

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:

- ▶ addresses the powers and duties of the liquidator;
- ▶ modifies the dollar amount for transactions a liquidator may engage in without the permission 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 by the 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

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

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

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

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

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

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

(A) appoint a special deputy to act for ~~[him]~~ the liquidator under this chapter~~[:]~~;

(B) determine the special deputy's compensation, subject to the approval of the court.

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

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

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

(A) employees and agents~~[:]~~;

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

(C) actuaries~~[:]~~;

(D) accountants~~[:]~~;

(E) appraisers~~[:]~~;

(F) consultants~~[:]~~; and

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

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

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

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

(ii) If the property of the insurer does not contain sufficient cash or liquid assets to defray

the reasonable costs incurred, the commissioner may advance the costs so incurred out of the department's appropriation.

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

(e) ~~[He]~~ The liquidator may:

(i) hold hearings~~;~~;

(ii) subpoena witnesses and compel their attendance~~;~~;

(iii) administer oaths~~;~~;

(iv) examine any person under oath~~;~~;

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

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

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

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

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

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

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

(h) ~~[He]~~ The liquidator may cooperate with the associations created under Chapter 28, Guaranty Associations, and associations created under similar laws in other jurisdictions in using

assets of the estate to transfer policy obligations to a solid assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under Section 31A-27-335.

(i) ~~(i)~~ ~~[He]~~ The liquidator may acquire, hypothecate, encumber, lease, improve, sell, transfer, or otherwise dispose of or deal with any property of the insurer at its market value or upon fair and reasonable terms and conditions, except that ~~[no]~~ a transaction involving property with a market value exceeding ~~[\$25,000]~~ \$100,000 may not be concluded without the express permission of the court.

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

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

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

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

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

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

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

(m) ~~[He]~~ The liquidator may prosecute any action which may exist in behalf of the creditors, members, policyholders, or shareholders of the insurer against any officer of the insurer,

or any other person.

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

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

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

(ii) Guaranty funds and associations shall be given reasonable access to the records to enable them to carry out their statutory obligations.

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

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

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

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

(A) statutes of limitations[;];

(B) statutes of frauds[;]; and

(C) the defense of usury.

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

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

(t) [~~He~~] The liquidator may:

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

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

(u) ~~He~~ The liquidator may:

(i) abandon property or a claim ~~he~~ the liquidator considers unprofitable or burdensome; and

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

(v) ~~He~~ The liquidator may enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation, or dissolution of an insurer doing business in both states.

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

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

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

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

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

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

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

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

(ii) the payment was made in discharge of ~~that~~ the obligation described in Subsection

(1)(b)(i).

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

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

(ii) approved by the court.

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

(c) If a reinsurer does not pay the amount billed under Subsection (2)(b) within 180 days after the reinsurer has received the billing, 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.

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

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

Subsection 31A-27-314~~[(+8)]~~(1)(r), Sections 31A-27-328 through 31A-27-332, Section 31A-27-336, Subsection 31A-27-403(3), Section 31A-27-406, and Section 31A-27-407 do not apply to loss claims to the extent that they are subject to Chapter 28, Guaranty Associations, or to corresponding laws of other states.

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

31A-27-330.6. Reinsurance commutations.

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

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

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

(A) commercially reasonable[;];

(B) actuarially sound[;]; and

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

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

(A) reviewed by the court; and

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

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

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

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

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

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

(ii) Within 30 days after appointment of the two arbitrators under Subsection (3)(b)(i), the court shall appoint an independent, impartial, disinterested arbitrator qualified by actuarial training in the insurance and reinsurance industry.

~~[(b)]~~ (c) Within 60 days following the appointment of the third arbitrator under Subsection (3)(b), the parties shall submit to the arbitration panel their commutation proposals and 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 open claim files; and

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

~~[(c)]~~ (d)(i) Within 60 days following the parties' submissions~~[-]~~ under Subsection (3)(c):

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

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

(ii) The court shall confirm the arbitration panel's award absent proof of statutory grounds

for vacating or modifying the award.

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

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

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

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

~~[(f)]~~ (g) Except as provided in Subsection (4), nothing in this section may 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.

(4) (a) A commutation provision is not effective if it is demonstrated to the court that the provision was 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 liquidation order of the insurer shall be rebuttably presumed to have been entered into in contemplation of insolvency.

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