

31A-27a-405 Powers of the liquidator.

(1) The liquidator may:

(a)

(i) hold hearings, subpoena a witness to compel the witness' attendance, administer oaths, examine a person under oath, and compel a person to subscribe to that person's testimony after the testimony is correctly reduced to writing; and

(ii) in connection with a power listed in Subsection (1)(a)(i), require the production of a record that the liquidator considers relevant to the inquiry;

(b) audit the records of all agents of the insurer to the extent that those records relate to the business activities of the insurer;

(c) collect all debts and money due and claims belonging to the insurer, wherever located, and for this purpose to:

(i) institute action in another jurisdiction, to forestall garnishment and attachment proceedings against the debt;

(ii) in addition to paying other Class 1 claims described in Subsection 31A-27a-701(2)(a), if the payment assists or results in the collection or recovery of property of the insurer that provides a net benefit to creditors of the estate, pay Class 1 administrative costs of the estate:

(A) upon approval of the receivership court; and

(B) only to the extent of the collection or recovery of the property;

(iii) do any other act as is necessary or expedient to collect, conserve, or protect the insurer's property, including the power to sell, compound, compromise, or assign a debt for purposes of collection upon the terms and conditions that the liquidator considers consistent with this chapter; and

(iv) pursue any creditor's remedies available to enforce a claim of the insurer;

(d) conduct public and private sales of the property of the insurer;

(e) subject to Subsection (6), use property of the estate of an insurer under a liquidation order to transfer:

(i)

(A) a policy obligation; or

(B)

(I) the insurer's obligations under a surety bond or a surety undertaking; and

(II) collateral held by the insurer with respect to the reimbursement obligations of the principals under the surety bond or surety undertaking;

(ii) to a solvent assuming insurer; and

(iii) if the transfer can be arranged without prejudice to applicable priorities under Section 31A-27a-701;

(f) subject to Subsection (4), acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any property of the estate:

(i) at its market value; or

(ii) upon terms and conditions that are fair and reasonable;

(g) execute, acknowledge, and deliver any deed, assignment, release, or other instrument necessary or proper to effectuate a sale of property or other transaction in connection with the liquidation;

(h)

(i) subject to Subsection (7), borrow money for the purpose of facilitating the liquidation:

(A) on the security of the property of the estate; or

(B) without security; and

- (ii) execute and deliver a document necessary to the transaction to borrow money;
 - (i)
 - (i) enter into a contract necessary to carry out the order to liquidate; and
 - (ii) subject to Section 31A-27a-113, assume or reject an executory contract or unexpired lease to which the insurer is a party;
 - (j)
 - (i) continue to prosecute or to institute in the name of the insurer or in the liquidator's own name a suit or other legal proceeding, in this state or elsewhere; and
 - (ii) abandon the prosecution of a claim the liquidator considers unprofitable to pursue further;
 - (k) if the insurer is dissolved under Section 31A-27a-404, apply to a court in this state or elsewhere for leave to substitute the liquidator for the insurer as a party;
 - (l) subject to Subsection (8), prosecute or assert with exclusive standing an action that may exist on behalf of the public or a creditor, member, policyholder, or shareholder of the insurer against a person, except to the extent that:
 - (i) a claim is personal to a specific creditor, member, policyholder, or shareholder; and
 - (ii) recovery on the claim would not inure to the benefit of the estate;
 - (m) subject to Subsection (8), take possession of a record or property of the insurer as may be convenient for the purposes of efficient and orderly execution of the liquidation;
 - (n) deposit in one or more banks in this state sums required for meeting current administration expenses and dividend distributions;
 - (o) invest all sums not currently needed, unless the receivership court orders otherwise;
 - (p) file any necessary document for record in the office of a recorder of deeds or record office in this state or elsewhere where property of the insurer is located;
 - (q) subject to Subsection (9), assert all defenses available to the insurer as against a third person, including statutes of limitations, statutes of frauds, and the defense of usury;
 - (r) exercise and enforce all the rights, remedies, and powers of a creditor, shareholder, policyholder, or member, including any power to avoid a transfer or lien that may be voidable under this chapter or otherwise;
 - (s)
 - (i) intervene in a proceeding wherever instituted that might lead to the appointment of a receiver or trustee for the insurer or any of its property; and
 - (ii) act as the receiver or trustee whenever the appointment is offered;
 - (t) enter into an agreement with a receiver or commissioner of any other state; and
 - (u) exercise all powers held on or conferred after April 30, 2007, on a receiver by the laws of this state not inconsistent with this chapter.
- (2) The liquidator is vested with all the rights of the one or more entities in receivership.
- (3) The enumeration of the powers and authority of the liquidator in this section:
- (a) may not be construed as a limitation upon the liquidator; and
 - (b) does not exclude in any manner the right to do other acts:
 - (i) not specifically enumerated or otherwise provided for; and
 - (ii) to the extent necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.
- (4)
- (a) The liquidator may take the following actions as provided in this Subsection (4):
 - (i) hypothecate, encumber, lease, sell, transfer, abandon, or otherwise dispose of or deal with property of the insurer;
 - (ii) settle or resolve a claim brought by the liquidator on behalf of the insurer; or
 - (iii) commute or settle a claim of reinsurance under a contract of reinsurance.

