subsection (5)(c)(ii), collateral held to secure the insured's performance of obligations is a general asset of the estate to the extent that:
 - (A) the insurer pays or has paid a deductible claim before the day on which a final order of liquidation is entered and the deductible is not reimbursed by the insured;
 - (B) the receiver pays or has paid a deductible claim; or
 - (C) the insured fails to pay or reimburse to the insurer other secured obligations to the extent the payment or reimbursement is due or payable before the day on which a final order of liquidation is entered and remains unpaid.
 - (ii) The receiver shall determine the extent that collateral described in this Subsection (5)(c) is a general asset.
 - (d) The receiver shall draw down collateral to the extent necessary if the insured fails to:
 - (i) perform the insured's funding or payment obligations under any deductible policy;
 - (ii) pay deductible reimbursements within:
 - (A) the time specified in the deductible policy; or
 - (B) 60 days after the date of the billing if no time is specified in the deductible policy;
 - (iii) timely fund any other secured obligation; or
 - (iv) timely pay expenses defined in Subsection (8).
 - (e)

- (i) The receiver shall first apply or reserve collateral to the insured's obligations referenced in Subsections (5)(c)(i)(A) and (C).
 - (ii) The receiver shall use any collateral remaining after the application of Subsection (5)(e)(i) to:
 - (A) reimburse deductible claims submitted by an affected guaranty association;
 - (B) adjust and pay uncovered claims allowed by the liquidator;
 - (C) pay other secured obligations of the insured that become due and payable after the date of liquidation; or
 - (D) pay expenses as defined in Subsection (8).
 - (iii) The receiver shall:
 - (A) use collateral under Subsection (5)(e)(ii) in the order that the deductible claims or charges against the collateral listed in Subsection (5)(e)(ii) are received and accepted by the receiver; and
 - (B) continue until all valid deductible claims or charges are fully reimbursed or paid or the collateral is exhausted.
 - (iv) If there are amounts payable or reimbursable under this Subsection (5)(e) and the receiver for any reason has been precluded from drawing the collateral, the receiver may establish a reserve against the collateral for those amounts. Only the collateral exceeding the reserve shall be considered remaining collateral under this Subsection (5)(e).
 - (f) Once all claims, other secured obligations, or expenses under Subsection (8) covered by collateral have been paid and the receiver is satisfied that no new claims, other secured obligations, or expenses under Subsection (5)(e) may be presented, the receiver shall release any remaining collateral to the insured in accordance with the deductible policy or agreement relating to other secured obligations.
- (6) To the extent an affected guaranty association pays a deductible claim for which the insurer would have been entitled to reimbursement from the insured, the following provisions apply:
- (a)
 - (i) When an affected guaranty association pays a deductible claim, the affected guaranty association shall report the claim to the receiver.
 - (ii) The receiver shall collect from the insured all deductible amounts due as reimbursement. Subject to Subsection (8), when the insured reimbursements are collected, the receiver shall reimburse the affected guaranty association for deductible claims.
 - (iii) A reimbursement paid to the affected guaranty association pursuant to this Subsection (6)(a) may not be treated as a distribution under Section 31A-27a-703 or as an early access payment under Section 31A-27a-704.
 - (iv) If an affected guaranty association pays a deductible claim that is also subject to reimbursement under statutory net worth provisions, the affected guaranty association shall:
 - (A) bill the insured directly;
 - (B) notify the insurer of the payment; and
 - (C) notify the receiver of any receipt of a reimbursement under net worth provisions, which shall be credited against the insured's deductible reimbursement obligations to the extent that the reimbursement applies to deductible claims.
 - (b)
 - (i) This Subsection (6)(b) applies if:
 - (A) the receiver declines to seek reimbursement from the insured or from any available collateral;
 - (B) the receiver is unsuccessful in obtaining reimbursement from the insured or from any available collateral; or

- (C) the receiver fails to take available commercially reasonable actions to collect a reimbursement owed.
- (ii) The receiver shall notify an affected guaranty association if the receiver declines to seek or is unsuccessful in obtaining reimbursement from the insured or from any available collateral.
- (iii) If a condition described in Subsection (6)(b)(i) exists, notwithstanding whether the affected guaranty association receives the notice required by Subsection (6)(b)(ii), an affected guaranty association:
 - (A) may, after notice to the receiver, collect a reimbursement due from the insured for the deductible claims the affected guaranty association has paid:
 - (I) on the same basis as the receiver; and
 - (II) with the same rights and remedies; and
 - (B) shall report any amounts collected under Subsection (6)(b)(iii)(A) from each insured to the receiver.
- (iv) The receiver shall provide an affected guaranty association with available information needed to collect a reimbursement due from the insured.
- (v) When an affected guaranty association undertakes to collect reimbursements from the insured, the affected guaranty association shall notify all other guaranty associations who have paid deductible claims on behalf of the same insured that this action is being taken.
- (vi) An amount collected by the affected guaranty association pursuant to this Subsection (6)(b) may not be treated as a distribution under Section 31A-27a-703 or as an early access payment under Section 31A-27a-704.
- (vii) An affected guaranty association may net an expense incurred in collecting a reimbursement against that reimbursement.
- (c) The receiver shall provide any affected guaranty associations with periodic reports concerning the receiver's activities in discharging responsibilities under this section, which shall include an accounting for the receiver's deductible billing and collection activities.
- (d) To the extent that an affected guaranty association pays a deductible claim that is not reimbursed either from collateral or by insured payments, the affected guaranty association has a claim for those amounts in the delinquency proceeding. Any claim by an affected guaranty association shall be reduced by reimbursed or unreimbursed expenses described in Subsection (8) incurred by the receiver.
- (e)
 - (i) If any collateral is held under a deductible policy at the time the receiver files an application to terminate the delinquency proceeding, and it appears that an additional deductible claim may be payable by an affected guaranty association under the deductible policy, the receiver shall:
 - (A) transfer to an affected guaranty association the portion of the collateral that is reasonably estimated to be necessary to pay the deductible claim; and
 - (B) release any remaining portion of the collateral to the insured.
 - (ii) An affected guaranty association shall handle any collateral transferred from the receiver as provided in this section.
- (f) Nothing in this Subsection (6) limits any rights of the receiver or an affected guaranty association under applicable statutory law to obtain reimbursement from an insured for a claims payment made by the affected guaranty association under a policy of the insurer or for the affected guaranty association's related expenses.
- (7)
 - (a) The receiver shall periodically adjust the collateral being held using accepted actuarial principles and practices.

- (b) The receiver may impose a discretionary safety margin for collateral maintained.
 - (c) The receiver may not be required to review collateral more than once a year.
 - (d) The receiver shall inform any affected guaranty association and the insured of any collateral reviews, including the basis for any proposed adjustment.
- (8) The receiver may do the following in relation to reasonable expenses incurred in fulfilling the receiver's responsibilities under this section:
- (a) deduct the expense from reimbursements;
 - (b) deduct the expense from the collateral; or
 - (c) recover the expense through billings to the insured.
- (9)
- (a) A receiver shall meet the receiver's obligations under this section in a timely manner.
 - (b) If an affected guaranty association believes that a receiver is not meeting an obligation under this section in a timely manner, upon motion by an affected guaranty association, a receivership court may grant relief to the affected guaranty association if the receivership court finds that the receiver is not meeting an obligation under this section in a timely manner.
- (10) This section modifies Subsection 31A-22-1010(2)(b) to the extent necessary to permit an insured to participate in the payment of the insurance claims and losses by reimbursement of a receiver or affected guaranty association as provided in this section.

Enacted by Chapter 309, 2007 General Session