

INSURANCE LIQUIDATION LAW

AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: James A. Ferrin

LONG TITLE

General Description:

This bill modifies the Insurance Code to address liquidation.

Highlighted Provisions:

This bill:

- ▶ modifies the dollar amount for transactions a liquidator may engage in without the
sion of the court;
- ▶ addresses a reinsurer's liability for paid claims;
- ▶ corrects a cross reference;
- ▶ places a dollar amount on which commutation and release agreements are reviewed
court; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

31A-27-314, as last amended by Chapter 185, Laws of Utah 1997
31A-27-326, as enacted by Chapter 242, Laws of Utah 1985
31A-27-327, as enacted by Chapter 242, Laws of Utah 1985



28 **31A-27-330.6**, as enacted by Chapter 9, Laws of Utah 1996, Second Special Session

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section **31A-27-314** is amended to read:

32 **31A-27-314. Powers and duties of the liquidator.**

33 (1) The liquidator shall report to the court, at intervals specified by the court, on the
34 progress of the liquidation in whatever detail the court orders. Unless the court orders
35 otherwise, the liquidator has the [following] powers and responsibilities[:] described in this
36 Subsection (1).

37 (a) (i) [He] The liquidator may:

38 (A) appoint a special deputy to act for [him] the liquidator under this chapter[;]; and
39 (B) determine the special deputy's compensation, subject to the approval of the court.

40 (ii) The special deputy has all the powers of the liquidator granted by this section.

41 (iii) The special deputy serves at the pleasure of the liquidator.

42 (b) (i) [He] The liquidator may appoint or engage:

43 (A) employees and agents[;];

44 (B) legal counsel pursuant to Section 31A-2-108[;];

45 (C) actuaries[;];

46 (D) accountants[;];

47 (E) appraisers[;];

48 (F) consultants[;]; and

49 (G) other personnel necessary to assist in the liquidation.

50 (ii) The career service laws do not apply to [these] the persons described in Subsection
51 (1)(b)(i).

52 (c) [He] The liquidator may fix the compensation of persons under Subsection (1)(b),
53 subject to the approval of the court.

54 (d) (i) [He] The liquidator may defray all reasonable expenses of taking possession of,
55 conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and
56 property of the insurer.

57 (ii) If the property of the insurer does not contain sufficient cash or liquid assets to
58 defray the reasonable costs incurred, the commissioner may advance the costs so incurred out

59 of the department's appropriation.

60 (iii) Any amounts [so] paid under Subsection (1)(d)(ii) are expenses of administration
61 and shall be repaid for the credit of the [Insurance Department] department out of the first
62 available cash of the insurer.

63 (e) [He] The liquidator may:

64 (i) hold hearings[;];

65 (ii) subpoena witnesses and compel their attendance[;];

66 (iii) administer oaths[;];

67 (iv) examine any person under oath[;];

68 (v) compel any person to subscribe to [his] that person's testimony after it has been
69 correctly reduced to writing[;]; and

70 (vi) in connection with [these proceedings] a proceeding under this Subsection (1)(e),
71 require the production of any books, papers, records, or other documents that the liquidator
72 considers relevant to the inquiry.

73 (f) [He] The liquidator may collect all debts and claims due and money belonging to
74 the insurer, wherever located, and for this purpose:

75 (i) institute timely action in other jurisdictions to forestall garnishment and attachment
76 proceedings against those debts;

77 (ii) ~~H~~ [for any bad or doubtful debts;] ~~H~~ perform any other acts necessary or expedient to
78 collect, conserve, or protect its assets or property, including selling, compounding,
79 compromising, or assigning ~~H~~ ANY BAD OR DOUBTFUL DEBTS ~~H~~ for collection, upon the terms and
conditions as [he] the liquidator
80 considers best[~~, any bad or doubtful debts~~]; and

81 (iii) pursue any creditor's remedies available to enforce [his] the liquidator's claims.