- (b) The liquidator may take an action described in Subsection (4)(a) at the liquidator's discretion if the property or claim has a market or settlement value, as shown on the receivership's financial statements, that does not exceed:
 - (i) the lesser of:
 - (A) \$1,000,000; or
 - (B) 10% of the general assets of the estate; or
 - (ii) an amount increased from the amount described in Subsection (4)(b)(i), if the receivership court increases the amount upon a petition of the liquidator and a showing that compliance with this Subsection (4)(b) is:
 - (A) burdensome to the liquidator in administering the estate; and
 - (B) unnecessary to protect the material interests of creditors.
- (c) In all instances other than those described in Subsection (4)(b), the liquidator may take an action described in Subsection (4)(a) only after obtaining approval of the receivership court as provided in Section 31A-27a-107.
- (d) The liquidator may, at the liquidator's discretion, request the receivership court to approve a proposed action as provided in Section 31A-27a-107:
 - (i) if the value of the property or claim appears to be less than the threshold provided in Subsection (4)(b) but cannot be ascertained with certainty; or
 - (ii) for any other reason as determined by the liquidator.
- (e)
 - (i) After obtaining approval of the receivership court as provided in Section 31A-27a-107, the liquidator may transfer rights to payment under a ceding reinsurance agreement covering policy to a third party transferee.
 - (ii) The transferee has the rights to collect and enforce collection of the reinsurance for the amount payable to the ceding insurer or to its receiver:
 - (A) without diminution because:
 - (I) of the insolvency; or
 - (II) the receiver failed to pay all or a portion of the claim; and
 - (B) on the basis of the amounts paid or allowed pursuant to Section 31A-27a-511.
 - (iii) The transfer of the rights described in Subsection (4)(e)(ii) does not give rise to any defense regarding the reinsurer's obligations under the reinsurance agreement regardless of whether the agreement or other applicable law prohibits the transfer of rights under the reinsurance agreement.
 - (iv) Except as provided in this Subsection (4), a transfer of rights pursuant to this Subsection (4)(e) may not impair any right or defense of the reinsurer that:
 - (A) exists before the transfer; or
 - (B) would have existed in the absence of the transfer.
 - (v) Except as otherwise provided in this Subsection (4), a transfer of rights pursuant to this Subsection (4)(e) does not relieve the transferee or the liquidator from an obligation owed to the reinsurer pursuant to the reinsurance or other agreement.
- (5)
 - (a) The liquidator is not obligated to defend an action against the insurer or insured.
 - (b) If a defense is an obligation of the insurer, an insured not defended by a guaranty association may:
 - (i) provide its own defense; and
 - (ii) include the cost of the defense as part of the insured's claim.
 - (c) The right of the liquidator to contest coverage on a particular claim is preserved without the necessity for an express reservation of rights.

- (6) Once a liquidator makes a transfer described in Subsection (1)(e), the estate has no further liability under a transferred policy, surety bond, or surety undertaking after the transfer is made if:
 - (a) all insureds, principals, third party claimants, and obligees under the policy, surety bond, or surety undertaking consent; or
 - (b) the receivership court so orders.
- (7) Funds borrowed under Subsection (1)(h):
 - (a) may be repaid as an administrative expense; and
 - (b) have priority over any other claims in Class 1 under the priority of distribution.
- (8)
 - (a) Subsection (1)(l) does not infringe or impair any of the rights provided to an affected guaranty association pursuant to its enabling statute or otherwise.
 - (b) Notwithstanding Subsection (1)(m), an affected guaranty association shall have reasonable access to the records of the insurer necessary for the affected guaranty association to carry out its statutory obligations.
- (9)
 - (a) A waiver of a defense by the insurer after a petition pursuant to Section 31A-27a-201 or 31A-27a-207 is filed does not bind the liquidator.
 - (b) Notwithstanding Subsection (1)(q), when an affected guaranty association determines it has an obligation to defend a suit, the liquidator:
 - (i) shall defer to that obligation; and
 - (ii) may defend only in cooperation with the affected guaranty association.

Enacted by Chapter 309, 2007 General Session