82 (g) [He] The liquidator may conduct public and private sales of the property of the
83 insurer in a manner prescribed by the court.

84 (h) [He] The liquidator may cooperate with the associations created under Chapter 28,
85 Guaranty Associations, and associations created under similar laws in other jurisdictions in
86 using assets of the estate to transfer policy obligations to a solid assuming insurer, if the
87 transfer can be arranged without prejudice to applicable priorities under Section 31A-27-335.

88 (i) (i) [He] The liquidator may acquire, hypothecate, encumber, lease, improve, sell,
89 transfer, or otherwise dispose of or deal with any property of the insurer at its market value or

90 upon fair and reasonable terms and conditions, except that [no] a transaction involving property
91 with a market value exceeding [\$25,000] \$100,000 may not be concluded without the express
92 permission of the court.

93 (ii) The liquidator may [also] execute, acknowledge, and deliver any deeds,
94 assignments, releases, and other instruments necessary or proper to effectuate any sale of
95 property or other transaction in connection with the liquidation.

96 (iii) In cases where real property sold by the liquidator is located other than in the
97 county where the liquidation is pending, the liquidator shall cause a certified copy of the order
98 of appointment to be filed with the county recorder for the county in which the property is
99 located.

100 (j) [He] The liquidator may borrow money on the security of the insurer's assets or
101 without security, and execute and deliver all documents necessary to that transaction for the
102 purpose of facilitating the liquidation.

103 (k) (i) [He] The liquidator may enter into any contracts which are necessary to carry out
104 the order to liquidate, and assume or reject any contracts to which the insurer is a party.

105 (ii) A contract is considered rejected if it is not assumed within 60 days after the order
106 of liquidation, unless the time for action is extended by the court.

107 (l) (i) [He] The liquidator may continue to prosecute and institute in the name of the
108 insurer or in [his] the liquidator's own name, any suits and other legal proceedings, in this state
109 or elsewhere.

110 (ii) If the insurer is dissolved under Section 31A-27-312, the liquidator may apply to
111 any court in this state or elsewhere for leave to substitute [himself] the liquidator for the insurer
112 as plaintiff.

113 (m) [He] The liquidator may prosecute any action which may exist in behalf of the
114 creditors, members, policyholders, or shareholders of the insurer against any officer of the
115 insurer, or any other person.

116 (n) (i) [He] The liquidator may remove any records and property of the insurer to:

117 (A) the offices of the commissioner; or [to]

118 (B) any other place [which] that is convenient for the efficient and orderly execution of
119 the liquidation.

120 (ii) Guaranty funds and associations shall be given reasonable access to the records to

121 enable them to carry out their statutory obligations.

122 (o) [He] The liquidator may deposit in one or more depositing institutions in this state
123 those sums [which] that are required for meeting current administration expenses and dividend
124 distributions.

125 (p) [He] The liquidator may deposit with the state treasurer for investment under Title
126 51, Chapter 7, State Money Management Act, all sums not currently needed, unless the court
127 orders otherwise.

128 (q) [He] The liquidator may file any necessary documents for record in the office of
129 any county recorder or record office in this state or elsewhere, where the property of the insurer
130 is located.

131 (r) [He] (i) The liquidator may assert all defenses available to the insurer as against
132 third persons, including:

133 (A) statutes of limitations[;];
134 (B) statutes of frauds[;]; and
135 (C) the defense of usury.

136 (ii) A waiver of any defense by the insurer after a petition for liquidation has been filed
137 does not bind the liquidator.

138 (s) [He] The liquidator may exercise and enforce all the rights, remedies, and powers of
139 any creditor, shareholder, policyholder, or member of the insurer, including any power given by
140 law to avoid any transfer or lien that is not included among the powers given by Sections
141 31A-27-319 through 31A-27-322.

142 (t) [He] The liquidator may:

143 (i) intervene in any proceeding, wherever instituted, that might lead to the appointment
144 of a receiver or trustee[;]; and

145 (ii) act as the receiver or trustee whenever the appointment is offered.

146 (u) [He] The liquidator may:

147 (i) abandon property or a claim [he] the liquidator considers unprofitable or
148 burdensome; and

149 (ii) obtain a court order declaring the abandonment of the property or claim.

150 (v) [He] The liquidator may enter into agreements with any receiver or commissioner
151 of any other state relating to the rehabilitation, liquidation, conservation, or dissolution of an

152 insurer doing business in both states.

153 (w) [He] The liquidator may exercise all the powers conferred upon receivers by the
154 laws of this state [~~which~~] that are not inconsistent with this chapter.

155 (x) The enumeration in this section of the powers and authority of the liquidator is not
156 a limitation upon [~~him~~] the liquidator, and does not exclude the right to do other acts not
157 specifically mentioned or otherwise provided for, which acts are necessary or expedient for the
158 accomplishment of or in aid of the purpose of liquidation.

159 (2) A court order issued after a hearing and pursuant to Subsection (1)(g), (1)(i), (1)(t),
160 or (1)(u) may be appealed as a final order for purposes of [Rule 54 of the] Utah Rules of Civil
161 Procedure, Rule 54.

162 Section 2. Section **31A-27-326** is amended to read:

31A-27-326. Reinsurer's liability -- Paid claims.

164 (1) (a) The amount recoverable by the liquidator from a reinsurer may not be reduced
165 as a result of delinquency proceedings, regardless of any provision in the reinsurance contract
166 or other agreement.

167 (b) Payment made directly to an insured or other creditor does not diminish the
168 reinsurer's obligation to the insurer's estate, except when:

169 (i) the reinsurance contract provides for direct coverage of a named insured; and

170 (ii) the payment was made in discharge of [~~that~~] the obligation described in Subsection
171 (1)(b)(i).

172 (2) (a) A claim shall be considered a paid claim when the claim is:

173 (i) recommended to the court by the liquidator; and

174 (ii) approved by the court.

175 (b) A reinsurer shall be billed by the liquidator on a paid claim for amounts recovered
176 under reinsurance contracts.

177 (c) If a reinsurer does not pay the amount billed under Subsection (2)(b) within ~~H~~ **[60] 180 h**
177a days

178 after ~~H~~ **[receipt of] THE REINSURER HAS RECEIVED** ~~h~~ the billing, interest on the unpaid billed
178a amount will ~~H~~ **BEGIN TO** ~~h~~ accrue at the statutory legal
179 rate provided in Subsection 15-1-1(2) ~~H~~ **, EXCEPT THAT ALL OR A PORTION OF THE INTEREST**
179a **MAY BE WAIVED AS PART OF AN ARBITRATION PROCEEDING** ~~h~~ .

180 Section 3. Section **31A-27-327** is amended to read:

31A-27-327. Applicability of claims settlement provisions to loss claims.

182 Subsection 31A-27-314[~~(18)~~](1)(r), Sections 31A-27-328 through 31A-27-332, Section

183 31A-27-336, Subsection 31A-27-403(3), Section 31A-27-406, and Section 31A-27-407 do not
184 apply to loss claims to the extent that they are subject to Chapter 28, Guaranty Associations, or
185 to corresponding laws of other states.

186 Section 4. Section **31A-27-330.6** is amended to read:

187 **31A-27-330.6. Reinsurance commutations.**

188 Notwithstanding Section 31A-27-330.5, when the insurer has been a party to a
189 reinsurance agreement:

190 (1) (a) The liquidator may negotiate a voluntary commutation and release of all
191 obligations arising from the agreements. [Commutation]

192 (b) (i) Subject to Subsection (1)(b)(ii), a commutation and release [agreements]
193 agreement voluntarily entered into by the parties shall be [reviewed by the court and shall be
194 approved if the agreements are]:

195 (A) commercially reasonable[;];

196 (B) actuarially sound[;]; and

197 (C) made in the best interests of the creditors of the insurer.

198 (ii) A commutation and release agreement voluntarily entered into by the parties that
199 exceeds \$100,000 shall be:

200 (A) reviewed by the court; and

201 (B) approved if the agreement meets the standards described in Subsection (1)(b)(i).

202 (2) At any time following a five-year period subsequent to the entry of the order of
203 liquidation, the liquidator may apply to the court, with notice to the other party, for an order
204 requiring that parties to the reinsurance agreement submit their commutation proposal to a
205 panel of three arbitrators.

206 (3) (a) Venue for the arbitration shall be:

207 (i) within the district of the liquidation court's jurisdiction; or

208 (ii) such other location as may be agreed to by the parties.

209 [~~(a)~~ (b) (i) Upon the court's determination that commutation would be in the best
210 interests of the creditors of the liquidation estate, the court shall require that the liquidator and
211 the other party each appoint an arbitrator within 30 days.

212 (ii) Within 30 days after appointment of the two arbitrators under Subsection (3)(b)(i),
213 the court shall appoint an independent, impartial, disinterested arbitrator qualified by actuarial

214 training in the insurance and reinsurance industry.

215 [t~~b~~] c) Within 60 days following the appointment of the third arbitrator under
216 Subsection (3)(b), the parties shall submit to the arbitration panel their commutation proposals
217 and other documents and information relevant to the determination of the parties' rights and
218 obligations under the reinsurance agreement to be commuted, including:

219 (i) a written review of open claim files; and

220 (ii) an actuarial estimate of incurred-but-not-reported losses.

221 [t~~c~~] d (i) Within 60 days following the parties' submissions[;] under Subsection

222 (3)(c):

223 (A) the arbitration panel shall issue an award specifying the general terms of a
224 commercially reasonable and actuarially sound commutation and release agreement[;]; and

225 (B) the liquidator shall promptly submit the award to the court.

226 (ii) The court shall confirm the arbitration panel's award absent proof of statutory
227 grounds for vacating or modifying the award.

228 [t~~d~~] e) The time periods established in this Subsection [t~~4~~] (3) may be extended
229 upon the consent of the parties or by order of the court, for good cause shown.

230 [t~~e~~] f) If the arbitration panel finds, upon request of either party, that payment of or
231 enforcement of the arbitration panel's award would likely cause the insolvency of the affected
232 reinsurer, the portion of the award related to outstanding and incurred but not reported losses
233 may not be enforced and payment of the obligations may not be accelerated, except:

234 (i) to the extent that the liquidator agrees to the payment, after consultation with the
235 reinsurer's domiciliary commissioner; and

236 (ii) on the liquidator's determination that enforcement of the award will not cause the
237 reinsurer's insolvency.

238 [t~~f~~] g) Except as provided in Subsection (4), nothing in this section may be construed
239 to supersede or impair any provision in a reinsurance agreement that establishes a
240 commercially reasonable and actuarially sound method for valuing and commuting the
241 obligations of the parties to the reinsurance agreement by providing in the contract the specific
242 methodology to be used for valuing and commuting the obligations.

243 (4) (a) A commutation provision is not effective if it is demonstrated to the court that
244 the provision was entered into in contemplation of the insolvency of one or more of the parties.

245 (b) A contractual commutation provision entered into within one year of the liquidation
246 order of the insurer shall be rebuttably presumed to have been entered into in contemplation of
247 insolvency.

248 (5) Sections 31A-27-330[;] and 31A-27-330.5[;] and [31A-27-330.6] this section apply
249 to liquidation proceedings that are pending on April 29, 1996, and to all future liquidations.

**Legislative Review Note
as of 12-24-03 8:18 AM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

State Impact

No fiscal impact.

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst