

INSURER RECEIVERSHIP MODEL ACT

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ARTICLE I. GENERAL PROVISIONS

Section 101. Construction and Purpose

- A. This Act shall be cited as the Insurer Receivership Act.
- B. This Act shall not be interpreted to limit the powers granted the commissioner by other provisions of the law.
- C. This Act shall be liberally construed to support the purposes stated in Subsection E.
- D. All powers and authority of a receiver under this Act are cumulative and are in addition to all powers and authority that are available to a receiver under law other than this Act.
- E. The purpose of this Act is the protection of the interests of insureds, claimants, creditors and the public generally through:
 - (1) Early detection of any potentially hazardous condition in an insurer and prompt application of appropriate corrective measures;
 - (2) Improved methods for conserving and rehabilitating insurers;
 - (3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;
 - (4) Apportionment of any unavoidable loss in accordance with the statutory priorities set out in this Act;
 - (5) Lessening the problems of interstate receivership by facilitating cooperation among states in delinquency proceedings, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state;
 - (6) Regulation of the business of insurance by the impact of the law relating to delinquency procedures and related substantive rules; and
 - (7) Providing for a comprehensive scheme for the receivership of insurance companies and those subject to this Act as part of the regulation of the business of insurance in this state. Proceedings in cases of insurer insolvency and delinquency are deemed an integral aspect of the business of insurance and are of vital public interest and concern.

Section 102. Conflicts of Law

This Act, Title [XXX], and the state insurance guaranty association acts constitute this state's insurer receivership laws, and these laws shall be construed together in a manner that is consistent. In the event of a conflict between the insurer receivership laws and the provisions of any other law, the insurer receivership laws shall prevail.

Section 103. Persons Covered

The provisions of this Act shall be applied to:

- A. All insurers who are doing, or have done, an insurance business in this state, and against whom claims arising from that business may exist now or in the future, and to all persons subject to examination by the commissioner;
- B. All insurers who purport to do an insurance business in this state;
- C. All insurers who have insureds resident in this state;

- D. All other persons organized or doing insurance business, or in the process of organizing with the intent to do insurance business in this state;
- E. All nonprofit service plans and all fraternal benefit societies and beneficial societies subject to [insert statute identification if desired];
- F. All title insurance companies subject to [insert statute identification if desired];
- G. All prepaid health care delivery plans [insert statute identification if desired]; and
- H. [Any other specialty type insurer not covered by the general law that should be subject to this Act].

Drafting Note: In considering other specialty type insurers, special attention should be given to surety companies. They are intended to be included under this Act; but, because of the enacting state's law, may not be included in the general provisions related to the business of insurance.

Section 104. Definitions

For the purposes of this Act:

- A. The terms “affiliate” of, or person “affiliated” with, a specific person, “control” and “subsidiary” shall have the meanings ascribed to them in [insert citation equivalent to Section 1 of the NAIC Model Insurance Holding Company System Regulatory Act].
- B. “Alien insurer” means an insurer incorporated or organized under the laws of a jurisdiction that is not a state.
- C. “Commissioner” means the insurance commissioner [or the equivalent title, such as director or superintendent, utilized by the enacting state] of this state, or his or her designee, unless the context requires otherwise.
- D. “Creditor” or “claimant” is a person having any claim against an insurer, whether the claim is matured or not, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent.
- E. “Delinquency proceeding” means any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating or conserving the insurer, and any summary proceeding under Section 201.
- F. “Department” means the Insurance Department of this state unless the context requires otherwise.
- G. “Doing business” (including “doing insurance business” and the “business of insurance”) includes, but is not limited to, any of the following acts, whether effected by mail, electronic means, or otherwise:
 - (1) The issuance or delivery of contracts, certificates or binders of insurance, either to persons resident in or covering a risk located in this state;
 - (2) The solicitation of applications for the contracts, or other negotiations preliminary to the execution of the contracts;
 - (3) The collection of premiums, membership fees, assessments or other consideration for the contracts;
 - (4) The transaction of matters subsequent to execution of the contracts and arising out of them;
 - (5) Operating as an insurer under a license or certificate of authority issued by the Insurance Department; or
 - (6) The acts identified in [cite to state unauthorized insurance act].

- H. “Domiciliary state” means the state in which an insurer is incorporated or organized; or, in the case of an alien insurer, its state of entry. In the case of a risk retention group, the domiciliary state shall be the state in which the risk retention group is chartered as contemplated in the Liability Risk Retention Act (15 U.S.C. § 3901, *et seq.*).
- I. “Foreign insurer” means any insurer domiciled in another state.
- J. “Formal delinquency proceeding” means any conservation, rehabilitation or liquidation proceeding.
- K. (1) “General assets” includes all property of the estate that is not:
- (a) Subject to a properly perfected secured claim;
 - (b) Subject to a valid and existing express trust for the security or benefit of specified persons or classes of persons; or
 - (c) Required by the insurance laws of this state or any other state to be held for the benefit of specified persons or classes of persons.
- (2) “General assets” includes all property of the estate or its proceeds in excess of the amount necessary to discharge claims described in Paragraph (1) of this subsection.
- L. “Good faith” means honesty in fact and intention, and in regard to the provisions of Article VI of this Act also requires the absence of information that would lead a reasonable person in the same position to know that the insurer is financially impaired or insolvent, together with the absence of knowledge regarding the imminence or pendency of any delinquency proceeding against the insurer.
- M. “Guaranty association” means any mechanism mandated by [insert citation to guaranty association enabling acts] or a similar mechanism in another state, which is created for the payment of claims or continuation of policy obligations of financially impaired or insolvent insurers.
- N. “Impaired” means that the insurer does not have admitted assets at least equal to all its liabilities together with the minimum surplus required to be maintained by [cite states insurance statutes and regulations regarding minimum capital and surplus requirements] or has a total adjusted capital that is less than its Authorized Control Level Risk Based Capital (RBC) as defined in [cite to states enactments related to the RBC Model Act, Risk RBC For Health Organizations Model Act and any related regulations].
- O. “Insolvency” or “insolvent” means the insurer is unable to pay its obligations when they are due or does not have admitted assets at least equal to all its liabilities or has a total adjusted capital that is less than its Mandatory Control Level RBC as defined in [cite to state’s enactments related to the RBC Model Act, RBC For Health Organizations Model Act and any related regulations]. For purposes of this Act “admitted assets” and “liabilities” will have the meanings ascribed to them and be measured in accordance with the NAIC Statements of Statutory Accounting Principles as incorporated in this state by [cite state’s insurance statute incorporating the NAIC Statements of Statutory Accounting Principles].
- P. “Insurer” means any person who has done, purports to do, is doing or is licensed to do the business of insurance, or is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization, supervision or conservation by, any insurance commissioner. For purposes of this Act, any other persons included under Section 103 shall be deemed to be insurers.
- Q. “Netting agreement” means (1) a contract or agreement (including terms and conditions incorporated by reference therein), including a master agreement (which master agreement, together with all schedules, confirmations, definitions and addenda thereto and transactions under any thereof, shall be treated as one netting agreement), that documents one or more transactions between the parties to the agreement for or involving one or more qualified financial contracts and that provides for the netting, liquidation, setoff, termination, acceleration or close out under or in connection with one or more qualified financial contracts or present or future payment or delivery obligations or payment or delivery entitlements thereunder (including liquidation or close-out values relating to such obligations or entitlements) among the parties to the netting agreement; (2) any master agreement or bridge agreement for one or more master agreements

described in Paragraph (1) of this subsection; or (3) any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in Paragraph (1) or (2) of this subsection; provided that any contract or agreement described in Paragraph (1) or (2) of this subsection relating to agreements or transactions that are not qualified financial contracts shall be deemed to be a netting agreement only with respect to those agreements or transactions that are qualified financial contracts.

- R. “New value” means money or money’s worth in goods, services or new credit, or release by a transferee of property previously transferred to the transferee in a transaction that is neither void nor voidable by the insurer or the receiver under any applicable law, including proceeds of the property, but does not include an obligation substituted for an existing obligation.
- S. “Party in interest” means the commissioner, any non-domiciliary commissioner in whose state the insurer has outstanding claims liabilities, and any of the following parties that have filed a request with the receivership court for inclusion as a party in interest and to be on the service list: an insurer that ceded to or assumed business from the insurer, a policyholder, a third party claimant, a creditor, a ten percent (10%) or greater equity security holder in the insolvent insurer, any affected guaranty association and any person, including any indenture trustee, with a financial or regulatory interest in the delinquency proceeding.
- T. “Person” means individual, aggregation of individuals, partnership, corporation or other entity.
- U. “Policy” means a written contract of insurance or written agreement for or effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders, endorsements and papers that are a part of the policy. For purposes of this Act, the term “policy” shall not include a contract of reinsurance.
- V. “Property of the insurer” or “property of the estate” includes:
 - (1) All right, title and interest of the insurer in property, whether legal or equitable, tangible or intangible, choate or inchoate, and includes choses in action, contract rights, and any other interest recognized under the laws of this state;
 - (2) Entitlements that existed prior to the entry of an order of conservation, rehabilitation or liquidation, and entitlements that may arise by operation of the provisions of this part or other provisions of law allowing the receiver to avoid prior transfers or assert other rights; and
 - (3) All records and data that are otherwise the property of the insurer, in whatever form maintained, including, but not limited to, claims and claim files, policyholder lists, application files, litigation files, premium records, rate books, underwriting manuals, personnel records, financial records or similar records within the possession, custody or control of a managing general agent, third-party administrator, management company, data processing company, accountant, attorney, affiliate or other person.
- W. “Qualified financial contract” means any commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the commissioner determines by regulation, resolution or order to be a qualified financial contract for the purposes of this Act.
 - (1) “Commodity contract” means:
 - (a) A contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a board of trade or contract market under the Commodity Exchange Act (7 U.S.C. § 1, *et seq.*) or a board of trade outside the United States;
 - (b) An agreement that is subject to regulation under Section 19 of the Commodity Exchange Act (7 U.S.C. § 1, *et seq.*) and that is commonly known to the commodities trade as a margin account, margin contract, leverage account or leverage contract;

- (c) An agreement or transaction that is subject to regulation under Section 4c(b) of the Commodity Exchange Act (7 U.S.C. § 1, *et seq.*) and that is commonly known to the commodities trade as a commodity option;
 - (d) Any combination of the agreements or transactions referred to in this paragraph; or
 - (e) Any option to enter into an agreement or transaction referred to in this paragraph.
- (2) “Forward contract,” “repurchase agreement,” “securities contract” and “swap agreement” shall have the meanings set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

Drafting Note: This definition of “qualified financial contract” is intended to be consistent with definitions applicable under federal law in instances of insolvency of other types of financial institutions. It is not the intention of this provision, or of Section 711, to affect the scope of permissible investments of insurers or the valuation thereof, or to modify any other regulatory framework applicable to investments or investment practices of insurers.

- X. “Receiver” means liquidator, rehabilitator, conservator or ancillary receiver, as the context requires.
- Y. “Receivership” means any liquidation, rehabilitation, conservation or ancillary receivership, as the context requires.
- Z. “Receivership court” refers to the court [may insert specific court] in which a delinquency proceeding is pending, unless the context requires otherwise.
- AA. “Reinsurance” means transactions or contracts whereby an assuming insurer agrees to indemnify a ceding insurer against all, or a part, of any loss that the ceding insurer may sustain under the policy or policies that it has issued or will issue.
- BB. “Secured claim” means a claim secured by an asset that is not a general asset, but not including special deposit claims or a claim based on mere possession. The right to set off as provided in Section 609 shall be a secured claim. A secured claim shall not include any claim arising from a constructive or resulting trust.
- CC. “Special deposit” means a deposit established pursuant to statute for the security or benefit of a limited class or classes of persons.
- DD. “Special deposit claim” means any claim secured by a special deposit, but does not include any claim secured by the general assets of the insurer.
- EE. “State” means any state, district or territory of the United States.
- FF. “Transfer” shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein, including a setoff, or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title in property delivered to an insurer and foreclosure of the insurer’s equity of redemption shall be deemed a transfer suffered by the insurer.
- GG. “Unauthorized insurer” means an insurer transacting the business of insurance in this state that has not received a Certificate of Authority from this state, or some other type of authority that allows for the transaction of the business of insurance in this state.

Section 105. Jurisdiction and Venue

- A. No delinquency proceeding under this Act shall be commenced by a person other than the commissioner of this state and no court shall have jurisdiction to entertain, hear or determine any delinquency proceeding commenced by any other person.

- B. No court of this state shall have jurisdiction to entertain, hear or determine any complaint praying for the liquidation, rehabilitation, seizure, sequestration, conservation or receivership of any insurer, or praying for a stay or injunction or restraining order or other relief preliminary to, incidental to or relating to the proceedings other than in accordance with this Act.
- C. The receivership court shall, as of the commencement of a delinquency proceeding under this Act, have exclusive jurisdiction of all property of the insurer, wherever located, including property located outside the territorial limits of the state. The receivership court shall have original but not exclusive jurisdiction of all civil proceedings arising under this Act or arising in or related to delinquency proceedings under this Act.
- D. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to the [insert citation to state rules of civil procedure] or other applicable provisions of law in an action brought by the receiver:
- (1) If the person served is or has been an agent, broker or other person who has at any time written policies of insurance for or has acted in any manner whatsoever on behalf of an insurer against which a delinquency proceeding has been instituted, in any action resulting from or incident to such a relationship with the insurer;
 - (2) If the person served is or has been an insurer or reinsurer who has at any time entered into a contract of reinsurance with an insurer against which a delinquency proceeding has been instituted, or is an intermediary, agent or broker of or for the reinsurer, or with respect to the contract, in any action on or incident to the reinsurance contract;
 - (3) If the person served is or has been an officer, director, manager, trustee, organizer, promoter or other person in a position of comparable authority or influence over an insurer against which a delinquency proceeding has been instituted, in any action resulting from or incident to such a relationship with the insurer;
 - (4) If the person served is or was at the time of the institution of the delinquency proceeding against the insurer holding assets in which the receiver claims an interest on behalf of the insurer, in any action concerning the assets; or
 - (5) If the person served is obligated to the insurer in any way whatsoever, in any action on or incident to the obligation.
- E. If the receivership court on motion of any party finds that any action should as a matter of substantial justice be tried in a forum outside this state, the receivership court may enter an appropriate order to stay further proceedings on the action in this state. Except as to claims against the estate and in regard to any contracts rejected by the receiver under Section 114, nothing in this Act shall deprive a reinsurer of any contractual right to pursue arbitration. A party in arbitration may bring a claim or counterclaim against the estate, but the claim or counterclaim shall be subject to this Act.
- F. Service shall be made upon the person named in the petition in accordance with the [insert state] Rules of Civil Procedure. In lieu of such service, upon application to the receivership court, service may be made in such a manner as the receivership court directs whenever it is satisfactorily shown by affidavit:
- (1) In the case of a corporation, that the officers of the corporation cannot be served because they have departed from the state or have otherwise concealed themselves with intent to avoid service;
 - (2) In the case of an insurer whose business is conducted, at least in part, by an attorney in fact, managing general agent, or other such entity (including but not limited to, a reciprocal, Lloyd's association or inter-insurance exchange), that the individual attorney-in-fact, managing general agent, or other such entity, or its officers of the corporate attorney-in-fact cannot be served because of their departure or concealment; or
 - (3) In the case of a natural person, that the person cannot be served because of the person's departure or concealment.

- G. All actions herein authorized shall be brought in the [identify proper court].

Drafting Note: Each state will need to consider the appropriate court and county for delinquency proceedings under this Act. In general, the venue is more appropriate if it is in the county where the office of the insurance commissioner is located. This assures expeditious and expert handling by concentrating these cases in the court with the most experience with regulatory affairs of all kinds, including insurance. An option could also be provided in the county where the principal office of the insurer is located.

- H. At any time after an order is entered pursuant to Section 201, 301, 401 or 501, the commissioner or receiver may transfer the case to the county of the principal office of the person proceeded against. In the event of transfer, the court in which the proceeding was commenced shall, upon application of the commissioner or receiver, direct its clerk to transmit the court's file to the clerk of the court to which the case is to be transferred. The proceeding shall thereafter be conducted in the same manner as if it had been commenced in the court to which the matter is transferred.

- I. **[Alternative 1]** No person shall be allowed to intervene in any liquidation proceeding in this state for the purpose of seeking or obtaining payment of any judgment, lien or other claim of any kind. The claims procedure set forth in this Act constitutes the exclusive means for obtaining payment of claims from the liquidation estate. Upon application to and approval by the receivership court, any guaranty association or its designated representative may intervene as a party and appear and participate in any court proceeding concerning a liquidation proceeding against an insurer if the association is or may become liable to act as a result of the liquidation proceeding. Intervention by any guaranty association or its designated representative conferred under this subsection shall not constitute grounds to establish general personal jurisdiction by the courts of this state. The intervening guaranty association or its designated representative shall be subject to the receivership court's jurisdiction for the limited purpose for which it intervenes.

[Alternative 2] No person shall be allowed to intervene in any liquidation proceeding in this state for the purpose of seeking or obtaining payment of any judgment, lien or other claim of any kind. The claims procedure set forth in this Act constitutes the exclusive means for obtaining payment of claims from the liquidation estate. Any guaranty association or its designated representative may intervene as a party as a matter of right and otherwise appear and participate in any court proceeding concerning a liquidation proceeding against an insurer if the association is or may become liable to act as a result of the liquidation proceeding. Intervention by any guaranty association or its designated representative conferred under this subsection shall not constitute grounds to establish general personal jurisdiction by the courts of this state. The intervening guaranty association or its designated representative shall be subject to the receivership court's jurisdiction for the limited purpose for which it intervenes.

[Alternative 3] No person shall be allowed to intervene in any liquidation proceeding in this state for the purpose of seeking or obtaining payment of any judgment, lien or other claim of any kind. The claims procedure set forth in this Act constitutes the exclusive means for obtaining payment of claims from the liquidation estate.

Drafting Note: States may choose Alternative 1, 2 or 3 for Subsection I depending on the ability of guaranty associations to intervene in liquidation proceedings. Alternative 1 permits guaranty associations to intervene for a limited purpose upon application to and approval by the receivership court. Alternative 2 permits intervention by guaranty associations as a matter of right, upon application to and approval by the receivership court. Alternative 3 is silent as to guaranty associations and contains the same general prohibition on intervention in liquidation proceedings as Alternatives 1 and 2.

- J. The foregoing provisions of this section notwithstanding, the provisions of this Act do not confer jurisdiction on the receivership court to resolve coverage disputes between guaranty associations and those asserting claims against them resulting from the initiation of a receivership proceeding under this Act except to the extent that the guaranty association has otherwise expressly consented to the jurisdiction of the receivership court pursuant to a plan of rehabilitation or liquidation that resolves its obligations to covered policyholders. The determination of any dispute with respect to the statutory coverage obligations of any guaranty association by a court or administrative agency or body with jurisdiction in the guaranty association's state of domicile shall be binding and conclusive as to the guaranty association's claim in the liquidation proceeding.

- K. Upon the request of the receiver the receivership court [or a chief administrative judge] may order that one judge hear all cases and controversies arising out of or related to the delinquency proceeding.

- L. Delinquency proceedings shall be exempt from any dormancy or similar program maintained for the early closure of civil actions.

Section 106. Exemption from Fees

The receiver shall not be required to pay any filing, recording, transcript or authentication fee to any public officer in this state.

Section 107. Notice and Hearing on Matters Submitted by the Receiver for Receivership Court Approval

- A. Upon written request to the receiver, a person shall be placed on the service list to receive notice of matters filed by the receiver. It shall be the responsibility of the person requesting notice to inform the receiver in writing of any changes in his or her address, or to request that his or her name be deleted from the service list. The receiver may require that the persons on the service list provide confirmation that they wish to remain on the service list. Any person who fails to confirm his or her intent to remain on the service list may be purged from the service list. Inclusion on the service list does not confer standing in the delinquency proceeding to raise, appear or be heard on any issue.
- B. Except as otherwise provided by this Act, notice and hearing of any matter submitted by the receiver to the receivership court for approval under this Act shall be conducted as follows:
 - (1) The receiver shall file an application explaining the proposed action, and the basis therefore. The receiver may include any evidence in support of the application. If the receiver determines that any documents supporting the application are confidential, the receiver may submit them to the receivership court under seal for *in camera* inspection.
 - (2) The receiver shall provide notice of the application to all persons on the service list and any other parties as determined by the receiver. Notice may be provided by first class mail postage paid, electronic mail, or facsimile transmission, at the receiver's discretion. For purposes of this section, notice is deemed to be given on the date that it is deposited with the U.S. Postmaster or transmitted, as applicable, to the last known address as shown on the service list.
 - (3) Any party in interest objecting to the application shall file an objection specifying the grounds therefore within [insert number] days or such longer time as the court may specify of the notice of the filing of the application or such other time as the receivership court may set and shall serve copies on the receiver and any other persons served with the application within the same time period. An objecting party shall have the burden of showing why the receivership court should not authorize the proposed action.

Drafting Note: Number of days for filing objections should be consistent with the state civil procedure or receivership practice.

- (4) If no objection to the application is timely filed, the receivership court may enter an order approving the application without a hearing, or hold a hearing to determine if the receiver's application should be approved. The receiver may request that the receivership court enter an order or hold a hearing on an expedited basis.
- (5) If an objection is timely filed, the receivership court may hold a hearing. If the receivership court approves the application and, upon a motion by the receiver, determines that the objection was frivolous or filed merely for delay or for other improper purpose, the receivership court shall order the objecting party to pay the receiver's reasonable costs and fees of defending the action.

Drafting Note: States may utilize the term application, petition, motion or such other term that is considered appropriate in their state. The state may also incorporate its procedures under its civil rules for the briefing and hearing of applications. "Petition" should be reserved for the initiation of delinquency proceedings.

Section 108. Injunctions and Orders

- A. The receivership court may issue any order, process or judgment, including stays or injunctions or other orders necessary or appropriate to carry out the provisions of this Act or an approved rehabilitation plan.
- B. No provision of this Act shall be construed to limit the ability of the receiver to apply to a court other than the receivership court in any jurisdiction to carry out any provision of this Act or for the purpose of pursuing claims against any person.
- C. Except as provided in Subsections E and F or as otherwise provided in this Act the commencement of a delinquency proceeding under this Act operates as a stay, applicable to all persons, of:
 - (1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the insurer, including an arbitration proceeding, that was or could have been commenced before the commencement of the delinquency proceeding under this Act, or to recover a claim against the insurer that arose before the commencement of the delinquency proceeding under this Act;
 - (2) The enforcement against the insurer or against property of the insurer of a judgment obtained before the commencement of the delinquency proceeding under this Act;
 - (3) Any act to obtain or retain possession of property of the insurer or of property from the insurer or to exercise control over property or records of the insurer;
 - (4) Any act to create, perfect or enforce any lien against property of the insurer;
 - (5) Any act to collect, assess or recover a claim against the insurer that arose before the commencement of a delinquency proceeding under this Act;
 - (6) The commencement or continuation of an action or proceeding against a reinsurer of the insurer, by the holder of a claim against the insurer, seeking reinsurance recoveries that are contractually due to the insurer;
 - (7) The commencement or continuation of an action or proceeding by a governmental unit to terminate or revoke an insurance license; and
 - (8) Termination, failure to renew, suspension of performance, declaration of default, demand for additional, substitute, or replacement security or performance, or other adverse action, with respect to any contract, agreement, or lease (including but not limited to policies, insurance and reinsurance contracts, surety bonds, or surety undertakings), whether or not the insurer is a party to the contract, agreement, lease, policy, bond, or undertaking, if the sole basis for the termination, failure to renew, suspension of performance, declaration of default, demand for additional, substitute, or replacement security or performance, or other adverse action is (i) the fact that the insurer is the subject of delinquency proceedings, and/or (ii) the fact that one or more of the insurer's licenses have been suspended or revoked because the insurer is the subject of delinquency proceedings.
- D. Except as provided in Subsections E and F or as otherwise provided in this Act, the commencement of a delinquency proceeding under this Act operates as a stay, applicable to all persons, of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding, including without limitation the enforcement of any judgment, against any insured that was or could have been commenced before the commencement of the delinquency proceeding under this Act, or to recover a claim against the insured that arose before or after the commencement of the delinquency proceeding under this Act and for which the insurer is or may be liable under a policy of insurance or is obligated to defend a party. The stay provided by this subsection shall terminate ninety (90) days after appointment of the receiver unless extended by order of the receivership court, for good cause shown, after notice to any affected parties and such hearing as the receivership court determines is appropriate; provided, however, that any applicable statute of limitation with respect to any claim against an insured shall be tolled during the period of the stay provided by this subsection and any extensions.

- E. Notwithstanding Subsection C, the commencement of a delinquency proceeding under this Act does not operate as a stay or prohibition of:
- (1) Except as provided in Subsection C(7), regulatory actions by the commissioners of non-domiciliary states, including, but not limited to the suspension of licenses;
 - (2) Criminal actions;
 - (3) Any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent the act is accomplished within any relation back period under applicable law;
 - (4) Setoff as permitted by Section 609;
 - (5) Pursuit and enforcement of non-monetary governmental claims, judgments and proceedings;
 - (6) Presentment of a negotiable instrument and the giving of notice of and protesting dishonor of the instrument;
 - (7) Enforcement of rights against single beneficiary trusts established pursuant to and in compliance with [cite to the credit for reinsurance law];
 - (8) Any right to cause the netting, liquidation, setoff, termination, acceleration or close out of obligations, or enforcement of any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation, under or in connection with any netting agreement or qualified financial contract as provided for in Section 711;
 - (9) Discharge by the guaranty association of statutory responsibilities under any applicable guaranty association act; or
 - (10) Any of the following actions:
 - (a) An audit by a governmental unit to determine tax liability;
 - (b) The issuance to the insurer by a governmental unit of a notice of tax deficiency;
 - (c) A demand for tax returns; or
 - (d) The making of an assessment for any tax and issuance of a notice and demand for payment of the assessment.
- F. Except as provided in Subsection H:
- (1) The stay of an act against property of the insurer under Subsection C continues until the property is no longer property of the receivership estate;
 - (2) The stay of any other act under Subsection C continues until the earlier of:
 - (a) The time the delinquency proceeding is closed; or
 - (b) The time the delinquency proceeding is dismissed.
- G. Notwithstanding the provision of Subsection C, but only to the extent not inconsistent with Section 609, claims against the insurer that arose before the commencement of the delinquency proceeding under this Act may be asserted as a counterclaim in any judicial, administrative or other action or proceeding initiated by or on behalf of the receiver against the holder of the claims.
- H. On request of a party in interest and after notice and such hearing as the receivership court determines appropriate, the receivership court may grant relief from the stay of Subsections C or D, such as by terminating, annulling, modifying or conditioning the stay:

- (1) For cause; or
 - (2) With respect to a stay of an act against property under Subsection C if:
 - (a) The insurer does not have any equity in the property; and
 - (b) The property is not necessary to an effective plan.
 - (3) For the purposes of this section, “cause” includes, but is not limited to, if (a) the receiver cancels a policy, a surety bond, or a surety undertaking, and (b) the creditor is entitled, by contract or law, to require the insured or the principal to have a policy, a surety bond, or a surety undertaking, and (c) the insured or the principal fails to obtain a replacement policy, surety bond, or surety undertaking within the later of thirty (30) days from the date of cancellation or the time permitted by contract or law.
- I. In any hearing under Subsection H, the party seeking relief from the stay shall have the burden of proof on each issue, which shall be established by clear and convincing evidence.
 - J. The estate of an insurer that is injured by any willful violation of a stay provided by this section shall be entitled to actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, the receivership court may impose additional sanctions.
 - K. Notwithstanding any other provision of law, no bond shall be required of the commissioner or receiver in relation to any stay or injunction under this section.

Section 109. Statutes of Limitation

- A. If applicable law, an order, or an agreement fixes a period within which the insurer may commence an action, and this period has not expired before the date of the filing of the initial petition in a delinquency proceeding, the receiver shall not by reason thereof be barred from commencing such an action if the receiver does so on or before the later of:
 - (1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or
 - (2) Four (4) years after the entry of the most recent receivership order.
- B. Except as provided in Subsection A, if applicable law, an order or an agreement fixes a period within which the insurer may file any pleading, demand, notice, or proof of claim or loss, or cure a default in a case or proceeding, or perform any other similar act, and the period has not expired before the date of the filing of the petition initiating formal delinquency proceedings, the receiver shall not by reason thereof be barred from filing, curing or performing, as the case may be, if the receiver does so on or before the later of:
 - (1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or
 - (2) Sixty (60) days after the entry of the most recent receivership order.
- C. If applicable law, an order or an agreement fixes a period for commencing or continuing a civil action in a court other than the receivership court on a claim against the insurer, and the period has not expired before the date of the filing of the initial petition in a delinquency proceeding, then the period does not expire until the later of:
 - (1) The end of the period, including any suspension of the period occurring on or after the filing of the initial petition in a delinquency proceeding; or
 - (2) Thirty (30) days after termination or expiration of the stay pursuant to this section with respect to the claim.

Section 110. Cooperation of Officers, Owners and Employees

- A. Any present or former officer, manager, director, trustee, owner, employee or agent of an insurer, or any other person with authority over or in charge of any segment of the insurer's affairs, shall cooperate with the commissioner or receiver in any proceeding under this Act or any investigation preliminary to the proceeding. The term "person" as used in this section, shall include any person who exercises control directly or indirectly over activities of the insurer through any holding company or other affiliate of the insurer. "To cooperate" shall include, but shall not be limited to, the following:
- (1) To reply promptly in writing to any inquiry from the commissioner or receiver requesting a reply; and
 - (2) To promptly make available to the commissioner or receiver any books, accounts, documents, or other records or information or property of or pertaining to the insurer and in his or her possession, custody or control.
- B. No person shall obstruct or interfere with the commissioner or receiver in the conduct of any delinquency proceeding or any preliminary or incidental investigation.
- C. This section shall not be construed to abridge otherwise existing legal rights, including the right to resist a petition for liquidation or other delinquency proceedings, or other orders.
- D. Any person included within Subsection A who fails to cooperate with the commissioner or receiver, or any person who obstructs or interferes with the commissioner or receiver in the conduct of any delinquency proceeding or any preliminary or incidental investigation, or who violates any order validly issued under this Act, may:
- (1) Be sentenced to pay a fine not exceeding \$10,000 or to undergo imprisonment for a term of not more than one year, or both; or
 - (2) After a hearing, be subject to the imposition by the commissioner of a civil penalty not to exceed \$10,000 and shall be subject further to the revocation or suspension of any insurance licenses issued by the commissioner.

Section 111. Delinquency Proceedings Commenced Prior to Enactment

Drafting Note: States may draft any provision with regard to application as to existing estates as long as this Act is applicable in its entirety to new delinquency proceedings. States may provide that this Act will apply to pending delinquency proceedings retrospectively with regard to procedural matters and prospectively with regard to the substantive rights of persons.

[Alternative 1] The provisions of this Act shall be applicable to proceedings instituted prior to the effective date of this Act. The provisions of this section shall not affect any final judgment or order entered by a court of competent jurisdiction prior to the effective date of this Act.

[Alternative 2] The provisions of this Act shall be applicable to proceedings instituted prior to the effective date of this Act. The provisions of this section shall not affect any final judgment or order entered by a court of competent jurisdiction prior to the effective date of this Act. Provided that claims against insurers under formal delinquency proceedings prior to the effective date of this Act shall be adjudicated under the law in effect prior to the effective date of this Act.

[Alternative 3] The provisions of this Act shall not apply to proceedings initiated prior to its effective date, unless the court, on motion of the commissioner, and after notice and hearing and for good cause shown, directs that all or any part of this Act shall be applicable to such proceedings.

Drafting Note: States that do not have *Fabe* cure legislation (proposed as a result of *United States Dept. of Treasury v. Fabe*, 608 U.S. 491 (1993)) enacted prior to the proposed effective date of this Act should adopt the *Fabe* cure legislation prior to the proposed effective date of this Act or should otherwise take steps to ensure that the *Fabe* cure is applied in open estates.

[Provision that may be added to Alternative 1, 2 or 3] Litigation filed in any court of competent jurisdiction under [cite to sections of prior law applicable to asset recovery in formal delinquency proceedings] shall be concluded as though [cite to sections of prior law applicable to asset recovery in formal delinquency proceedings] had not been repealed. Prior sections regarding insurer receiverships will sunset and be fully repealed after all asset recovery actions under proceedings filed in any court of competent jurisdiction prior to the effective date of this Act have been concluded.

Section 112. Actions By and Against the Receiver

- A. An allegation by the receiver of improper or fraudulent conduct against any person shall not be the basis of a defense to the enforcement of a contractual obligation owed to the insurer by a third party, but the third party is not barred by this section from seeking to establish independently as a defense that the conduct was materially and substantially related to the contractual obligation for which enforcement is sought.
- B. No prior wrongful or negligent actions of any present or former officer, manager, director, trustee, owner, employee or agent of the insurer may be asserted as a defense to a claim by the receiver under a theory of estoppel, comparative fault, intervening cause, proximate cause, reliance, mitigation of damages or otherwise; except that the affirmative defense of fraud in the inducement may be asserted against the receiver in a claim based on a contract and a principal under a surety bond or a surety undertaking shall be entitled to credit against any reimbursement obligation to the receiver for the value of any property pledged to secure the reimbursement obligation to the extent that the receiver has possession or control of the property or the insurer or its agents misappropriated (including, but not limited to, commingling) such property. Evidence of fraud in the inducement will be admissible only if it is contained in the records of the insurer.
- C. No action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.
- D. A judgment or order entered against an insured or the insurer in contravention of any stay or injunction under this Act, or at any time by default or collusion, shall not be considered as evidence of liability or of the quantum of damages in adjudicating claims filed in the estate arising out of the subject matter of the judgment or order.
- E. The provisions of Subsection D do not apply to guaranty associations' claims for amounts paid on settlements and judgments in pursuit of their statutory obligations.
- F. The receiver shall not be deemed a governmental entity for the purposes of any state law awarding fees to a litigant who prevails against a governmental entity.

Section 113. Unrecorded Obligations and Defenses Of Affiliates

- A. In any proceeding or claim by the receiver, no affiliate, controlled or controlling person, or present or former officer, manager, director, trustee or shareholder of the insurer may assert any defense, unless evidence of the defense was recorded in the books and records of the insurer at or about the time the events giving rise to the defense occurred and, if required by statutory accounting practices and procedures, was timely reported on the insurer's official financial statements filed with the [insert state regulatory official].
- B. No affiliate, controlled or controlling person, or present or former officer, manager, director, trustee or shareholder of the insurer may assert any claim, unless the obligations were recorded in the books and records of the insurer at or about the time the obligations were incurred and, if required by statutory accounting practices and procedures, were timely reported on the insurer's official financial statements filed with the [insert state regulatory official].
- C. Claims by the receiver against any affiliate, controlled or controlling person, or present or former officer, manager, director, trustee or shareholder of the insurer based on unrecorded or unreported transactions shall not be barred by this section.

Section 114. Executory Contracts

- A. The receiver may assume or reject any executory contract or unexpired lease of the insurer.
- B. If there has been a default in an executory contract or unexpired lease of the insurer, the receiver may not assume the contract or lease unless, at the time of the assumption of the contract or lease, the receiver:
 - (1) Cures or provides adequate assurance that the receiver will promptly cure the default; and
 - (2) Provides adequate assurance of future performance under the contract or lease.
- C. Subsection B does not apply to a default that is a breach of a provision relating to:
 - (1) The insolvency or financial condition of the insurer at any time before the closing of the delinquency proceeding;
 - (2) The appointment of or taking possession by a receiver in a case under this Act or a custodian before the commencement of the delinquency proceeding; or
 - (3) The satisfaction of any penalty rate or provision relating to a default arising from any failure of the insurer to perform non-monetary obligations under the executory contract or unexpired lease.
- D. A claim arising from the rejection, under this section or under a plan of rehabilitation or liquidation, of an executory contract or unexpired lease of the insurer that has not been assumed shall be determined, and shall be treated and classified as though the claim had arisen before the date of the filing of a successful petition commencing the delinquency proceeding.

Section 115. Immunity and Indemnification of the Receiver and Assistants

[Alternative 1]

- A. For the purposes of this section, the persons entitled to immunity and indemnification, and those entitled to only immunity, as applicable, are:
 - (1) All present and former receivers responsible for the conduct of a delinquency proceeding under this Act;
 - (2) All of the receiver's present and former assistants. For purposes of this section, "receiver's assistants" shall be defined to include the following:
 - (a) All present and former special deputies and assistant special deputies engaged by contract or otherwise;
 - (b) All persons whom the receiver, special deputies, or assistant special deputies have employed to assist in a delinquency proceeding under this Act; and
 - (c) Any state employees acting with respect to a delinquency proceeding under this Act; and
 - (3) All of the receiver's present and former contractors. For purposes of this section, "receiver's contractors" shall be defined to include all persons with whom the receiver, special deputies or assistant special deputies have contracted to assist in a delinquency proceeding under this Act, e.g. attorneys, accountants, auditors, actuaries, investment bankers, financial advisors, and any other professionals or firms who are retained or contracted with by the receiver as independent contractors and all employees of the contractors.

B. The receiver, the receiver's assistants, and the receiver's contractors shall have immunity under this Act, as follows:

- (1) The receiver, the receiver's assistants, and the receiver's contractors shall have official immunity and shall be immune from suit and liability, both personally and in their official capacities, for any claim for damage to or loss of property or personal injury or other civil liability caused by or resulting from any alleged act, error or omission of the receiver or any assistant or contractor arising out of or by reason of their duties or employment.
- (2) In addition, the receiver, the receiver's assistants, and the receiver's contractors shall have absolute judicial immunity and shall be immune from suit and liability, both personally and in their official capacities, for any claim for damage to or loss of property or personal injury or other civil liability caused by or resulting from any alleged act, error or omission of the receiver, assistant or contractor arising out of or by reason of any matters that have been subject to review by the receivership court after notice and opportunity to be heard, provided that the alleged act, error or omission was not disapproved or disallowed by the receivership court.
- (3) Nothing in this Act shall be construed to provide official immunity or judicial immunity or to otherwise hold the receiver or any assistant or contractor immune from suit and liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of the receiver, any assistant or contractor.

C. The receiver and the receiver's assistants shall be entitled to indemnification under this Act, as follows:

- (1) If any legal action is commenced against the receiver or any assistant, whether against the receiver or assistant personally or in their official capacity, alleging property damage, property loss, personal injury or other civil liability caused by or resulting from any alleged act, error or omission of the receiver or any assistant arising out of or by reason of their duties or employment, the receiver and any assistant shall be indemnified from the assets of the insurer for all expenses, attorneys' fees, judgments, settlements, decrees or amounts due and owing or paid in satisfaction of or incurred in the defense of the legal action unless it is determined upon a final adjudication on the merits that the alleged act, error or omission of the receiver or assistant giving rise to the claim did not arise out of or by reason of their duties or employment, or was caused by intentional or willful and wanton misconduct.
- (2) Attorneys' fees and any and all related expenses incurred in defending a legal action for which immunity or indemnity is available under this section shall be paid from the assets of the insurer, as they are incurred, in advance of the final disposition of the action upon receipt of an agreement by or on behalf of the receiver or assistant to repay the attorneys' fees and expenses if it shall ultimately be determined upon a final adjudication on the merits that the receiver or assistant is not entitled to immunity or indemnity under this section.
- (3) Any indemnification for expense payments, judgments, settlements, decrees, attorneys' fees, surety bond premiums or other amounts paid or to be paid from the insurer's assets pursuant to this section shall be an administrative expense of the insurer.
- (4) In the event of any actual or threatened litigation against a receiver or any assistant for which immunity or indemnity may be available under this section, a reasonable amount of funds which in the judgment of the receiver may be needed to provide immunity or indemnity shall be segregated and reserved from the assets of the insurer as security for the payment of indemnity until all applicable statutes of limitation shall have run and all actual or threatened actions against the receiver or any assistant have been completely and finally resolved, and all obligations under this section shall have been satisfied.
- (5) In lieu of segregation and reserving of funds, the receiver may, in the receiver's discretion, obtain a surety bond or make other arrangements that will enable the receiver to fully secure the payment of all obligations under this section.

- (6) If any legal action against an assistant for which indemnity may be available under this section is settled prior to final adjudication on the merits, the receiver shall pay the settlement amount on behalf of the assistant, or indemnify the assistant for the settlement amount, unless the receiver determines:
 - (a) That the claim did not arise out of or by reason of the assistant's duties or employment; or
 - (b) That the claim was caused by the intentional or willful and wanton misconduct of the assistant.
- (7) In any legal action in which a claim is asserted against the receiver, that portion of any settlement relating to the alleged act, error or omission of the receiver shall be subject to the approval of the receivership court. The receivership court shall not approve that portion of the settlement if it determines:
 - (a) That the claim did not arise out of or by reason of the receiver's duties or employment; or
 - (b) That the claim was caused by the intentional or willful and wanton misconduct of the receiver.
- D. Nothing contained or implied in this section shall operate, or be construed or applied to deprive the receiver, the receiver's assistants or receiver's contractors of any immunity, indemnity, benefits of law, rights or any defense otherwise available.
- E. The immunity and indemnification provided to the receiver's assistants and the immunity provided to the receiver's contractors under this section shall not apply to any action by the receiver against such person.
- F. Subsection B shall apply to any suit based in whole or in part on any alleged act, error or omission that takes place on or after the effective date of this Act.
- G. No legal action shall lie against the receiver or any assistant based in whole or in part on any alleged act, error or omission that took place prior to the effective date of this Act, unless suit is filed and valid service of process is obtained within twelve (12) months after the effective date of this Act.
- H. Subsection C shall apply to any suit that is pending on or filed after the effective date of this Act without regard to when the alleged act, error or omission took place.

Drafting Note: If state law provides for a self-insurance program that affords protection that is substantially similar to the provisions of Section 115, the state may utilize the program for indemnification purposes and corresponding immunity provisions in lieu of Section 115.

[Alternative 2] There shall be no liability on the part of, and no cause of action of any nature shall arise against, the department or its employees, the commissioner, in his or her capacity as receiver or otherwise, a special deputy, the receiver's assistants or the receiver's contractors for any action taken by them in performance of their powers and duties under this Act.

Section 116. Approval and Payment of Expenses

- A. The receiver may pay any expenses under contracts, leases, employment agreements or other arrangements entered into by the insurer prior to receivership, as he or she deems necessary for the purposes of this Act. The receiver is not required to pay any such expenses that he or she determines are not necessary and may reject any contract pursuant to Section 114.
- B. Receivership expenses other than those described in Subsection A shall be paid as follows:
 - (1) The receiver shall submit an application pursuant to Section 107 to the receivership court to approve:

- (a) The terms of compensation of each special deputy or contractor where the total amount of the compensation is reasonably expected by the receiver for the duration of the delinquency proceeding to exceed an amount established by the receivership court; and
 - (b) Any other anticipated expense in excess of an amount established by the receivership court.
- (2) The receiver may, as the receiver deems appropriate, submit an application to approve any compensation, anticipated expenses or incurred expenses not described in Paragraph (1).
 - (3) The receiver may pay as incurred any expenses not requiring receivership court approval and any expenses approved in the rehabilitation or liquidation order.
 - (4) The approval of expenses by the receivership court shall not prejudice the right of the receiver to seek any recovery, recoupment, disgorgement or reimbursement of fees based on contract or causes of action recognized in law or in equity.
- C. On an annual or more frequent basis, the receiver shall submit to the receivership court a report summarizing the expenses incurred in the prior period.
 - D. Receivership court approval shall not be required to pay expenses incurred by the receiver in connection with the appeal of an order of the receivership court.
 - E. **[Alternative 1]** All expenses of receivership shall be paid from the assets of the insurer, except as provided in this subsection. In the event that the insurer does not have sufficient cash or liquid assets to defray the expenses incurred, the commissioner may advance funds out of any appropriation for the maintenance of the insurance department. Any amounts advanced shall be repaid to the commissioner out of the first available moneys of the insurer.

[Alternative 2] All expenses of receivership shall be paid from the assets of the insurer, except as provided in this subsection. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the expenses incurred, the commissioner may advance funds from the account established under Subsection 804C. Any amounts advanced shall be repaid to the account out of the first available moneys of the insurer.

Drafting Note: States may utilize the term “application”, “motion” or such other term that is considered appropriate in their state.

Drafting Note: Alternative 2 is only appropriate if Alternative 1 to Section 804 is enacted.

Section 117. Financial Reporting

- A. Within 180 days after the entry of an order of receivership by the receivership court, and at least quarterly thereafter, the receiver shall comply with all requirements for receivership financial reporting as specified by the National Association of Insurance Commissioners. The financial reports shall include, at a minimum, a statement of the assets and liabilities of the insurer, the changes in those assets and liabilities and all funds received or disbursed by the receiver during that reporting period. These reports will also be filed with the receivership court. The receiver may qualify any financial report or provide notes to the financial statement for further explanation. The receivership court may order the receiver to provide such additional information as it deems appropriate.
- B. Within 180 days after the entry of an order of liquidation by the receivership court, and at least quarterly thereafter, or at such other intervals as may be agreed to between the liquidator and the guaranty associations, but in no event less than annually, each affected guaranty association shall file reports with the liquidator. The reports shall be in a format compatible to that specified by the National Association of Insurance Commissioners. These reports also shall be filed with the receivership court.
- C. For good cause shown, the receivership court may grant relief for an extension or modification of time to comply with Subsection A or B above or such other relief as may be appropriate.

Section 118. Records

- A. Upon entry of an order of conservation, rehabilitation or liquidation, the receiver shall be vested with title to all of the books, documents, papers, policy information, claim files and all other records of the insurer of whatever nature, in whatever medium and wherever located, regardless of whether the records are in the custody and control of third-party administrators, managing general agents, attorneys or other representatives of the insurer. The receiver may immediately take possession and control of all of the records of the insurer, and of the premises where the records are located. Third-party administrators, managing general agents, attorneys and other representatives of the insurer shall release all such records to the receiver, or to the receiver's designee, at the request of the receiver. The guaranty associations that have or may have obligations under policies issued by the insurer have the right, with the receiver's approval, to take necessary actions to obtain directly from any third-party administrator, managing general agent, attorney or other representative of the insurer all records pertaining to the insurer's business that are appropriate or necessary for the guaranty associations to fulfill their statutory obligations.
- B. The receiver shall have the authority to certify the records of a delinquent insurer described in Subsection A and the records of the receiver's office created and maintained in connection with a delinquent insurer, as follows:
 - (1) Records of a delinquent insurer may be certified by the receiver in an affidavit stating that the records are true and correct copies of records of the insurer that were received from the custody of the insurer, or found among its effects.
 - (2) Records created by or filed with the receiver's office in connection with a delinquent insurer may be certified by the receiver's affidavit stating that the records are true and correct copies of records maintained by the receiver's office.
- C. Original books, documents, papers, and other records, or copies thereof certified under Subsection B, when admitted in evidence shall be *prima facie* evidence of the facts disclosed and shall be admissible in evidence in the same manner as documents certified pursuant to [insert citation to state equivalent of F.R.E. 902(1)]. Certification of records by the receiver pursuant to this section shall be deemed to satisfy the requirements of [insert citation to state equivalent of F.R.E. 803(6)] and such records shall not be subject to objection under the hearsay rule.
- D. The records of a delinquent insurer held by the receiver shall not be considered as records of the Department of Insurance for any purposes, and the [insert citation to public records act] shall not apply to these records.

ARTICLE II. PROCEEDINGS

Section 201. Receivership Court's Seizure Order

- A. The commissioner may file in the [insert proper court] court of this state a petition with respect to an insurer domiciled in this state, an unauthorized insurer or, pursuant to Section 1001, a foreign insurer:
 - (1) Alleging that there exist grounds that would justify a court order for a formal delinquency proceeding against the insurer under this Act;
 - (2) Alleging that the interests of policyholders, creditors or the public will be endangered by delay; and
 - (3) Setting forth the contents of a seizure order deemed necessary by the commissioner.

- B. Upon a filing under Subsection A, the receivership court may issue forthwith, *ex parte* and without notice or hearing, the requested seizure order, which shall direct the commissioner to take possession and control of all or a part of the property, books, accounts, documents and other records of an insurer, and of the premises occupied by it for transaction of its business, and until further order of the receivership court enjoin the insurer and its officers, managers, agents and employees from disposition of its property and from the transaction of its business except with the written consent of the commissioner. Any person having possession or control of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued shall be guilty of a misdemeanor and punishable by a fine not exceeding \$1,000 or imprisonment not exceeding one year, or both fine and imprisonment.
- C. Any petition that prays for injunctive relief shall be verified by the commissioner or the commissioner's designee, but need not plead or prove irreparable harm or inadequate remedy at law. The commissioner shall provide only such notice as the receivership court may require.
- D. The receivership court shall specify in the seizure order what its duration shall be, which shall be the time the receivership court deems necessary for the commissioner to ascertain the condition of the insurer. On motion of the commissioner or the insurer or on its own motion, the receivership court may from time to time hold such hearings as it deems desirable after the notice as it deems appropriate, and may extend, shorten or modify the terms of the seizure order. The receivership court shall vacate the seizure order if the commissioner fails to commence a formal proceeding under this Act after having had a reasonable opportunity to do so. An order of the receivership court pursuant to a formal proceeding under this Act shall vacate the seizure order.
- E. Entry of a seizure order under this section shall not constitute a breach or an anticipatory breach of any contract of the insurer.
- F. An insurer subject to an *ex parte* seizure order under this section may petition the receivership court at any time after the issuance of a seizure order for a hearing and review of the seizure order. The receivership court shall hold the hearing and review not more than fifteen (15) days after the request. A hearing under this subsection may be held privately in chambers and it shall be so held if the insurer proceeded against so requests.
- G. If, at any time after the issuance of a seizure order, it appears to the receivership court that any person whose interest is or will be substantially affected by the seizure order did not appear at the hearing and has not been served, the receivership court may order that notice be given to the person. An order that notice be given shall not stay the effect of any seizure order previously issued by the receivership court.
- H. Whenever the commissioner makes any seizure as provided in Subsection B, on the demand of the commissioner, it shall be the duty of the sheriff of any county of this state, and of the police department of any municipal corporation therein to furnish the commissioner with necessary deputies, patrolmen or officers to assist the commissioner in making and enforcing the seizure order.

Section 202. Commencement of Formal Delinquency Proceeding

- A. Any formal delinquency proceeding against a person shall be commenced by filing a petition in the name of the commissioner or department.
- B. The petition shall state the grounds upon which the proceeding is based and the relief requested, and may include a prayer for restraining orders and injunctive relief as described in Section 108. Upon the filing of the petition, a notice thereof shall be forwarded by first class mail or electronic communication as permitted by the receivership court to the commissioners and guaranty associations in states in which the insurer did business.
- C. Any petition that prays for injunctive relief shall be verified by the commissioner or the commissioner's designee, but need not plead or prove irreparable harm or inadequate remedy at law. The commissioner shall provide only such notice as the receivership court may require.
- D. If any temporary restraining order is prayed for:

- (1) The receivership court may issue an initial order containing the relief requested;
 - (2) The order shall state the time and date of its issuance;
 - (3) The receivership court shall set a time and date for the return of summons, not more than ten (10) days from the time and date of the issuance of the initial order, at which time the person proceeded against may appear before the receivership court for a summary hearing; and
 - (4) The order shall not continue in effect beyond the time and date set for the return of summons, unless the receivership court shall expressly enter one or more orders extending the restraining order.
- E. If no temporary restraining order is requested, the receivership court shall cause summons to be issued. The summons shall specify a return date not more than thirty (30) days after issuance and that an answer must be filed at or before the return date.

Section 203. Return of Summons and Summary Hearing

- A. The receivership court shall hold a summary hearing at the time and date for the return of summons on a petition to commence a formal delinquency proceeding.
- B. If a person is not served with summons on a petition to commence a formal delinquency proceeding and fails to appear for the summary hearing, the receivership court shall:
- (1) Continue the summary hearing not more than ten (10) days;
 - (2) Provide for alternative service of summons upon the person; and
 - (3) Extend any restraining order.
- C. Upon a showing of good faith efforts to effect personal service upon a person who has failed to appear for a continued summary hearing, the receivership court shall order notice of the petition to commence a formal delinquency proceeding to be published. The order and notice shall specify a return date not less than ten (10) nor more than twenty (20) days after the publication and that the restraining order has been extended to the continued hearing date.
- D. If a person fails to appear for a summary hearing on a petition to commence a formal delinquency proceeding after service of summons, the receivership court shall enter judgment in favor of the commissioner against that person.
- E. (1) A person who appears for the summary hearing on a petition to commence a formal delinquency proceeding shall file its answer at the hearing and the receivership court shall:
- (a) Determine whether to extend any temporary restraining orders pending final judgment; and
 - (b) Set the case for trial on a date not more than ten (10) days from the summary hearing.
- (2) The receivership court shall grant no continuance for filing an answer.

Section 204. Proceedings for Expedited Trial: Continuances, Discovery, Evidence

- A. The receivership court shall proceed to hear the case on the petition to commence a formal delinquency proceeding at the time and date set forth for trial without a jury and without unnecessary delays. To the extent practicable, the receivership court shall give precedence to the matter over all other matters. To the extent authorized by law, the receivership court may assign the matter to other judges if necessary to comply with the need for expedited proceedings under this Act.
- B. Continuances for trial shall be granted only in extreme circumstances.

- C. The receivership court shall admit as self-authenticated any of the following when offered by the commissioner:
 - (1) Certified copies of the financial statements made by the insurer or an affiliate;
 - (2) Certified copies of examination reports of the insurer or an affiliate made by or on behalf of the commissioner;
 - (3) Certified copies of any other document filed with any insurance department by the insurer or an affiliate.
- D. The facts contained in any examination report of the insurer or an affiliate made by or on behalf of the commissioner shall be presumed to be true as of the date of the hearing if the examination was made as of a date not more than 270 days before the petition was filed. The presumption shall be rebuttable and shall shift the burden of production and persuasion to the insurer.
- E. Discovery shall be limited to grounds alleged in the petition, and shall be concluded on an expedited basis.

Section 205. Decision and Appeals

- A. The receivership court shall enter judgment on the petition to commence formal delinquency proceeding within fifteen (15) days after the conclusion of the evidence.
- B. Any order entered pursuant to Subsection A shall be final when entered. Any appeal shall be handled on an expedited basis and shall be taken within five (5) days of entry of the judgment.
- C. Absent entry of an order staying the order pursuant to Subsection D, the order shall be of full force and effect and the receiver shall carry out its terms and the provisions of this Act. No request for reconsideration, review or appeal, and no posting of a bond, shall dissolve or stay the judgment.
- D. A motion for a stay of the judgment, for approval of a supersede as bond or for other relief pending appeal must be presented to the receivership court in the first instance. Subject to the power of the appropriate appellate courts, the receivership court may suspend or otherwise modify an order entered under Subsection A or make any other appropriate order governing the enforceability of such order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.
- E. The receivership court or any appellate court to which the matter is presented may condition any relief it grants under Subsection D on the filing of a bond or other appropriate security with the receivership court.
- F. The provisions of Section 115 shall apply to all acts taken during the pendency of an appeal regardless of its ultimate disposition.
- G. The reversal or modification on appeal of an order of conservation, rehabilitation or liquidation does not affect the validity of the acts of the receiver pursuant to the order unless the order is stayed pending appeal.

Section 206. Confidentiality

- A. In all proceedings and judicial reviews under Section 201, all records of the insurer, department files, court records and papers, and other documents, so far as they pertain to or are a part of the record of the proceedings, shall be and remain confidential, and all papers filed with the clerk of the [insert proper court] court shall be held by the clerk in a confidential file as permitted by law, except to the extent necessary to obtain compliance with any order entered in connection with the proceedings, unless and until:
 - (1) The [insert proper court] court, after hearing argument in chambers, shall order otherwise;
 - (2) The insurer requests that the matter be made public; or
 - (3) The commissioner applies for an order under Section 207.

- B. The commissioner, conservator or rehabilitator may share documents, materials or other information in the possession, custody or control of the department, pertaining to an insurer that is the subject of a delinquency proceeding under this Act, with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, with an auditor appointed by the receivership court in accordance with Section 905, with representatives of guaranty associations that may have statutory obligations as a result of the insolvency of the insurer provided that the recipient agrees to maintain the confidentiality of the documents, material or other information. In the event that the domiciliary receiver believes that certain information is sensitive, the receiver may share that information subject to a continuation of the confidentiality obligations beyond the period allowed in Subsection D. Nothing in this section shall limit the power of the commissioner to disclose information under other applicable law.
- C. A domiciliary receiver shall permit a commissioner of another state or a guaranty association to obtain a listing of policyholders and certificate holders residing in the requestor's state, including current addresses and summary policy information, provided that the commissioner of another state or the guaranty association agrees to maintain the confidentiality of the records, and agrees that the records will be used only for regulatory or guaranty association purposes. Access to records may be limited to normal business hours. In the event that the domiciliary receiver believes that certain information is sensitive and disclosure might cause a diminution in recovery, the receiver may apply for a protective order imposing additional restrictions on access.
- D. The confidentiality obligations imposed by this section shall end upon the entry of an order of liquidation against the insurer, unless otherwise agreed to by the parties or pursuant to an order of the receivership court. Any continuation of confidentiality as provided in Subsection B shall not apply to any insurer records necessary for the guaranty associations to discharge their statutory responsibilities.
- E. No waiver of any applicable privilege or claim of confidentiality shall occur as a result of any disclosure, or any sharing of documents, materials or other information, made pursuant to this section.

Section 207. Grounds for Conservation, Rehabilitation or Liquidation

The commissioner may file in the [insert proper court] court of this state a petition with respect to an insurer domiciled in this state or an unauthorized insurer for an order of conservation, rehabilitation or liquidation on any one or more of the following grounds:

- A. The insurer is impaired;
- B. The insurer is insolvent;
- C. The insurer is about to become insolvent. An insurer is about to become insolvent for purposes of this section if it is reasonably anticipated that the insurer will not have liquid assets to meet its next ninety (90) days' current obligations;
- D. The insurer has neglected or refused to comply with an order of the commissioner to make good within the time prescribed by law any deficiency, whenever its capital and minimum required surplus, if a stock company, or its surplus, if a company other than stock, has become impaired;
- E. The insurer, its parent company, its subsidiaries or its affiliates have converted, wasted or concealed property of the insurer, or otherwise improperly disposed of, dissipated, used, released, transferred, sold, assigned, hypothecated or removed the property of the insurer;
- F. The insurer is in such condition that it could not meet the requirements for organization and authorization as required by law, except as to the amount of the original surplus required of a stock company under Section [insert proper section], and except as to the amount of the surplus required of a company other than a stock company in excess of the minimum surplus required to be maintained;

- G. The insurer, its parent company, its subsidiaries or its affiliates have concealed, removed, altered, destroyed or failed to establish and maintain books, records, documents, accounts, vouchers and other pertinent material adequate for the determination of the financial condition of the insurer by examination under Section [insert citation to examination authority statute in state's general insurance laws], or has failed to properly administer claims or maintain claims records that are adequate for the determination of its outstanding claims liability;
- H. At any time after the issuance of an order under Section [insert citation to corrective orders statute in state's general insurance laws], or at the time of instituting any proceeding under this Act, it appears to the commissioner that upon good cause shown, it would not be in the best interest of the policyholders, creditors or the public to proceed with the conduct of the business of the insurer;
- I. The insurer is in such condition that the further transaction of business would be hazardous financially, according to [insert citation to state's enactment of the NAIC Model Regulation to Define Standards and Commissioner's Authority for Companies Deemed to be in Hazardous Financial Condition] or otherwise, to its policyholders, creditors or the public;
- J. There is reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's property, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to the insurer that if established would endanger assets in an amount threatening the solvency of the insurer;
- K. Control of the insurer is in a person who is dishonest, untrustworthy or so lacking in insurance company managerial experience or capability as to be hazardous to policyholders, creditors or the public;
- L. Any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, director or trustee, employee, shareholder, or other person, has refused to be examined under oath by the commissioner concerning its affairs, whether in this state or elsewhere; or if examined under oath refuses to divulge pertinent information reasonably known to the person; and after reasonable notice of the fact, the insurer has failed promptly and effectively to terminate the employment and status of the person and all his or her influence on management;
- M. After demand by the commissioner under Section [cite examination law] or under this Act, the insurer has failed to promptly make available for examination any of its own property, books, accounts, documents, or other records, or those of any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer;
- N. Without first obtaining the written consent of the commissioner, the insurer has transferred, or attempted to transfer, in a manner contrary to Sections [cite holding company law] or [cite bulk reinsurance law], substantially its entire property or business, or has entered into any transaction the effect of which is to merge, consolidate or reinsure substantially its entire property or business in or with the property or business of any other person;
- O. The insurer or its property has been or is the subject of an application for the appointment of a receiver, trustee, custodian, conservator, sequestrator or similar fiduciary of the insurer or its property otherwise than as authorized under the insurance laws of this state;
- P. Within the previous five (5) years the insurer has willfully and continuously violated its charter or articles of incorporation, its bylaws, any insurance law of this state, or any valid order of the commissioner;
- Q. The insurer has failed to pay within sixty (60) days after the due date any obligation to any state or any subdivision thereof or any judgment entered in any state, if the court in which the judgment was entered had jurisdiction over the subject matter except that nonpayment shall not be a ground until sixty (60) days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the commissioner or in the courts;

- R. The insurer has systematically engaged in the practice of reaching settlements with and obtaining releases from claimants, and then unreasonably delaying payment, or failing to pay the agreed-upon settlements, or systematically attempted to compromise with claimants or other creditors on the ground that it is financially unable to pay its claims or obligations in full;
- S. The insurer has failed to file its annual report or other financial report required by statute within the time allowed by law;
- T. The board of directors or the holders of a majority of the shares entitled to vote, or a majority of those individuals entitled to the control of those entities specified in Section 103, request or consent to conservation, rehabilitation or liquidation under this Act;
- U. The insurer does not comply with its domiciliary state's requirements for issuance to it of a certificate of authority, or its certificate of authority has been revoked by its state of domicile; or
- V. When authorized by [cite risk-based capital law].

Section 208. Entry of Order

If the commissioner establishes any of the grounds provided in Section 207, then the receivership court shall grant the petition and issue the order of conservation, rehabilitation or liquidation requested in the petition. Upon the issuance of the order, a copy shall be forwarded by first class mail or electronic communication as permitted by the receivership court to the commissioners and guaranty associations in states in which the insurer did business.

Section 209. Effect of Order of Conservation, Rehabilitation or Liquidation

- A. The filing or recording of an order of receivership with the clerk of the [insert proper court] court or recorder of deeds of the county in which the principal business of the company is conducted, or, in the case of real estate, with the recorder of deeds of the county where the property is located, shall impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that recorder of deeds would have imparted.

Drafting Note: Filing requirements should conform to existing state law.

- B. Neither the filing of a petition commencing delinquency proceedings under this Act nor the entry of any order of seizure, conservation, rehabilitation or liquidation shall constitute a breach or an anticipatory breach of any contract or lease of the insurer.
- C. The receiver may appoint one or more special deputies. A special deputy shall have all the powers and responsibilities of the receiver granted under this section, unless specifically limited by the receiver and shall serve at the pleasure of the receiver. The receiver may employ or contract with legal counsel, actuaries, accountants, appraisers, consultants, clerks, assistants and such other personnel as may be deemed necessary. Any special deputy or other person with whom the receiver contracts under this subsection shall be considered to be an agent of the commissioner only in the commissioner's capacity as receiver, and shall not be considered an agent of the state. The provisions of any law governing the procurement of goods and services by the state shall not apply to any contract entered into by the commissioner as receiver. The compensation of any special deputies, employees and contractors and all expenses of taking possession of the insurer and of conducting the receivership shall be determined by the receiver, with the approval of the receivership court in accordance with Section 116, and shall be paid out of the property of the insurer. If the receiver, in his or her sole discretion, deems it necessary to the proper performance of the receiver's duties under this Act, the receiver may appoint an advisory committee of policyholders, claimants or other creditors including guaranty associations. The committee shall serve at the pleasure of the receiver and shall serve without compensation and without reimbursement for expenses. The receiver or the receivership court in proceedings conducted under this Act may not appoint any other committee of any nature.

ARTICLE III. CONSERVATION

Section 301. Conservation Orders

- A. An order to conserve the business of an insurer shall appoint the commissioner and his or her successors in office as the conservator and shall direct the conservator to take possession [and title] of the assets of the insurer, and to administer them under the general supervision of the court.

Drafting Note: Adding “and title” is optional.

- B. Any order issued under this section shall require accountings to the receivership court by the conservator. Accountings shall be at such intervals as the receivership court specifies in its order, but no less frequently than semi-annually.
- C. Unless otherwise directed by the receivership court, the conservator shall, within five (5) days of entry of an order of conservation, give or cause to be given notice of the order of conservation by first class mail or electronic communication to the guaranty associations of this state and any other guaranty association that has or may have obligations as a result of the delinquency proceeding.

Section 302. Powers and Duties of the Conservator

- A. The conservator shall conduct an analysis of the business and financial condition of the insurer to determine if, in the best judgment of the conservator, it will be possible to correct the problems that led to the order of conservation and restore the insurer to private management and normal operations. Within 180 days of an order of conservation, the conservator shall file a [motion or application] in the receivership court asking that:
 - (1) The insurer be released from conservation, subject to Section 901;
 - (2) The insurer be placed into rehabilitation; or
 - (3) The insurer be placed into liquidation.
- B. The period for filing the [motion or application] may be extended by the receivership court upon the motion of the conservator for one additional period of 180 days.
- C. With receivership court approval pursuant to Section 107, the conservator may take such action as the conservator deems necessary or appropriate to reform and revitalize the insurer, including but not limited to, canceling policies, insurance and reinsurance contracts (other than life or health insurance or annuities), surety bonds or surety undertakings, or transferring policies, insurance and reinsurance contracts, surety bonds or surety undertakings to a solvent assuming insurer. The conservator shall have all the powers of the directors, officers and managers of the insurer, whose authority shall be suspended, except as redelegated by the conservator. The conservator shall have full power to direct and manage, to hire and discharge employees, and to deal with the property and business of the insurer. The conservator shall not be liable under [cite to state version of statute imposing liability for issuing policies while insolvent] as the result of good faith issuance or renewal of policies while in conservation.
- D. If it appears to the conservator that there has been criminal or tortious conduct, or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agent, broker, employee, affiliate or other person, the conservator may pursue all appropriate legal remedies on behalf of the insurer.
- E. The conservator may assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds, and the defense of usury. A waiver of any defense by the insurer after a petition pursuant to Sections 201 or 207 has been filed shall not bind the conservator.
- F. The enumeration, in this section, of the powers and authority of the conservator shall not be construed as a limitation upon the conservator, nor shall it exclude in any manner the right to do other acts not specifically enumerated or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of conservation.

Section 303. Coordination With Guaranty Associations and Orderly Transition to Rehabilitation or Liquidation

- A. Upon the entry of an order of conservation or as soon thereafter as is practical, the conservator or his or her designated representative shall consult with the potentially obligated guaranty associations or their designated representatives to determine the extent to which the guaranty associations will be impacted by or may assist in the efforts to conserve the insurer, and shall also provide appropriate information to the guaranty associations to allow them to evaluate and discharge their statutory responsibilities. The conservator shall begin appropriate contingency planning and organizing so that an orderly transition to liquidation occurs, if liquidation is necessary. An orderly transition to liquidation requires, among other things, that: (i) the conservator to the fullest extent possible reserve sufficient assets to continue to meet obligations under insurance policies of the insolvent insurer until the guaranty associations are triggered, and (ii) the conservator shall conduct affairs in such a way and cooperate as necessary with the guaranty associations that may become liable as a result of the insolvency of the insurer to ensure that the guaranty associations are provided with appropriate information, along with necessary updates at reasonable intervals, and a reasonable period of time to plan and organize so that the guaranty associations are able to properly discharge statutory responsibilities upon being triggered.
- B. Upon a determination by the commissioner or conservator that the insurer should be rehabilitated, the commissioner or conservator or his or her designated representative shall consult with the potentially obligated guaranty associations to advise them of the decision to seek an order of rehabilitation.
- C. Upon a determination by the commissioner or a receiver that the insurer should be liquidated, the commissioner or receiver or his or her designated representative shall participate in cooperative efforts with the potentially obligated guaranty associations to ensure that an orderly transition to liquidation occurs. The conservator shall make available to the guaranty associations the information necessary to discharge their responsibilities upon becoming statutorily obligated. To the extent that information is available, or as it becomes available, the conservator shall provide appropriate information to guaranty associations in the states where the insurer transacted business.
- D. Appropriate information as referred to in this section at a minimum includes the following for lines of business written by the insurer (whether covered or not covered by guaranty associations): a general description of the different types of business written or assumed by the insurer; claim counts and policy counts by state and by line of business; claim and policy reserves; account values; cash surrender values; policy loans; interest crediting history; premiums and mode of payment; unpaid claims and amounts; sample policies and endorsements; listing of different locations of claim files; if third party administrators were used, copies of executed contracts and a description of the contractual arrangements; and information concerning claims in litigation or dispute, including a listing of claims with assigned defense counsel for those claims going to trial in the near future after a possible liquidation date. Appropriate information also includes information concerning states in which the insurer is or was licensed and time periods for which the insurer is or was licensed; and other information reasonably requested by a guaranty association necessary for it to fulfill its statutory duties. In the case of a property and casualty insurer, the conservator, in cooperation with the guaranty associations, shall make all reasonable efforts to prepare the insurer's electronic policy and claims data so that, upon the entry of an order of liquidation the data will be ready for transmission using the Uniform Data Standards as promulgated by the National Association of Insurance Commissioners.
- E. The listing of information in Subsection D is not necessarily an exclusive list and other information in order to ensure that an orderly transition to liquidation occurs may be needed and may be appropriately provided by the receiver.

ARTICLE IV. REHABILITATION

Section 401. Rehabilitation Orders

- A. An order to rehabilitate the business of an insurer shall appoint the commissioner and his or her successors in office as the rehabilitator and shall direct the rehabilitator to take possession [and title] of the assets of the insurer, and to administer them under the general supervision of the court.

Drafting Note: Adding "and title" is optional.

- B. Any order issued under this section shall require accountings to the receivership court by the rehabilitator. Accountings shall be at such intervals as the receivership court specifies in its order, but no less frequently than semi-annually. Each accounting shall include a report concerning the rehabilitator's opinion as to the likelihood that a plan under Section 403 will be prepared by the rehabilitator and the timetable for doing so.
- C. In recognition of the need for a prompt and final resolution for all persons affected by a plan of rehabilitation, any appeal from an order of rehabilitation or an order approving a plan of rehabilitation shall be heard on an expedited basis. A stay of an order of rehabilitation or an order approving a plan of rehabilitation shall not be granted unless the appellant demonstrates that extraordinary circumstances warrant delaying the recovery under the plan of rehabilitation of all other persons, including policyholders. If the plan provides an appropriate mechanism for adjustment in the event of any adverse ruling from an appeal, no stay shall be granted.

Section 402. Powers and Duties of the Rehabilitator

- A. The rehabilitator may take such action as the rehabilitator deems necessary or appropriate to reform and revitalize the insurer, including but not limited to, canceling policies, insurance and reinsurance contracts (other than life or health insurance or annuities), surety bonds or surety undertakings, or transferring policies, insurance and reinsurance contracts, surety bonds or surety undertakings to a solvent assuming insurer, with court approval. The rehabilitator shall have all the powers of the directors, officers and managers of the insurer, whose authority shall be suspended, except as redelegated by the rehabilitator. The rehabilitator shall have full power to direct and manage, to hire and discharge employees, and to deal with the property and business of the insurer. The rehabilitator shall not be liable under [insert citation to state version of statute imposing liability for issuing policies while insolvent] as the result of good faith issuance or renewal of policies while in rehabilitation.
- B. If it appears to the rehabilitator that there has been criminal or tortious conduct, or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agent, broker, employee, affiliate, or other person, the rehabilitator may pursue all appropriate legal remedies on behalf of the insurer.
- C. The rehabilitator may assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds, and the defense of usury. A waiver of any defense by the insurer after a petition pursuant to Sections 201 or 207 has been filed shall not bind the rehabilitator.
- D. The enumeration, in this section, of the powers and authority of the rehabilitator shall not be construed as a limitation upon the rehabilitator, nor shall it exclude in any manner the right to do other acts not specifically enumerated or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of rehabilitation.

Section 403. Filing of Rehabilitation Plans

- A. The rehabilitator shall prepare and file a plan to effect rehabilitation with the receivership court within one year after the entry of the rehabilitation order or such further time as the receivership court may allow. Upon application of the rehabilitator for approval of the plan, and after such notice and hearings as the receivership court may prescribe, the receivership court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. Any plan approved under this section shall be in compliance with applicable law and fair and equitable to all parties concerned. If the plan is approved, the rehabilitator shall carry out the plan. In the case of a life insurer, the plan proposed may include the imposition of liens upon the policies of the company, if all rights of shareholders are relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for a period not to exceed one year from the entry of the order approving the rehabilitation plan, unless the receivership court, for good cause shown, shall extend the moratorium.
- B. Once a plan has been filed, any party in interest may object to the plan.

- C. A plan shall:
- (1) Except as provided at Subsection E, provide no less favorable treatment of a claim or class of claims than would occur in liquidation, unless the holder of a particular claim or interest agrees to a less favorable treatment of that particular claim or interest;
 - (2) Provide adequate means for the plan's implementation;
 - (3) Contain information concerning the financial condition of the insurer and the operation and effect of the plan, as far as is reasonably practicable in light of the nature and history of the insurer, the condition of the insurer's books and records and the nature of the plan; and
 - (4) Provide for the disposition of the books, records, documents and other information relevant to the duties and obligations covered by the plan.
- D. A plan may include any other provisions not inconsistent with the provisions of this Act, including, but not limited to:
- (1) Payment of distributions;
 - (2) Assumption or reinsurance of all or a portion of the insurer's remaining liabilities by, and transfer of assets and related books and records to, a licensed insurer or other entity;
 - (3) To the extent appropriate, application of insurance company regulatory market conduct standards to any entity administering claims on behalf of the receiver or assuming direct liabilities of the insurer;
 - (4) Contracting with a state guaranty association or any other qualified entity to perform the administration of claims;
 - (5) Annual independent financial and performance audits of any entity administering claims on behalf of the receiver that is not otherwise subject to examination pursuant to state insurance law; and
 - (6) Termination of the insurer's liabilities other than those under policies of insurance as of a date certain.
- E. A plan may designate and separately treat one or more separate sub-classes consisting only of those claims within these classes that are for or reduced to *de minimis* amounts. A *de minimis* amount shall be any amount equal to or less than a maximum *de minimis* amount approved by the receivership court as being reasonable and necessary for administrative convenience.

Section 404. Termination of Rehabilitation

- A. Whenever the rehabilitator believes further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders or the public, or would be futile, the rehabilitator may move for an order of liquidation. In accordance with Section 405, the rehabilitator or the rehabilitator's designated representative shall coordinate with the guaranty associations that may become liable as a result of the liquidation and any national association of guaranty associations to plan for transition to liquidation.
- B. The protection of the interests of insureds, claimants and the public requires the timely performance of all insurance policy obligations; therefore, if the payment of policy obligations is suspended in substantial part for a period of six (6) months at any time after the appointment of the rehabilitator and the rehabilitator has not filed an application for approval of a plan under Section 403, the rehabilitator shall petition the receivership court for an order of liquidation or seek an order, on good cause shown, for a longer suspension period.
- C. The rehabilitator or the directors of the insurer may at any time petition the receivership court for, or the receivership court on its own motion may enter, an order terminating rehabilitation of an insurer. Subject to the provisions of Section 901, if the receivership court finds that rehabilitation has been accomplished and that grounds for rehabilitation under Section 207 no longer exist, it shall order that the insurer be restored to title and possession of its property and the control of the business.

Section 405. Coordination with Guaranty Associations and Orderly Transition to Liquidation

- A. Upon the entry of an order of rehabilitation or as soon thereafter as is practical, the rehabilitator or his or her designated representative shall consult with the potentially obligated guaranty associations or their designated representatives to determine the extent to which the guaranty associations will be impacted by or may assist in the efforts to rehabilitate the insurer, and shall also provide appropriate information to the guaranty associations to allow them to evaluate and discharge their statutory responsibilities. The rehabilitator shall begin appropriate contingency planning and organizing so that an orderly transition to liquidation occurs, if liquidation is necessary. An orderly transition to liquidation requires, among other things, that: (i) the rehabilitator to the fullest extent possible reserve sufficient assets to continue to meet obligations under insurance policies of the insolvent insurer until the guaranty associations are triggered, and (ii) the rehabilitator shall conduct affairs in such a way and cooperate as necessary with the guaranty associations that may become liable as a result of the insolvency of the insurer to ensure that the guaranty associations are provided with appropriate information, along with necessary updates at reasonable intervals, and a reasonable period of time to plan and organize so that the guaranty associations are able to properly discharge statutory responsibilities upon being triggered.
- B. Appropriate information as referred to in this section at a minimum includes the following for lines of business written by the insurer (whether covered or not covered by guaranty associations): a general description of the different types of business written or assumed by the insurer; claim counts and policy counts by state and by line of business; claim and policy reserves; account values; cash surrender values; policy loans; interest crediting history; premiums and mode of payment; unpaid claims and amounts; sample policies and endorsements; listing of different locations of claim files; if third party administrators were used, copies of executed contracts and a description of the contractual arrangements; and information concerning claims in litigation or dispute, including a listing of claims with assigned defense counsel for those claims going to trial in the near future after a possible liquidation date. Appropriate information also includes information concerning states in which the insurer is or was licensed and time periods for which the insurer is or was licensed; and other information reasonably requested by a guaranty association necessary for it to fulfill its statutory duties. In the case of a property and casualty insurer, the conservator or rehabilitator, in cooperation with the guaranty associations, shall make all reasonable efforts to prepare the insurer's electronic policy and claims data so that, upon the entry of an order of liquidation the data will be ready for transmission using the Uniform Data Standards as promulgated by the National Association of Insurance Commissioners.
- C. The listing of information in Subsection B is not necessarily an exclusive list and other information in order to ensure that an orderly transition to liquidation occurs may be needed and may be appropriately provided by the receiver.

ARTICLE V. LIQUIDATION

Section 501. Liquidation Orders

- A. An order to liquidate the business of an insurer shall appoint the commissioner and any successor in office as the liquidator and shall direct the liquidator to take possession of the property of the insurer and to administer it subject to this Act. The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation.
- B. Upon issuance of the order of liquidation, the rights and liabilities of the insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate shall become fixed as of the date of entry of the order of liquidation, except as provided in Sections 502 and 705, unless otherwise fixed by the [insert applicable court] court.
- C. An order to liquidate the business of an alien insurer in this state shall be in the same terms and have the same legal effect as an order to liquidate a domestic insurer.
- D. Whenever applicable, a petition for liquidation should include a request for a judicial declaration [or finding] of insolvency. After providing proper notice and hearing, the receivership court may at any time make the declaration of insolvency.

- E. In the event an order of liquidation is set aside upon appeal, the company shall not be released from delinquency proceedings except in accordance with Section 901.

Section 502. Continuance of Coverage

- A. Notwithstanding any policy or contract language or any other statute, and unless ordered otherwise by the receivership court upon application by the receiver, all reinsurance contracts by which the insurer has assumed the insurance obligations of another insurer are cancelled upon entry of an order of liquidation.
- B. Notwithstanding any policy or contract language or any other statute, all policies, insurance contracts (other than reinsurance by which the insurer has ceded insurance obligations to another person), surety bonds or surety undertakings, other than life, disability income, long term care or health insurance or annuities, in effect at the time of issuance of an order of liquidation shall continue in force as provided in this section, unless further extended by the receiver with the approval of the receivership court, until the earlier of:
 - (1) Thirty (30) days from the date of entry of the liquidation order;
 - (2) The date of expiration of the policy coverage;
 - (3) The date the insured has replaced the insurance coverage with equivalent insurance with another insurer or otherwise terminated the policy;
 - (4) The date the liquidator has effected a transfer of the policy obligation pursuant to Section 504A(5); or
 - (5) The date proposed by the liquidator and approved by the receivership court to cancel coverage.

Drafting Note: The provision in Paragraph (5) is designed to allow for possible immediate cancellation of policies in the event there is no guaranty fund coverage.

- C. An order of liquidation under Section 501 shall terminate coverages at the time specified in Subsections A and B for purposes of any other statute.
- D. Policies of life, disability income, long term care or health insurance or annuities covered by a guaranty association or portions of such policies covered by one or more guaranty associations, under applicable law, shall continue in force, subject to the terms of the policy (including any terms restructured pursuant to a court-approved rehabilitation plan) to the extent necessary to permit the guaranty associations to discharge their statutory obligations. Policies of life, disability income, long term care or health insurance or annuities, or portions of such policies, not covered by one or more guaranty associations shall terminate as provided under Subsection B, except to the extent the liquidator proposes and the receivership court approves the use of property of the estate, consistent with Section 801, for the purpose of continuing the contracts or coverage by transferring them to an assuming reinsurer.
- E. The cancellation of any bond or surety undertaking shall not release any co-surety or guarantor.
- F. Except as otherwise provided in this Act, the obligations of the insolvent insurer's reinsurers shall not be released or discharged by a termination under this section of the policies ceded to reinsurers.
- G. Contracts by which the insurer has reinsured obligations arising under policies of life, disability income, long-term care insurance or annuities shall continue or terminate as provided in Section 612 of this Act.

Section 503. Sale or Dissolution of the Insurer's Corporate Entity

- A. Notwithstanding the entry of a liquidation order, the liquidator may apply for an order to sell or dissolve the corporate entity or charter of a domestic insurer or the United States branch of an alien insurer domiciled in this state, at any time after an order of liquidation of the insurer has been granted, consistent with the provisions of this section.

- B. Upon an application to sell the corporate entity or charter, with notice as prescribed in this Act, the receivership court may enter an order;
- (1) Separating the corporate entity or charter, together with any of its licenses to do business and such assets as the liquidator deems appropriate to the transaction, from the remaining estate in liquidation and all of its assets and the claims or interests of all claimants, creditors, policyholders and stockholders;
 - (2) Canceling all outstanding stock and other securities of, and other equity interests in, the corporate entity or charter, provided that the cancellation shall not affect any claim against the estate by holders of the equity interests;
 - (3) Authorizing the issuance and sale of new stock or other securities for the purpose of transferring to one or more buyers control and ownership of the corporate entity or charter; and
 - (4) Authorizing the sale of the corporate entity or charter, together with any of its licenses to do business and such general assets as the liquidator deems appropriate to the transaction, free and clear from the claims or interest of all claimants, creditors, policyholders and stockholders.
- C. The sale of the corporate entity or charter may be made in the manner and on the terms and conditions applied for by the liquidator and ordered by the receivership court. Any sale shall be subject to the domiciliary state's laws regarding acquisition of an insurer [refer to state's Insurance Holding Company law or other law regarding the transfer of control of insurers]. The proceeds from the sale of the corporate entity or charter shall become a part of the property of the estate in liquidation, and the then separate corporate entity or charter, together with any of its licenses to do business and such assets as the liquidator deems appropriate to the transaction, shall thereafter be free and clear from the claims or interest of all claimants, creditors, policyholders and stockholders of the insurer in liquidation. The court shall be deemed to have broad powers to effect the disposition of corporate entities and their charters including, without limiting the foregoing, reorganizations and conversions thereof.
- D. This section shall be liberally construed to accomplish its purposes to provide an expeditious and effective procedure to realize the maximum proceeds possible from the sale of a corporate entity or charter separated from an estate in liquidation and to ensure that the purchasers receive clear and marketable titles.
- E. If permission to sell the corporate entity or charter is not granted prior to discharge of the liquidator, in accordance with this section or otherwise with receivership court approval, the receivership court may order dissolution of the corporate entity or charter, or dissolution shall be deemed complete by operation of law upon the discharge of the liquidator if the insurer is insolvent, or dissolution may be ordered by the receivership court upon the discharge of the liquidator if the insurer is under a liquidation order for some other reason.

Section 504. Powers of the Liquidator

- A. The liquidator shall have the power:
- (1) To hold hearings, to subpoena witnesses to compel their attendance, to administer oaths, to examine any person under oath, and to compel any persons to subscribe to their testimony after it has been correctly reduced to writing; and in connection therewith to require the production of any books, papers, records or other documents that the liquidator deems relevant to the inquiry;
 - (2) To audit the books and records of all agents of the insurer insofar as those records relate to the business activities of the insurer;
 - (3) To collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:
 - (a) To institute action in other jurisdictions, in order to forestall garnishment and attachment proceedings against those debts;

- (b) To pay Class 1 administrative costs of the estate, at the liquidator's sole discretion and upon approval of the receivership court, where the payments assist or result in the collection or recovery of property of the insurer that provides a net benefit to creditors of the estate;
 - (c) To do such other acts as are necessary or expedient to collect, conserve or protect its property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as the liquidator deems consistent with this Act; and
 - (d) To pursue any creditor's remedies available to enforce the insurer's claims;
- (4) To conduct public and private sales of the property of the insurer;
- (5) (a) To use property of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under Section 801;
- (b) To use property of the estate of an insurer under a liquidation order to transfer the insurer's obligations under surety bonds and surety undertakings, and collateral held by the insurer with respect to the reimbursement obligations of the principals under those surety bonds and surety undertakings, to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under Section 801; and if all insureds, principals, third party claimants, and obliges under the policies, surety bonds, and surety undertakings consent, or if the receivership court so orders, the estate shall have no further liability under the transferred policies, surety bonds, or surety undertakings after the transfer is made;
- (6) Subject to Subsection D, to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with, any property of the estate at its market value or upon such terms and conditions as are fair and reasonable. The liquidator shall also have the power to 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;
- (7) To borrow money on the security of the property of the estate or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation. Any such funds borrowed may be repaid as an administrative expense and have priority over any other claims in Class 1 under the priority of distribution;
- (8) To enter into such contracts as are necessary to carry out the order to liquidate, and, subject to the provisions of Section 114, to assume or reject any executory contract or unexpired lease to which the insurer is a party;
- (9) To continue to prosecute and to institute in the name of the insurer or in the liquidator's own name suits and other legal proceedings, in this state or elsewhere, and to abandon the prosecution of claims the liquidator deems unprofitable to pursue further. If the insurer is dissolved under Section 503, the liquidator shall have the power to apply to any court in this state or elsewhere for leave to substitute the liquidator for the insurer as a party;
- (10) To prosecute or assert with exclusive standing any action that may exist on behalf of the creditors, members, policyholders or shareholders of the insurer or the public against any person, except to the extent that a claim is personal to a specific creditor, member, policyholder or shareholder and recovery on the claim would not inure to the benefit of the estate. This subsection does not infringe or impair any of the rights provided to a guaranty association pursuant to its enabling statute or otherwise;

- (11) To take possession of such records and property of the insurer as may be convenient for the purposes of efficient and orderly execution of the liquidation. Guaranty associations shall have reasonable access to the records of the insurer necessary for them to carry out their statutory obligations;
 - (12) To deposit in one or more banks in this state sums required for meeting current administration expenses and dividend distributions;
 - (13) To invest all sums not currently needed, unless the receivership court orders otherwise;
 - (14) To file any necessary documents for record in the office of any recorder of deeds or record office in this state or elsewhere where property of the insurer is located;
 - (15) To assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds and the defense of usury. A waiver of any defense by the insurer after a petition pursuant to Sections 201 or 207 has been filed shall not bind the liquidator. Whenever a guaranty association has an obligation to defend any suit, the liquidator shall defer to that obligation and may defend only in cooperation with the guaranty association or in the absence of the guaranty association's defense;
 - (16) To exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member, including any power to avoid any transfer or lien that may be voidable under this Act or otherwise;
 - (17) To intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee for the insurer or any of its property, and to act as the receiver or trustee whenever the appointment is offered;
 - (18) To enter into agreements with any receivers or commissioners of any other states; and
 - (19) To exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with the provisions of this Act.
- B. The liquidator is vested with all the rights of the entity or entities in receivership.
- C. The enumeration, in this section, of the powers and authority of the liquidator shall not be construed as a limitation upon the liquidator, nor shall it exclude in any manner the right to do other acts not specifically enumerated or otherwise provided for, to the extent necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.
- D. The liquidator may hypothecate, encumber, lease, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer, or settle or resolve any claim brought by the liquidator on behalf of the insurer, or commute or settle any claim of reinsurance under any contract of reinsurance, as follows:
- (1) If the property or claim has a market or settlement value that does not exceed the lesser of \$1,000,000 or ten percent (10%) of the general assets of the estate, as shown on the receivership's financial statements, the liquidator may take the action at his or her discretion. The receivership court may, upon petition of the liquidator, increase the threshold upon a showing that compliance with this requirement is burdensome to the liquidator in administering the estate and is unnecessary to protect the material interests of creditors.
 - (2) In all instances other than those described in Paragraph (1), the liquidator may take the action only after obtaining approval of the receivership court as provided in Section 107.
 - (3) The liquidator may, at the liquidator's discretion, request the receivership court to approve a proposed action as provided in Section 107 if the value of the property or claim appears to be less than the threshold provided in Paragraph (1) but cannot be ascertained with certainty, or for any other reason as determined by the liquidator.

(4) After obtaining approval of the receivership court as provided in Section 107 of this Act, the liquidator may transfer rights to payment under ceding reinsurance agreements covering policies to a third party transferee. The transferee shall have the rights to collect and enforce collection of the reinsurance for the amount payable to the ceding insurer or to its receiver, without diminution because of the insolvency or because the receiver has failed to pay all or a portion of the claim, based on the amounts paid or allowed pursuant to Subsection 611. The transfer of these rights shall 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. Except as provided in this subsection, any transfer of rights pursuant to this provision shall not impair any rights or defenses of the reinsurer that existed prior to the transfer or would have existed in the absence of the transfer. Except as otherwise provided in this subsection, any transfer of rights pursuant to this provision shall not relieve the transferee or the liquidator from obligations owed to the reinsurer pursuant to the reinsurance or other agreement.

E. The liquidator shall not be obligated to defend any action against the insurer or insured. Any insureds not defended by a guaranty association may provide their own defense, and include the cost of the defense as part of their claims, if the defense was an obligation of the insurer. The right of the liquidator to contest coverage on a particular claim shall be deemed preserved without the necessity for an express reservation of rights.

Section 505. Notice to Creditors and Others

A. Unless the receivership court otherwise directs, the liquidator shall give or cause to be given notice of the liquidation order as soon as possible:

- (1) By first class mail or electronic communication as permitted by the receivership court to all the insurer's agents, brokers, or producers of record, with current appointments or current licenses to represent the insurer, and to all other agents, brokers or producers as the liquidator deems appropriate at their last known address;
- (2) By first class mail or electronic communication as permitted by the receivership court to all current policyholders, pending claimants and, as determined by the receivership court, former policyholders and other creditors; and

Drafting Note: Notice under this paragraph should include notices to various state and federal agencies with an interest in the delinquency proceeding, *e.g.* Interstate Commerce Commission and state public utility commissions.

- (3) By publication in a newspaper of general circulation in the county in which the insurer has its principal place of business and in other locations that the liquidator deems appropriate.

B. The notice of the entry of an order of liquidation shall contain or provide directions for obtaining the following information:

- (1) A statement that the insurer has been placed in liquidation;
- (2) A statement that states that certain acts are stayed under Section 108 and describes any additional injunctive relief ordered by the receivership court;
- (3) A statement whether, and to what extent, the insurer's policies continue in effect;
- (4) To the extent applicable, a statement that coverage by state guaranty associations may be available for all or part of policy benefits in accordance with applicable state guaranty laws;
- (5) A statement of the deadline for filing claims, if established, and the requirements for filing a proof of claim pursuant to Section 701 on or before that date;
- (6) A statement of the date, time and location of any initial status hearing scheduled at the time the notice is sent;

- (7) A description of the process for obtaining notice of matters before the receivership court; and
 - (8) Such other information as the liquidator or the receivership court deems appropriate.
- C. If notice is given in accordance with this section, the distribution of property of the insurer under this Act shall be conclusive with respect to all claimants, whether or not they received notice.
- D. Notwithstanding the foregoing, the liquidator shall have no duty to locate any persons or entities if no address is found in the records of the insurer, or if mailings are returned to the liquidator because of inability to deliver at the address shown in the company's books and records. In these circumstances the notice by publication as required by this Act or actual notice received is sufficient notice. Written certification by the liquidator or other knowledgeable person acting for the liquidator, that the notices were deposited in the United States mail, postage prepaid, or that the notices have been electronically transmitted shall be *prima facie* evidence of mailing and receipt. All claimants shall have a duty to keep the liquidator informed of any changes of address.
- E. Notwithstanding Subsection A, upon application of the liquidator the receivership court may find that notice by publication as required in this section is sufficient notice to those persons holding an occurrence policy that expired more than four (4) years prior to the entry of the order of liquidation, and under which there are no pending claims; or the receivership court may order other notice to those persons that it deems appropriate.

Section 506. Duties of Agents

- A. At the request of the liquidator, an agent receiving notice of the entry of the liquidation order shall, within fifteen (15) days of receipt, or such longer time as the liquidator may require, provide notice of that order on a form prescribed by the liquidator to each policyholder and other person named in any policy issued through the agent. Within thirty (30) days of the mailing, the agent shall provide a certification of mailing and list of insureds noticed as prescribed by the liquidator.
- B. Every person who represented the insurer as an agent and receives notice in the form prescribed in Section 505, shall within thirty (30) days of the notice provide to the liquidator (in addition to the information the agent may be required to provide pursuant to Section 110) the information in the agent's records related to any policy issued by the insurer through the agent, and, if the agent is a general agent, the information in the general agent's records related to any policy issued by the insurer through an agent under contract to the general agent, including the name and address of the sub-agent. A policy shall be deemed issued through an agent if the agent has a property interest in the expiration of the policy, or if the agent has had in his or her possession a copy of the declarations of the policy at any time during the life of the policy, except where the ownership of the expiration of the policy has been transferred to another.
- C. Any agent failing to provide information to the liquidator as required in Subsection B may be subject to payment of a penalty of not more than \$1,000, in addition, the agent's license may be suspended after a hearing held by the commissioner.
- D. Notwithstanding an agent's property interest, if any, in the expiration of the policy, the liquidator shall have the exclusive power to determine whether, and under what terms, to cancel or transfer the policy.

ARTICLE VI. ASSET RECOVERY

Section 601. Turnover of Assets

- A. If the receiver determines that funds or property in the possession of another person are rightfully the property of the estate, the receiver shall deliver to the person a written demand for immediate delivery of the funds or property, referencing this section by number, referencing the court and docket number of the receivership action, and notifying the person that any claim of right to the funds or property by the person shall be presented to the receivership court within twenty (20) days after the date of the written demand. Any person who holds funds or other property belonging to an entity subject to an order of receivership under this Act shall deliver the funds or other property to the receiver on demand. Should the person allege any right to retain the funds or other property, the person shall file a pleading with the receivership court setting out that right within twenty (20) days of the receipt of the demand that the funds or property be delivered to the receiver. The person shall serve a copy of the pleading on the receiver. The pleading shall inform the receivership court as to the nature of the claim to the property, the alleged value of the property or amount of funds held, and what action has been taken by the person to preserve and protect the property or to preserve any funds pending determination of the dispute. The relinquishment of possession of funds or property by any person who has received a demand pursuant to this section does not constitute a waiver of a right to make a claim in the receivership.
- B. If requested by the receiver, the receivership court shall hold a hearing to determine where and under what conditions the property or funds shall be held by the person pending determination of the dispute. The receivership court may impose such conditions as it may deem necessary or appropriate for the preservation of the property until the receivership court can determine the validity of the person's claim to the property or funds. If any property or funds are allowed to remain in the possession of the person after demand made by the receiver, that person shall be strictly liable to the estate for any waste, loss or damage to or diminution of value of the property or funds retained.
- C. If a person has filed a pleading alleging any right to retain funds or property as provided in Subsection A, the receivership court shall hold a subsequent hearing to determine the entitlement of the person to the funds or property claimed by the receiver.
- D. If a person fails to deliver the property or to file the pleading described by Subsection A within the twenty-day period, the receivership court may, upon petition of the receiver and upon a copy of the petition being served by the petitioner to that person, issue its summary order directing the immediate delivery of the funds or property to the receiver and finding that the person has waived all claims of right to the funds or property.

Section 602. Recovery from Affiliates

The receiver shall have a right to recover from any affiliate of the insurer any property of the insurer transferred to or for the benefit of the affiliate, or its value, subject to the following limitations:

- A. The transfer was made within the five (5) years preceding the initial petition for receivership,
- B. No transfer is recoverable under this section if the affiliate shows that, when the transfer was made:
 - (1) The insurer was solvent,
 - (2) The transfer was lawful, and
 - (3) Neither the insurer nor the affiliate knew or reasonably should have known that the transfer, under then-applicable statutory accounting standards, would:
 - (a) Place the insurer in violation of applicable capital or surplus requirements;
 - (b) Place the insurer below the risk-based capital level as defined by Section [insert citation to applicable risk-based capital statute];

- (c) Place the insurer in violation of statutory writing ratios [reference to state statutes defining, if applicable, or eliminate this provision];
- (d) Cause the insurer's filed financial statements not to present fairly the capital and surplus of the insurer; or
- (e) Otherwise cause the insurer to be in a hazardous financial condition.

Section 603. Unauthorized Post-Petition Transfers

- A. Except as otherwise provided in this section, the receiver may avoid any transfer of an interest of the insurer in property, or any obligation incurred by the insurer, that was made or incurred after the petition for receivership was filed, and that is not authorized by the receiver and approved by the receivership court.
- B. Except to the extent that a transfer or obligation voidable under this section is otherwise voidable under this Act, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain, at the option of the receivership court, any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that the transferee or obligee gave value to the insurer in exchange for the transfer or obligation.

Section 604. Voidable Preferences and Liens

- A. A preference is a transfer of any interest in property of an insurer:
 - (1) To or for the benefit of a creditor;
 - (2) For or on account of an antecedent debt;
 - (3) Made or suffered by the insurer within two (2) years preceding the filing of a successful petition commencing delinquency proceedings; and
 - (4) That enables the creditor to receive more than the creditor would receive if:
 - (a) The insurer was liquidated under this Act;
 - (b) The transfer had not been made; and
 - (c) The creditor was entitled to receive payment of the debt to the extent provided by this Act.

Drafting Note: Paragraph (4) substitutes a review of the benefit to the creditor rather than the effect on "this debt" as provided in the prior model act provisions. The objective is to eliminate the ambiguity in situations where a creditor may hold multiple "debts."

- B. Any preference may be avoided by the receiver if:
 - (1) The insurer was insolvent at the time of the transfer;
 - (2) The transfer was made within 120 days before the filing of the petition commencing delinquency proceedings;
 - (3) The creditor receiving it or being benefited thereby or its agent in reference to the transfer had, at the time when the transfer was made, reasonable cause to believe that the insurer was insolvent or was about to become insolvent; or
 - (4) The creditor receiving it was:
 - (a) An officer or director of the insurer;

- (b) An employee, attorney or other person who was in fact in a position to effect a level of control or influence over the actions of the insurer comparable to that of an officer or director, whether or not the person held that position; or
 - (c) An affiliate.
- C. The receiver may not avoid a transfer under this section:
 - (1) To the extent that the transfer was:
 - (a) Intended by the insurer and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the insurer; and
 - (b) In fact a substantially contemporaneous exchange;
 - (2) To the extent that the transfer was in payment of a debt incurred by the insurer in the ordinary course of business or financial affairs between the insurer and the transferee and the transfer was:
 - (a) Made in the ordinary course of business or financial affairs between the insurer and the transferee; or
 - (b) Made according to ordinary business terms;
 - (3) To or for the benefit of a creditor, to the extent that, after the transfer, the creditor gave new value to or for the benefit of the insurer:
 - (a) Not secured by an otherwise unavoidable security interest; and
 - (b) On account of which new value the insurer did not make an otherwise unavoidable transfer to or for the benefit of the creditor; or
 - (4) To the extent the transfer was made in respect of a bond posted in connection with an administrative or judicial proceeding in order to appeal, set aside, or stay execution of a judgment.
- D. For purposes of this section:
 - (1) A transfer of property other than real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.
 - (2) A transfer of real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.
 - (3) A transfer that creates an equitable lien shall not be deemed to be perfected if there are available means by which a legal lien could be created.
 - (4) A transfer not perfected prior to the filing of a petition for receivership shall be deemed to be made immediately before the filing commencing delinquency proceedings.
 - (5) The provisions of this subsection apply whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.
- E. A lien obtainable by legal or equitable proceedings upon a simple contract is one arising in the ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens that under applicable law are given a special priority over other liens that are prior in time.

- F. A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of Subsection D, if these consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. Such a lien could not, however, become superior and such a purchase could not create superior rights for the purpose of Subsection D through any acts subsequent to the obtaining of the lien or subsequent to such a purchase that requires the agreement or concurrence of any third party or that require any further judicial action or ruling.
- G. A transfer of property for or on account of a new and contemporaneous consideration that is deemed under Subsection D to be made or suffered after the transfer because of delay in perfecting it does not thereby become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or bona fide purchasers' rights are performed within twenty-one (21) days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if such a loan is actually made, or a transfer that becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.
- H. (1) If any lien deemed voidable under Subsection B has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the filing of a petition commencing delinquency proceedings, the indemnifying transfer or lien shall also be deemed voidable.
- (2) The property affected by any lien deemed voidable under Subsections B and H(1) shall be discharged from the lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the receiver, except that the receivership court may upon due notice order the lien to be preserved for the benefit of the estate and the receivership court may direct that the conveyance be executed as may be proper or adequate to evidence the title of the receiver.
- (3) Reasonable notice of any hearing in the proceeding shall be given to all parties as required by law including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the receivership court may in the same proceeding ascertain the value of the property or lien, and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the receivership court, to the receiver, within such reasonable times as the receivership court shall fix.
- (4) The liability of the surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the receiver, or where the property is retained under Subsection H(3), to the extent of the amount paid to the receiver.
- I. Nothing in this section shall prejudice any other claim by the receiver against any person.

Section 605. Fraudulent Transfers and Obligations

- A. The receiver may avoid any transfer of an interest of the insurer in property, any reinsurance transaction or any obligation incurred by an insurer that was made or incurred on or within two (2) years before the date of the initial filing of a petition commencing delinquency proceedings under this Act, if the insurer voluntarily or involuntarily:
- (1) Made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any person to which it was or became indebted on or after the date that the transfer was made or the obligation was incurred; or
- (2) Received less than a reasonably equivalent value in exchange for the transfer or obligation.

- B. Except to the extent that a transfer or obligation voidable under this section is voidable under other provisions of this Act, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that the transferee or obligee gave value to the insurer in exchange for the transfer or obligation. For purposes of this section, a transfer is made when the transfer is so perfected that a bona fide purchaser from the insurer against whom applicable law permits the transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in the property of the transferee, but if the transfer is not so perfected before the commencement of the delinquency proceeding, the transfer is deemed to have been made immediately before the date of the initial filing of the petition commencing delinquency proceedings.
- C. For purposes of this section, “value” means property or satisfaction or securing of a present or antecedent debt of the insurer.
- D. In the event a reinsurance transaction is avoided under this section:
 - (1) The receiver shall tender to the reinsurer the value of any consideration transferred to the insurer in connection with the transaction less the amount of matured and liquidated liabilities owing by the reinsurer to the estate; and
 - (2) The parties shall be returned to their relative positions prior to the implementation of the transaction avoided.

Section 606. Receiver As Lien Creditor

- A. The receiver may avoid any transfer of or lien upon the property of, or obligation incurred by, an insurer that the insurer or a policyholder, creditor, member or stockholder of the insurer may have avoided without regard to any knowledge of the receiver, the commissioner, the insurer or any policyholder, creditor, member or stockholder of the insurer and whether or not such a policyholder, creditor, member or stockholder exists.
- B. The receiver shall be deemed a creditor without knowledge for purposes of pursuing claims under the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act or similar provisions of state or federal law.

Section 607. Liability of Transferee

- A. Except as otherwise provided in this section, to the extent that the receiver obtains an order pursuant to Section 601, or avoids a transfer under Sections 602, 603, 604, 605 or 606, the receiver may recover the property transferred, or the value of the property, from:
 - (1) The initial transferee of the transfer or the entity for whose benefit the transfer was made; or
 - (2) Any immediate or mediate transferee of the initial transferee.
- B. The receiver may not recover under Subsection A(2) of this section from:
 - (1) A transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
 - (2) Any immediate or mediate good faith transferee of the transferee.
- C. Any transfer avoided in accordance with this Act is preserved for the benefit of the receivership estate, but only with respect to property of the insurer.
- D. In addition to the remedies specifically provided in Sections 601, 602, 603, 604, 605 and 606 and Subsection A, should the receiver be successful in establishing a claim to the property or any part thereof, the receiver shall be entitled to recover judgment for the following:

- (1) Rental for the use of tangible property from the later of the entry of the receivership order or the date of the transfer;
 - (2) In the case of funds or intangible property, the greater of (a) the actual interest or (b) income earned by the property or (c) interest at the statutory rate for judgments, from the later of the entry of the receivership order or the date of the transfer; and
 - (3) Except as to recoveries from guaranty associations, all costs and investigative and other expenses necessary to the recovery of the property or funds, and reasonable attorney fees.
- E. In any action pursuant to this section, the receivership court may allow the receiver to seek recovery of the property involved or its value.
- F. In any action pursuant to Sections 601, 602, 603, 604, 605, 606 and 609, the receiver has the burden of proving the avoidability of a transfer, and the person against whom recovery or avoidance is sought has the burden of proving the nature and extent of any affirmative defense.

Section 608. Claims of Holders of Void or Voidable Rights

- A. The receiver may disallow all claims of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment or encumbrance voidable under this Act, unless the creditor surrenders the preference, lien, conveyance, transfer, assignment or encumbrance. If the avoidance is effected by a proceeding in which a final judgment has been entered, the claim shall not be allowed unless the money is paid or the property is delivered to the receiver within thirty (30) days from the date of the entering of the final judgment, except that the receivership court may allow further time if there is an appeal or other continuation of the proceeding.
- B. A claim allowable under Subsection A by reason of the avoidance, whether voluntary or involuntary, or a preference, lien, conveyance, transfer, assignment or encumbrance, may be filed as an excused late filing under Subsection 701B if filed within thirty (30) days from the date of the avoidance, or within the further time allowed by the receivership court under Subsection A.

Section 609. Setoffs

- A. Mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under this Act, shall be set off and the balance only shall be allowed or paid, except as provided in Subsection B, Section 612 and Section 613. Obligations arising out of the termination of life, disability income or long term care reinsurance contracts pursuant to Section 612 may be set off against other debts and credits arising out of contracts between the insurer and the reinsurer.
- B. No setoff shall be allowed after the commencement of a delinquency proceeding under this Act in favor of any person if:
- (1) The claim against the insurer is disallowed;
 - (2) The claim against the insurer was purchased by or transferred to the person on or after the filing of the receivership petition or within 120 days preceding the filing of the receivership petition;
 - (3) The obligation of the insurer is owed to an affiliate or entity other than the person, absent written assignment of the obligation made more than 120 days before the filing of the petition for receivership;
 - (4) The obligation of the person is owed to an affiliate or entity other than the insurer, absent written assignment of the obligation made more than 120 days before the filing of the petition for receivership;

- (5) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution;
 - (6) The obligations between the person and the insurer arise out of transactions by which either the person or the insurer has assumed risks and obligations from the other party and then has ceded back to that party substantially the same risks and obligations. Notwithstanding the provisions of this subsection, the receiver may permit setoffs if in his or her discretion a setoff is appropriate because of specific circumstances relating to a transaction;
 - (7) The obligation of the person arises out of any avoidance action taken by the receiver; or
 - (8) The obligation of the insured is for the payment of earned premiums or retrospectively rated earned premiums in accordance with Section 613.
- C. The receiver may avoid pursuant to Sections 604, 605 and 606, and subject to defenses under those sections any setoff that occurred prior to the commencement of the delinquency proceeding under this Act when the setoff would otherwise be disallowed pursuant to subsection B of this section.

Drafting Note: It is the intent of the drafters, with respect to Subsections B(3) and B(4), to deny setoffs between companies who are affiliated so as to not allow one company to use setoffs of another affiliate. Contractual provisions contrary to this intent would not be effective.

Section 610. Assessments

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

- F. If a member does not appear and serve duly verified objections upon the receiver on or before the return day of the order to show cause under Subsection D, the receivership court shall make an order adjudging the member liable for the amount of the assessment against the member pursuant to Subsection D together with costs, and the receiver shall have a judgment against the member therefore.
- G. If on or before the return day, the member appears and serves duly verified objections upon the receiver, the receivership court may hear and determine the matter or may appoint a referee to hear it and make such order as the facts warrant.
- H. The receiver may enforce any order or collect any judgment under Subsection F by any lawful means.
- I. Any assessment of a subscriber or member of an insurer made by the receiver pursuant to the order of receivership court fixing the aggregate amount of the assessment against all members or subscribers and approving the classification and formula made by the receiver under this section shall be *prima facie* correct.
- J. Any claim filed by an assessee who fails to pay an assessment, after the conclusion of any legal action by the assessee objecting to the assessment, shall be deemed a late filed claim under Section 801.

Drafting Note: This section may be eliminated if the state has no insurers issuing assessable policies.

Section 611. Reinsurer's Liability

- A. Except as otherwise provided in this Act, the amount recoverable by the receiver from reinsurers shall not be reduced as a result of a delinquency proceeding with a finding of insolvency, regardless of any provision in the reinsurance contract or other agreement. No agreement, written, oral or otherwise shall be enforceable to the extent it is in conflict, or not in strict compliance, with this section. Except as expressly provided herein, no other person whether as a creditor, third party beneficiary or otherwise shall have a direct right to reinsurance proceeds from any reinsurer of the insolvent insurer on the basis of any written or oral agreement, or pursuant to any action or cause of action seeking any equitable or legal remedy. This section shall apply to all the insurer's reinsurance contracts including but not limited to treaty reinsurance, quota share reinsurance, facultative reinsurance, or fronting or captive reinsurance arrangements.
- B. Except as otherwise provided in Subsection I of this section, the amount recoverable by the liquidator from reinsurers shall be payable under a contract or contracts reinsured by the reinsurer on the basis of:
 - (1) Proof of payment of the insured claim by a guaranty association, the insurer or the receiver to the extent of the payment; or
 - (2) The allowance of the claim pursuant to Section 708, an order of the receivership court or a plan of rehabilitation.
- C. If an insurer takes credit for a reinsurance contract in any filing or submission made to the commissioner, and the reinsurance contract does not contain the provisions required with respect to the obligations of reinsurers in the event of insolvency of the reinsured, that reinsurance contract shall be deemed to contain the provisions required with respect to the obligations of reinsurers in the event of insolvency of the reinsured in order to obtain credit for reinsurance or other applicable statutes.
- D. All reinsurance contracts that are presumed or construed to contain provisions pursuant to Subsection C, shall be deemed to contain the following provision:

In the event of insolvency and the appointment of a receiver, the reinsurance obligation shall be payable to the ceding insurer or to its receiver without diminution because of the insolvency or because the receiver has failed to pay all or a portion of the claim. Payment shall be made upon either:

 - (1) Proof of payment of the insured claim by a guaranty association, the insurer or the receiver to the extent of the payment; or

- (2) The allowance of the claim pursuant to Section 708 of the Insurer Receivership Act, or the allowance of claims pursuant to an order of the receivership court or plan of rehabilitation.
- E. The receiver shall give written notice, in accordance with the terms of the contract, to each reinsurer obligated in relation to the claim of the pendency of a claim against the reinsured company. Failure of the receiver to give notice of a pending claim pursuant to a provision in the reinsurance contract shall not excuse the obligation of the reinsurer unless it is prejudiced thereby, and if it is prejudiced, its obligations shall be reduced only to the extent of the prejudice. The reinsurer may interpose, at its own expense, in the proceeding in which the claim is to be adjudicated, any defense or defenses that it may deem available to the reinsured company or its receiver.
- F. The entry of an order of conservation, rehabilitation or liquidation shall not be deemed a breach or an anticipatory breach of any reinsurance contract, nor shall it be grounds for retroactive revocation or retroactive cancellation of any reinsurance contracts by the reinsurer.
- G. In the event that reinsurance payments to a receiver of a ceding insurer are later determined to be payments in excess of the amounts actually due to the receiver, the excess shall be credited against future payments due to the receiver or shall be repaid to the reinsurer as an administrative expense of the estate pursuant to Section 801A. Any repayment may be limited based on the property remaining in the estate.
- H. (1) Subject to Subsection A, payments made by the reinsurer directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate and payments made by the reinsurer shall be made directly to the ceding insurer or its receiver, except when:
- (a) The reinsurance contract, or other written agreement to which the insured, ceding insurer and reinsurer are all parties specifically provides another payee, other than an affiliate of the ceding insurer or reinsurer, of the reinsurance in the event of the insolvency or receivership of the ceding insurer; provided that the provision is contained in the reinsurance contract as it was written on the date of its initial execution; or the provision is contained in the other written agreement as it was written on the date of the initial policy issuance;
 - (b) The reinsurance contract, as it was written on the date of its initial execution contains a provision where the assuming insurer with the consent of the direct insured and the ceding insurer has assumed all policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under the policies and in substitution for the entire obligations of the ceding insurer to the payees; or
 - (c) A life and health insurance guaranty association has made the election to succeed to the rights and obligations of the insolvent insurer under a contract of reinsurance in accordance with Section 612, the life and health guaranty association laws of its domiciliary state, or pursuant to other applicable law, rule, order or assignment contract, in which case payments shall be made directly to or at the direction of the guaranty association.
- (2) Both the receiver and the reinsurer shall be entitled to recover from any person (other than the receiver or a guaranty association), who unsuccessfully makes a claim directly against the reinsurer, their attorneys' fees and expenses incurred in preventing any collection by that person.
- I. Nothing in this Act shall be construed to authorize the liquidator or any other entity to compel payment from a non-life reinsurer on the basis of estimated incurred but not reported losses or loss expenses or case reserves for unpaid losses and loss expenses, except under Sections 614 and 615 and with respect to claims allowed in accordance with Section 705.

Section 612. Life and Health Reinsurance

- A. Contracts reinsuring life, disability income or long term care insurance policies or annuities issued by a ceding insurer that has been placed in conservation or rehabilitation proceedings pursuant to this Act shall be continued or terminated pursuant to the terms or conditions of each contract and the provisions of this section.
- B. Contracts reinsuring life, disability income or long term care insurance policies or annuities issued by a ceding insurer that has been placed into liquidation pursuant to this Act shall be continued, subject to the provisions of this section, unless either (i) the contracts were terminated pursuant to their terms prior to the date of the order of liquidation (the “coverage date”); or (ii) the contracts were terminated pursuant to the order of liquidation, in which case the provisions of Subsection I shall apply.
- C.
 - (1) At any time within 180 days of the coverage date, a guaranty association covering life, disability income or long term care insurance policies or annuities, in whole or in part, may elect to assume the rights and obligations of the ceding insurer that relate to the policies or annuities covered, in whole or in part, by the guaranty association, in each case under any one or more reinsurance contracts between the insolvent insurer and its reinsurers selected by the guaranty association. Any such assumption shall be effective as of the coverage date. The election shall be effected by the guaranty association or the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) on its behalf sending written notice, return receipt requested, to the affected reinsurers.
 - (2) To facilitate the earliest practicable decision about whether to assume any of the contracts of reinsurance, and in order to protect the financial position of the estate, the receiver and each reinsurer of the ceding insurer shall make available upon request to affected guaranty associations or to NOLHGA on their behalf as soon as possible after commencement of formal delinquency proceedings (i) copies of in-force contracts of reinsurance and all related files and records relevant to the determination of whether such contracts should be assumed, and (ii) notices of any defaults under the reinsurance contracts or any known event or condition which with the passage of time could become a default under the reinsurance contracts.
 - (3) The following Subparagraphs (a) through (d) shall apply to reinsurance contracts so assumed by a guaranty association:
 - (a) The guaranty association shall be responsible for all unpaid premiums due under the reinsurance contracts, for periods both before and after the coverage date, and shall be responsible for the performance of all other obligations to be performed after the coverage date, in each case that relates to policies of life, disability income or long term care insurance or annuities covered, in whole or in part, by the guaranty associations. The guaranty association may charge policies of insurance or annuities covered in part by the guaranty association, through reasonable allocation methods, the costs for reinsurance in excess of the obligations of the guaranty association and shall provide notice and an accounting of these charges to the liquidator.
 - (b) The guaranty association shall be entitled to any amounts payable by the reinsurer under the reinsurance contracts with respect to losses or events that occur in periods on or after the coverage date and that relate to policies of life, disability income or long term care insurance or annuities covered, in whole or in part, by the association, provided that, upon receipt of the amounts, the guaranty association shall be obliged to pay to the beneficiary under the insurance policy or annuity on account of which the amounts were paid a portion of the amount equal to the lesser of:
 - (i) The amount received by the guaranty association; and
 - (ii) The excess of the amount received by the guaranty association over the amount equal to the benefits paid by the guaranty association on account of the policy or annuity less the retention of the insurer applicable to the loss or event.

- (c) Within thirty (30) days following the guaranty association's election (the "election date"), the guaranty association and each reinsurer under contracts assumed by the guaranty association shall calculate the net balance due to or from the guaranty association under each reinsurance contract as of the election date with respect to policies or annuities covered, in whole or in part, by the guaranty association, which calculation shall give full credit to all items paid by either the insurer or its receiver or the reinsurer prior to the election date. The reinsurer shall pay the receiver any amounts due for losses or events prior to the coverage date, subject to any set-off for premiums unpaid for periods prior to the date, and the guaranty association or reinsurer shall pay any remaining balance due the other, in each case within five (5) days of the completion of the aforementioned calculation. Any disputes over the amounts due to either the guaranty association or the reinsurer shall be resolved by arbitration pursuant to the terms of the affected reinsurance contracts or, if the contract contains no arbitration clause, pursuant to the provisions of Subsection I(4). If the receiver has received any amounts due the guaranty association pursuant to Subparagraph (b) of this paragraph, the receiver shall remit the same to the guaranty association as promptly as practicable.
 - (d) If the guaranty association or receiver, on the guaranty association's behalf, within sixty (60) days of the election date, pays the unpaid premiums due for periods both before and after the election date that relate to policies of life, disability income or long term care insurance or annuities covered, in whole or in part, by the guaranty association, the reinsurer shall not be entitled to terminate the reinsurance contracts for failure to pay premiums, insofar as the reinsurance contracts relate to policies of life, disability income or long term care insurance or annuities covered, in whole or in part, by the guaranty association, and shall not be entitled to set off any unpaid amounts due under other contracts, or unpaid amounts due from parties other than the guaranty association, against amounts due the guaranty association.
- D. When, pursuant to court approval under Section 502 of this Act, a receiver continues policies of life, disability income or long term care insurance or annuities in force following an order of liquidation, and the policies of insurance are not covered in whole or in part by one or more guaranty associations, the receiver may, within 180 days of the coverage date, elect to assume the rights and obligations of the ceding insurer under any one or more of the reinsurance contracts that relate to the policies or annuities, provided the contracts have not been terminated as set forth in Subsection B. The election shall be effected by sending written notice, return receipt requested, to the affected reinsurers. In that event, payment of premiums on the reinsurance contracts for the policies and annuities, for periods both before and after the coverage date, shall be chargeable against the estate as a Class 1 administrative expense. Amounts paid by the reinsurer on account of losses on the policies and annuities shall be to the estate of the insolvent insurer.
- E. During the period from the coverage date until the election date,
 - (1)
 - (a) Neither the guaranty association nor the reinsurer shall have any rights or obligations under reinsurance contracts that the guaranty association has the right to assume under Subsection C, whether for periods prior to or after the coverage date;
 - (b) Neither the receiver nor the reinsurer shall have any rights or obligations under reinsurance contracts that the receiver has the right to assume under Subsection D with respect to the period after the coverage date, but their respective rights and obligations for the period prior to the coverage date shall remain unchanged; and
 - (c) The reinsurer, the receiver and the guaranty associations shall, to the extent practicable, provide each other data and records reasonably requested;
 - (2) Provided that once the guaranty association or the receiver, as the case may be, has elected, or declined to elect, to assume a reinsurance contract, the parties' rights and obligations shall be governed by Subsection C, D or I, as applicable.

- F. (1) If a guaranty association does not elect to assume a reinsurance contract by the election date pursuant to Subsection C, the guaranty association shall have no rights or obligations, in each case for periods both before and after the coverage date, with respect to the reinsurance contract.
- (2) If a receiver does not elect to assume a reinsurance contract by the election date pursuant to Subsection D, the receiver and the reinsurer shall retain their respective rights and obligations with respect to the reinsurance contract for the period before the coverage date, but shall have no rights or obligations to each other for the period after the coverage date, except as provided in Subsection I.
- (3) Where a guaranty association or the receiver, as the case may be, does not elect to assume a reinsurance contract by the election date, the reinsurance contract shall be terminated retroactively effective on the coverage date. Reinsurance contracts covering policies of life, disability income or long term care insurance or annuities that are terminated pursuant to Section 502 shall terminate effective on the coverage date. In either case, Subsection I shall apply.
- G. When policies of life, disability income or long term care insurance or annuities, or guaranty association obligations with respect thereto, are transferred to an assuming insurer, reinsurance on the policies or annuities may also be transferred by the guaranty association, in the case of contracts assumed under Subsection C, or the receiver, in the case of contracts assumed under Subsection D, as the case may be, subject to the following:
- (1) Unless the reinsurer and the assuming insurer agree otherwise, the reinsurance contract transferred shall not cover any new policies of insurance or annuities in addition to those transferred;
- (2) The obligations described in Subsections C and D of this section shall no longer apply with respect to matters arising after the effective date of the transfer; and
- (3) Notice shall be given in writing, return receipt requested, by the transferring party to the affected reinsurer not less than thirty (30) days prior to the effective date of the transfer.
- H. The provisions of this section shall, to the extent provided in this Act, supersede the provisions of any law or of any affected reinsurance contract that provides for or requires any payment of reinsurance proceeds, on account of losses or events that occur in periods after the coverage date, to the receiver of the insolvent insurer or any other person. The receiver shall remain entitled to any amounts payable by the reinsurer under the reinsurance contracts with respect to losses or events that occur in periods prior to the coverage date, subject to provisions of this Act including applicable setoff provisions.
- I. When a contract reinsuring life, disability income or long term care insurance policies or annuities is terminated pursuant to this Act, the procedures set forth in this subsection shall apply.
- (1) The reinsurer and the receiver shall, upon written notice to the other party to the reinsurance contract no later than thirty (30) days after the receipt by the reinsurer of notice of termination, commence a mandatory negotiation and arbitration procedure in accordance with this subsection.
- (2) Each party shall appoint an actuary to determine an estimated sum due as a result of the termination of the reinsurance contract calculated in a way expected to make the parties economically indifferent as to whether the reinsurance contract continues or terminates, giving due regard to the economic effects of the insolvency. The sum shall take into account the present value of future cash flows expected under the reinsurance contract and be based on a gross premium valuation of net liability using current assumptions that reflect post-insolvency experience expectations, with no additional margins, net of any amounts payable and receivable, with a market value adjustment to reflect premature sale of assets to fund the settlement.
- (3) Within ninety (90) days of the written request pursuant to Paragraph (1), each party shall provide the other party with its estimate of the sum due as a result of the termination of the reinsurance contract, together with all relevant documents and other information supporting the estimate. The parties shall make a good faith effort to reach agreement on the sum due.

- (4) If the parties are unable to reach agreement within ninety (90) days following the submission of materials required in Paragraph (3), either party may initiate arbitration proceedings as provided in the reinsurance contract. In the event that the reinsurance contract does not contain an arbitration clause, either party may initiate arbitration pursuant to this paragraph by providing the other party with a written demand for arbitration. The arbitration shall be conducted pursuant to the following procedures:
- (a) Venue for the arbitration shall be within the county of the court's jurisdiction or another location agreed to by the parties.
 - (b) Within thirty (30) days of the responding party's receipt of the arbitration demand, each party shall appoint an arbitrator who is a disinterested active or retired officer or executive of a life insurance or reinsurance company, or other professional with no less than ten (10) years' experience in or relating to the field of life insurance or life reinsurance. The two arbitrators shall appoint an independent, impartial, disinterested umpire who is an active or retired officer or executive of a life insurance or reinsurance company, or other professional with no less than ten (10) years' experience in the field of life insurance or life reinsurance. If the arbitrators are unable to agree on an umpire, each arbitrator shall provide the other with the names of three (3) qualified individuals, each arbitrator shall strike two (2) names from the other's list and the umpire shall be chosen by drawing lots from the remaining individuals.
 - (c) Within sixty (60) days following the appointment of the umpire, the parties shall, unless otherwise ordered by the panel, submit to the arbitration panel their estimates of the sum due as a result of the termination of the reinsurance contract, together with all relevant documents and other information supporting the estimate.
 - (d) The time periods set forth in these subparagraphs may be extended upon mutual agreement of the parties.
 - (e) The panel shall have all powers necessary to conduct the arbitration proceedings in a fair and appropriate manner, including the power to request additional information from the parties, authorize discovery, hold hearings and hear testimony. The panel also may, if it deems necessary, appoint independent actuarial experts, the expense of which shall be shared equally between the parties.
- (5) An arbitration panel considering the matters set forth in this subsection shall apply the standards set forth in Subsection I(2) and shall issue a written award specifying a net settlement amount due from one party or the other as a result of the termination of the reinsurance contract. The supervising court shall confirm that award absent proof of statutory grounds for vacating or modifying arbitration awards under the Federal Arbitration Act.
- (6) If the net settlement amount agreed or awarded pursuant to this subsection is payable by the reinsurer, the reinsurer shall pay the amount due to the estate subject to any applicable set-off under Section 609. If the net settlement amount agreed or awarded pursuant to this subsection is payable by the insurer, the reinsurer shall be deemed to have a timely filed claim against the estate for that amount, which claim shall be paid pursuant to the priority established in Section 801G. The guaranty associations shall not be entitled to receive the net settlement amount, except to the extent they are entitled to share in the estate assets as creditors of the estate, and shall have no responsibility for the net settlement amount.

J. Except as otherwise provided in this section, nothing in this section shall alter or modify the terms and conditions of any reinsurance contract. Nothing in this section shall abrogate or limit any rights of any reinsurer to claim that it is entitled to rescind a reinsurance contract. Nothing in this section shall give a policyholder or beneficiary an independent cause of action against a reinsurer that is not otherwise set forth in the reinsurance contract. Nothing in this section shall limit or affect any guaranty association's rights as a creditor of the estate against the assets of the estate. Nothing in this section shall apply to reinsurance agreements covering property or casualty risks.

Drafting Note: For those states that have adopted Section 8N of the NAIC Life and Health Insurance Guaranty Association Model Act, this section should be read in conjunction with that section.

Section 613. Recovery of Premiums Owed

- A. An insured shall pay, either directly to the receiver or to an agent that has paid or is obligated to pay the receiver on behalf of the insured, any unpaid earned premium or retrospectively rated premium due the insurer. Premium on surety business is deemed earned at inception if no policy term can be determined. All other premium will be deemed earned and will be prorated equally over the determined policy term, regardless of any provision in the bond, guaranty, contract or other agreement.
- B. A person, other than the insured, responsible for the remittance of a premium, shall turn over to the receiver any unpaid premium due and owing as shown on the records of the insurer, including any amount representing commissions, for the full policy term due the insurer at the time of the entry of the receivership order, whether earned or unearned based on the termination of coverage under Section 502. The unpaid premium due the receiver from any person other than the insured excludes any premium not collected from the insured and not earned based on the termination of coverage under Section 502.
- C. A person, other than the insured, responsible for the remittance of a premium, shall turn over to the receiver any unearned commission of that person based on the termination of coverage under Section 502. Credits or setoffs or both shall not be allowed to an agent, broker, premium finance company or any other person for any amounts advanced to the insurer by the person on behalf of, but in the absence of a payment by, the insured, or for any other amount paid by the person to any other person after the entry of the order of receivership.
- D. Persons that collect premium, or finance premium under a premium finance contract, that is due the insurer in receivership are deemed to hold that premium in trust as a fiduciary for the benefit of the insurer and to have availed themselves of the laws of this state, regardless of any provision to the contrary in any agency contract or other agreement.
- E. A premium finance company is obligated to pay any amounts due the insurer from premium finance contracts, whether the premium is earned or unearned. The receiver has the right to collect any unpaid financed premium directly from the premium finance company by taking an assignment of the underlying premium finance contracts, or directly from the insured that is a party to the premium finance contract.
- F. Upon satisfactory evidence of a violation of this section, by a person other than an insured, the commissioner may pursue one or more of the following courses of action:
 - (1) Suspend or revoke or refuse to renew the licenses of the offending party or parties;
 - (2) Impose a penalty of not more than \$1,000 for each act in violation of this section by the party or parties; and
 - (3) Impose any other sanction or penalty allowed for by law.
- G. Before the commissioner shall take any action as set forth in Subsection F of this section, written notice shall be given to the person, company, association or exchange accused of violating the law, stating specifically the nature of the alleged violation and fixing a time and place, at least ten (10) days thereafter, when a hearing on the matter shall be held. After a hearing, or upon failure of the accused to appear at a hearing, the commissioner, if a violation is found, shall impose the penalties under Subsection F of this section that he or she deems advisable. If the commissioner takes action under this subsection, the party aggrieved may appeal from that action as provided in Section [insert citation to state administrative procedure act].

Section 614. Commutation and Release Agreements

- A. Notwithstanding Section 611, the liquidator and any reinsurer may negotiate a voluntary commutation and release of all obligations arising from reinsurance agreements in which the insurer was the ceding party. Any commutation and release agreement voluntarily entered into by the parties shall be commercially reasonable, actuarially sound, and in the best interests of the creditors of the insurer. Any agreement subject to this subsection that has a gross consideration in excess of \$250,000 shall be submitted pursuant to Section 107 to the receivership court for approval. The agreement shall be approved if it meets the standards described in this subsection.
- B. Without derogating from the provisions of Section 611, in the event that the liquidator is unable to negotiate a voluntary commutation with a reinsurer with respect to the reinsurance agreements between the insurer and that reinsurer, the liquidator may, in addition to any other remedy available under applicable law, apply to the receivership court, with notice to the reinsurer, for an order requiring that the parties submit commutation proposals with respect to the reinsurance agreements to a panel of three (3) arbitrators:
 - (1) At any time after seventy-five percent (75%) of the actuarially estimated ultimate incurred liability for all of the casualty claims against the liquidation estate, calculated as of the date of the entry of the order of liquidation by or at the instance of the liquidator, is reached by allowance of claims in the liquidation estate pursuant to Sections 703 and 705; provided that for purposes of this subsection, the calculation shall not be performed during the five-year period subsequent to the entry of the order of liquidation; or
 - (2) At any time in regard to a reinsurer if that reinsurer has a total adjusted capital that is less than 250 percent of its Authorized Control Level Risk Based Capital (RBC) as defined in [cite to states enactments related to the RBC Model Act and any related regulations].
- C. For purposes of this section “casualty claims” means the insurer’s aggregate claims arising out of insurance contracts in the following lines: farm owners multiperil, homeowners multiperil, commercial multiperil, medical malpractice, workers’ compensation, other liability, products liability, auto liability, aircraft (all peril) and international (of the foregoing lines).
- D. Venue for the arbitration shall be within the district of the receivership court’s jurisdiction, or another location agreed to by the parties.
- E. If the liquidator determines that commutation would be in the best interests of the creditors of the liquidation estate, the liquidator may petition the receivership court to order arbitration, in which case the receivership court shall require that the liquidator and the reinsurer each appoint an arbitrator within thirty (30) days after the date of entry of the order for arbitration. If either party fails to appoint an arbitrator within the thirty-day period, the other party shall be entitled to appoint both arbitrators, which appointments shall be binding on the parties. The two (2) arbitrators shall be active or retired executive officers of insurance or reinsurance companies, not under the control of or affiliated with the insurer or the reinsurer. Within thirty (30) days after appointment of the two (2) arbitrators, the two (2) arbitrators shall attempt to agree on the appointment of a third independent, impartial, disinterested arbitrator and if agreement is not reached within the thirty-day period, the third arbitrator shall be appointed by the receivership court. The disinterested arbitrator shall be or, if retired, have been, an executive officer of a U.S. domiciled insurance or reinsurance company, not under the control of or affiliated with either of the parties, who has had at least fifteen (15) years’ experience in the reinsurance industry.
- F. The arbitration panel may choose to retain as an expert to assist the panel in its determinations, a retired, disinterested executive officer of a U.S. domiciled insurance or reinsurance company having at least fifteen (15) years loss reserving actuarial experience. In the event that the panel is unable to unanimously agree on the identity of the expert within fourteen (14) days, the expert shall be appointed by the president of the Casualty Actuarial Society should the matter involve underlying property and casualty insurance or the president of the Society of Actuaries should the matter involve underlying life insurance. The expert shall not be entitled to vote in the proceeding, but shall issue a written report and recommendation to the panel within sixty (60) days after receipt of the commutation proposals submitted by the parties pursuant to Subsection G, which shall be included as part of the arbitration record and accompany the award issued by the panel pursuant to Subsection H. The cost of the expert should be paid equally by the parties.

- G. Within ninety (90) days following the appointment of the third arbitrator under Subsection E, 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 a written review of any disputed paid claim balances, any open claim files and related case reserves at net present value, and any actuarial estimates with the basis of computation of any other reserves and any incurred-but-not-reported losses at net present value.
- H. Within ninety (90) days following the parties' submissions under Subsection G, the arbitration panel shall:
- (1) Issue an award, determined by a majority of the panel, specifying the terms of a commercially reasonable and actuarially sound commutation agreement between the parties; or
 - (2) If a majority of the panel determines that it is unable to derive a commercially reasonable and actuarially sound commutation based upon the submissions of the parties and, if applicable, the report and recommendation of the expert retained in accordance with Subsection F, the panel shall be entitled to issue an award declining commutation between the parties for a period not to exceed two (2) years. Following expiration of the two-year period allowable under this paragraph, the liquidator shall be entitled to again invoke arbitration in accordance with Subsection B, in which event the provisions of Subsections B through I will be applied to the renewed proceeding, except that the panel shall be obliged to issue an award under Paragraph (1).
- I. Once an award is issued, the liquidator shall promptly submit the award to the receivership court for confirmation.
- J. Within thirty (30) days of confirmation of the award by the receivership court, the reinsurer shall give notice to the receiver that it:
- (1) Will commute its liabilities to the insurer for the amount of the award in return for a full and complete release of all liabilities between the parties, whether past, present or future; or
 - (2) Will not commute its liabilities to the insurer, in which case the reinsurer shall establish and maintain in accordance with Section 615 a Reinsurance Recoverable Trust in the amount of 102 percent of the award. The reinsurer shall pay the costs and fees associated with establishing and maintaining the trust established under this subsection.
- K. If the reinsurer notifies the liquidator that it will commute its liabilities pursuant to Subsection J(1), the liquidator shall have thirty (30) days to:
- (1) Tender to the reinsurer a proposed commutation and release agreement providing for a full and complete release of all liabilities between the parties, whether past, present or future, which agreement shall require that the reinsurer effect payment of the commutation amount within fourteen (14) days from the date of consummation of the agreement; or
 - (2) Reject the commutation in writing, subject to receivership court approval, in which event the reinsurer shall be obliged to establish and maintain a Reinsurance Recoverable Trust in accordance with Section 615. The liquidator and the reinsurer shall share equally in the costs and fees associated with establishing and maintaining the trust established under this subsection.
- L. Except for the period provided in Paragraph H(2), the time periods established in Subsections F, G, H, J and K may be extended upon the consent of the parties or by order of the receivership court, for good cause shown.
- M. Subject to Subsection N, nothing in this section shall be construed to supersede or impair any provision in a reinsurance agreement that establishes a commercially reasonable and actuarially sound method for valuing and commuting the obligations of the parties to the reinsurance agreement by providing in the contract the specific methodology to be used for valuing and commuting the obligations between the parties.

- N. A commutation provision in a reinsurance agreement is not effective if it is demonstrated to the receivership court that the provision was entered into in contemplation of the insolvency of one or more of the parties. 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.

Section 615. Reinsurance Recoverable Trust Provisions

A. As used in this section:

- (1) “Beneficiary” means the domiciliary insurance commissioner, as liquidator of the insurer for whose sole benefit a Reinsurance Recoverable Trust is established.
- (2) “Grantor” means the reinsurer who has established a Reinsurance Recoverable Trust for the sole benefit of the beneficiary.
- (3) A “qualified U.S. financial institution” means an institution that:
 - (a) Is organized, or in the case of a U.S. branch or agency office of a foreign banking organization, licensed under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers; and
 - (b) Is regulated, supervised and examined by federal or state authorities having regulatory authority over banks and trust companies.
- (4) “Reinsurance Recoverable Trust” means a trust established pursuant to Section 614.

B. The trust agreement governing a Reinsurance Recoverable Trust shall:

- (1) Be entered into between the beneficiary, the grantor and a trustee, which shall be a qualified U.S. financial institution;
- (2) Create a trust account into which assets shall be deposited in accordance with Section 614;
- (3) Provide that the beneficiary shall have the right to withdraw assets from the trust only:
 - (a) Based on filed claims allowed pursuant to Sections 703 or 705;
 - (b) Where the grantor has been notified, in writing, of the allowance of the claim;
 - (c) To the extent that the amount to be withdrawn exceeds any setoff permitted by Section 609 due to the grantor; and
 - (d) Where sixty (60) days has expired during which the grantor has failed to either pay the claim or, subject to and without derogation from Section 611, the provisions of which shall at all times be and remain binding on the reinsurer, file notice of a written dispute with respect to the claim under and in terms of the reinsurance agreement; or
 - (e) If the beneficiary has complied with any different or other terms and conditions mutually agreed to by the beneficiary and the grantor in the trust agreement;
- (4) Require the trustee to:
 - (a) Receive assets and hold all assets at the trustee’s office in the United States in a safe place;
 - (b) Determine that all assets are in such form that the beneficiary, or the trustee upon direction by the beneficiary, may whenever necessary negotiate the assets, without consent or signature from the grantor or any other person or entity;

- (c) Furnish to the grantor and the beneficiary a statement of all assets in the trust account upon its inception and at intervals no less frequent than the end of each calendar quarter; and
 - (d) Notify the grantor and the beneficiary within ten (10) days of any deposits to or withdrawals from the trust account;
- (5) Be made subject to and governed by the laws of this state;
 - (6) Prohibit the invasion of the trust corpus for the purpose of paying compensation to, or reimbursing the expenses of, the trustee;
 - (7) Provide that the trustee shall be liable for its negligence, willful misconduct or lack of good faith;
 - (8) Provide that the trustee may resign upon delivery of a written notice of resignation, effective not less than ninety (90) days after the beneficiary and grantor receive the notice and that the trustee may be removed by the grantor by delivery to the trustee and the beneficiary of a written notice of removal, effective not less than ninety (90) days after the trustee and the beneficiary receive the notice, provided that a resignation or removal shall not be effective until a successor trustee has been duly appointed and approved by the beneficiary and the grantor and all assets in the trust have been duly transferred to the new trustee;
 - (9) Provide that the grantor shall have the full and unqualified right to vote any shares of stock in the trust account. Subject to other provisions of this section, any interest or dividends paid on shares of stock or other obligations in the trust account shall remain in the trust;
 - (10) Specify categories of investments reasonably acceptable to the beneficiary and authorize the trustee to invest funds and to accept substitutions, by the grantor, that the trustee determines are at least equal in market value to the assets withdrawn provided that no investment or substitution shall be made without prior approval from the beneficiary, which shall not be unreasonably or arbitrarily withheld;
 - (11) Provide that the beneficiary may at any time designate a party to which all or part of the trust assets are to be transferred. Transfer may be conditioned upon the trustee receiving, prior to or simultaneously, other specified assets;
 - (12) Specify the types of assets that may be included in the trust account, which shall consist only of cash in U.S. dollars, certificates of deposit issued by a U.S. bank and payable in U.S. dollars, and investments permitted by this state's insurance law or any combination of the above, provided investments in or issued by any entity controlling, controlled by or under common control with either the grantor or the beneficiary of the trust shall not exceed five percent (5%) of total investments. Assets deposited in the trust account shall be valued according to their current fair market value;
 - (13) Give the grantor the right to seek approval from the beneficiary, which shall not be unreasonably or arbitrarily withheld, to withdraw from the trust account all or any part of the trust assets and transfer those assets to the grantor, provided that:
 - (a) The grantor shall, at the time of withdrawal, replace the withdrawn assets with other qualified assets so as to maintain at all times the deposit in the required amount; or
 - (b) After withdrawal and transfer, the market value of the trust account is no less than 102 percent of the award made pursuant to Section 614G (1);
 - (14) Provide for the return of any amount withdrawn in excess of the actual amounts required for payment of reported allowed claims under Paragraph (3) of this subsection, and for interest payments at a rate not in excess of the prime rate of interest on the excess amounts withdrawn; and

- (15) Provide for termination of the Reinsurance Recoverable Trust in accordance with Subsection F.
- C. Nothing in this subsection shall be construed to alter the rights or obligations of the parties pursuant to contractual and statutory provisions providing for notice and the determination of claims.
- D. The grantor shall, prior to depositing assets with the trustee, execute assignments or endorsements in blank, or transfer legal title to the trustee of all shares, obligations or any other assets requiring assignments, in order that the beneficiary, or the trustee upon the direction of the beneficiary, may whenever necessary negotiate these assets without consent or signature from the grantor or any other entity.
- E. Without derogating the provisions of Section 611, in the event that the Reinsurance Recoverable Trust is exhausted or is insufficient to respond to claims allowed pursuant to Sections 703 or 705, should the grantor or the beneficiary believe that the amount held in the Reinsurance Recoverable Trust is either deficient or overstated, as the case may be, the grantor or the beneficiary may, should they fail to reach agreement on the extent, if any, to which supplementation or reduction of the Reinsurance Recoverable Trust should be occasioned, request that the receivership court order review of the amount held. This review shall be conducted applying procedures and terms as the receivership court shall, in its sole discretion, direct.
- F. A Reinsurance Recoverable Trust shall terminate upon the earlier of
- (1) The receivership court approval of a voluntary commutation between the grantor and the beneficiary pursuant to Section 614A;
 - (2) The mutual agreement of the grantor and the beneficiary; or
 - (3) A finding by the receivership court that the grantor has discharged its liabilities to the beneficiary.
- G. Upon termination of the Reinsurance Recoverable Trust, all assets not previously withdrawn by the beneficiary, pursuant to Subsection B(3) of this section, shall, with written approval of the beneficiary, be delivered to the grantor.

ARTICLE VII. CLAIMS

Section 701. Filing of Claims

- A. Proof of all claims shall be filed with the liquidator in the form required by Section 702 on or before the last day for filing specified in the notice required under Section 505, which date shall not be later than eighteen (18) months after entry of the order of liquidation unless the receivership court, for good cause shown, extends the time, except that proofs of claim for cash surrender values or other investment values in life insurance and annuities and for any other policies insuring the lives of persons need not be filed unless the liquidator expressly so requires. Only upon application of the liquidator, the receivership court may allow alternative procedures and requirements for the filing of proofs of claim or for allowing or proving claims. 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 such a person, class or group shall be deemed as having been filed for all purposes, except that the receivership court's waiver of proof of claim requirements shall not impact guaranty association proof of claim filing requirements or coverage determinations to the extent that the guaranty fund statute or filing requirements are inconsistent with the receivership court's waiver of proof.
- B. The liquidator shall 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:
- (1) The eligibility to file a proof of claim was not known to the claimant, and the claimant filed a proof of claim within ninety (90) days after first learning of the eligibility;
 - (2) A transfer to a creditor was avoided under Sections 603, 604 or 606, or was voluntarily surrendered under Section 608, and the filing satisfies the conditions of Section 608; or

- (3) The valuation of security held by a secured creditor under Section 710 shows a deficiency and the claim for the deficiency is filed within thirty (30) days after the valuation.
- C. Claims filed by reinsurers whose reinsurance contracts are terminated pursuant to Section 612, which arise from the termination, shall not be deemed late if they are filed within ninety (90) days of the termination and shall receive a ratable share of distributions, whether past or future, as if the claims were not late.
- D. The liquidator may petition the receivership court, subject to Section 107, to set a date certain after which no further claims may be filed, notwithstanding any other provision of this Act.

Section 702. Proof of Claim

- A. 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:
 - (1) The particulars of the claim including the consideration given for it;
 - (2) The identity and amount of the security on the claim;
 - (3) The payments made on the debt, if any;
 - (4) That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim;
 - (5) Any right of priority of payment or other specific right asserted by the claimant;
 - (6) The name and address of the claimant and the attorney, if any, who represents the claimant; and
 - (7) The claimant's social security or federal employer identification number.
- B. The liquidator may require that a prescribed form be used, and may require that other information and documents be included.
- C. At any time the liquidator may require the claimant to present information or evidence supplementary to that required under Subsection A and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.
- D. A guaranty association shall be permitted to file a single omnibus proof of claim for all claims of the association in connection with payment of claims of the insurer. The omnibus proof of claim may be periodically updated by the association without regard to the deadline specified in Section 701A, and the association may be required to submit a reasonable amount of documentation in support of the claim.

Section 703. Allowance of Claims

- A. Except as provided in Subsections K and L, the liquidator shall review all claims duly filed in the liquidation proceeding and shall further investigate, as the liquidator considers necessary. Consistent with the provisions of this Act, the liquidator may allow, disallow or compromise claims that will be recommended to the receivership court unless the liquidator is required by law to accept claims as settled by a person or organization, including a guaranty association, subject to any statutory or contractual rights of the affected reinsurers to participate in the claims allowance process. Notwithstanding any other provision of this Act, no claim under a policy of insurance shall be allowed for an amount in excess of the applicable policy limits or otherwise beyond or contrary to the coverage provided under the terms of the insurer's policies or contracts.

- B. Pursuant to the review, the liquidator shall provide notice of the claim determination by any means authorized under Subsection 107 of this Act to the claimant or the claimant's attorney. The notice shall set forth the amount of the claim allowed by the liquidator, if any, and the priority class of the claim as established in Section 801. In regard to claims to be allowed pursuant to Section 705, 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 forty-five (45) days before notice is provided to the claimant pursuant to this subsection. In regard to claims being allowed other than pursuant to Section 705, the same notice may be provided to any reinsurer that is or may be liable in respect of the claim. If no timely objection is submitted, the determination is binding on the reinsurer upon allowance.
- C. Within forty-five (45) days after the date the notice set forth in Subsection B was mailed, the claimant notified may submit written objections to the liquidator. Any such objections shall clearly set out all facts and the legal basis, if any, for the objections and the reasons why the claim should be allowed at a different amount or in a different priority class. If no timely objection is submitted, the determination is final. The liquidator may accelerate the allowance of claims by obtaining waivers of objections.
- D. A claim that is not mature as of the coverage termination date established under Section 502 may be allowed as if it were mature, except it shall be discounted to present value. A claim is not mature if payment on the claim is not yet due.
- E. A judgment or order against an insured or the insurer entered after the date of the initial filing of a successful petition for receivership, or within 120 days before the initial filing of the petition, and a judgment or order against an insured or the insurer entered at any time by default or by collusion need not be considered as evidence of liability or of the amount of damages.
- F. Claims under employment contracts by directors, officers or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to any order of receivership, unless explicitly approved in writing by the commissioner prior to an order of receivership or by the conservator or rehabilitator before the entry of an order of liquidation or by the liquidator after the entry of an order of liquidation.
- G. 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.
- H. The liquidator shall disallow claims that are for or determined to be for *de minimis* amounts. A *de minimis* amount shall be any amount equal to or less than a maximum *de minimis* amount approved by the receivership court as being reasonable and necessary for administrative convenience.
- I. Claims that do not contain all the applicable information required by Section 702, need not be further reviewed or adjudicated and may be denied or disallowed by the liquidator subject to the notice and objection procedures in this section
- J. The liquidator may reconsider a claim on the basis of additional information and amend the recommendation to the receivership court. The claimant shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The receivership court may amend its allowance or disallowance as appropriate.
- K. 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. If there are insufficient assets to justify processing all claims for any class listed in Section 801, the liquidator shall report the facts to the receivership court and make appropriate recommendations for handling the remainder of the claims.
- L. Any claim of a lessor for damages resulting from the termination of a lease of real property shall be disallowed to the extent the claim exceeds:
 - (1) The rent reserved by the lease, without acceleration, for the greater of one year, or fifteen percent (15%), not to exceed three (3) years, of the remaining term of the lease, following the earlier of:
 - (a) The date of the filing of the petition; and

- (b) The date on which the lessor repossessed, or the lessee surrendered, the leased property; plus
- (2) Any unpaid rent due under the lease, without acceleration, on the earlier of these dates.

Section 704. Claims under Occurrence Policies, Surety Bonds and Surety Undertakings

- A. Subject to the provisions of Section 703, any insured shall have the right to file a claim for the protection afforded under the insured's policy, irrespective of whether a claim is then known, if the policy is an occurrence policy.
- B. Subject to the provisions of Section 703, any obligee shall have the right to 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 then known.
- C. After a claim is filed under Subsection A or B, when a specific claim is made by or against the insured or by the obligee, the insured or the obligee shall supplement the claim, and the receiver shall treat the claim as a contingent or unliquidated claim under Section 705.

Section 705. Allowance of Contingent and Unliquidated Claims

- A. A claim of an insured or third party may be allowed under Section 703, regardless of the fact that it was contingent or unliquidated if any contingency is removed in accordance with Subsection B and the value of the claim is determined in accordance with Subsection C.
 - (1) A claim is contingent if the accident, casualty, disaster, loss, event or occurrence insured, reinsured or bonded against occurred on or before the date fixed under Section 501, but the act or event triggering the company's obligation to pay has not occurred as of that date.
 - (2) A claim is unliquidated if the insurer's obligation to pay has been established, but the amount of the claim has not been determined.
- B. Unless the receivership court directs otherwise, a contingent claim may be allowed if:
 - (1) The claimant has presented proof of the insurer's obligation to pay reasonably satisfactory to the liquidator; or
 - (2) The claim was 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 has furnished suitable proof, unless 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.
- C.
 - (1) An unliquidated claim may be allowed if its amount has been determined.
 - (2) If the amount of an unliquidated claim filed pursuant to Section 701 remains undetermined, the valuation of the unliquidated claim may be made by estimate whenever the liquidator determines that either liquidation of the claim would unduly delay the administration of the liquidation proceeding or that 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. Any estimate shall be based on an accepted method of valuing claims with reasonable certainty at their net present value, such as actuarial evaluation.

- D. As used in this section, “claim” means a demand for payment pursuant to Section 701 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.
- E. Notwithstanding the other provisions of this section, claims for the value or breach of any life, disability income, or long term care insurance policy or annuity shall not result in or serve as the basis of any liability of any reinsurer of the insurer. The reinsurers’ liability to the insurer shall be determined exclusively on the basis of their contracts of reinsurance and the provisions of Section 612.
- F. The liquidator may petition the receivership court to set a date certain prior to which all claims under this section shall be final. In addition to the notice requirements of Section 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.

Section 706. Special Provisions for Third Party Claims

- A. 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.
- B. Whether or not the third party files a claim, the insured may file a claim on the insured’s own behalf in the liquidation.
- C. The liquidator may make recommendations to the receivership court for the allowance of an insured’s claim after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. 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. The liquidator may reconsider the claim as provided in Subsection 703J. As claims against the insured are settled or barred, the insured or third party, as appropriate, shall be paid, from the amount withheld, the same percentage distribution as was paid on other claims of like priority, based on the lesser of the amount actually due from the insured by action or paid by agreement plus the reasonable costs and expense of defense, or the amount allowed on the claims by the receivership court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed property of the insurer.

Drafting Note: The fact that a third party claim often remains unsettled for a long time should not prevent the insured from getting protection from his or her policy as others have received from theirs, so long as it does not unreasonably delay the liquidation. Each claim should be evaluated at the latest possible time and a distribution apportioned to it. In this case, however, the distribution should not be paid to the insured but withheld for future payment to the insured, after completion of the litigation and payment of the judgment. If the insured wins the litigation, the amount withheld would revert to the unallocated funds of the liquidator except for allowable defense costs. If the amount reverts at a time or in a sum that would make it uneconomic to distribute it, it would be distributed in accordance with Section 804.

- D. (1) 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:
 - (a) Apportion the policy limits ratably among the timely filed allowed claims; or
 - (b) Give notice to the insured, known third parties and affected guaranty associations that the aggregate policy limits have been exceeded. Thirty (30) days after the date of the liquidator’s notice, no further amounts shall be allowed, the policy limits shall be apportioned ratably among the timely filed allowed claims, and any additional claims shall be rejected.
- (2) Claims by the insured shall be evaluated as in Subsection C. If any insured’s claim is subsequently reduced under Subsection C, the amount thus freed shall be apportioned ratably among the claims that have been reduced under this subsection.
- E. No claim may be allowed under this section to the extent it is covered by any guaranty association.

- F. A claimant may withdraw a proof of claim with the liquidator's approval. The liquidator may approve the withdrawal after giving notice of the withdrawal to the insured and only upon a showing of good cause.
- G. 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:
 - (1) By filing a proof of claim, a claimant 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 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 distributions paid by the liquidator on the claim and from any payments that a guaranty association may pay on account of the claim, except as provided in this section.
 - (2) The waiver provided under this section is conditioned upon the cooperation of the insured with the liquidator in the defense of the claim and any applicable guaranty association in defense of the claim. The waiver provided under this section does not operate to discharge the guaranty association from any of its responsibilities and duties, or 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 release the insured to the extent of the guaranty association's claim for reimbursement from the insured under a guaranty association act provision instituting a right to recover from high net worth insureds.
 - (3) The waiver provided under this section shall be void if:
 - (a) A claimant withdraws his or her proof of claim under Subsection F; or
 - (b) The liquidator avoids insurance coverage in connection with a proof of the claim.
 - (4) The liquidator shall provide, where applicable, notice of the election of remedies provision in this section on any proof of claim form it distributes. The notice shall be inserted above the claimant's signature line in typeface no smaller than the typeface of the rest of the notice and, in any event, no smaller than font size 14 and shall 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."

Section 707. Disputed Claims

- A. The liquidator may adopt, with the approval of the receivership court, procedures for the review, determination and appeal of claims that will be preliminary to review by the receivership court.
- B. Whenever objections to the liquidator's proposed treatment of a claim are filed and the liquidator does not alter the determination of the claim as a result of the objections, the liquidator shall ask the receivership court for a hearing pursuant to Section 107.
- C. The provisions of this section are not applicable to disputes with respect to coverage determinations by guaranty associations as part of their statutory obligations.
- D. The final disposition by the receivership court of a disputed claim shall be deemed a final judgment for purposes of appeal.

Section 708. Liquidator's Recommendations to the Receivership Court

The liquidator shall present to the receivership court, for approval, reports of claims settled or determined by the liquidator under Section 703. The reports will be presented from time to time as determined by the liquidator. The reports shall include information identifying the claim and the amount and priority class of the claim.

Section 709. Claims of Co-debtors

If a creditor does not timely file a proof of the creditor's claim, an entity that is liable to the creditor together with the insurer, or that has secured the creditor, may file a proof of the claim.

Section 710. Secured Creditors' Claims

- A. The value of a security held by a secured creditor shall be determined in one of the following ways:
- (1) By converting the same into money according to the terms of the agreement pursuant to which the security was delivered to the creditor; or
 - (2) By agreement or litigation between the creditor and the liquidator.
- B.
- (1) If a surety has paid any losses and loss adjustment expenses under its own surety instrument prior to any petition for a delinquency proceeding and the principal has posted collateral that remains available to reimburse the losses and/or loss adjustment expenses and at the time of the petition that collateral had not been credited against the payments made, then the receiver has the first priority to utilize the collateral to reimburse the pre-petition losses and expenses.
 - (2) If the principal under a surety bond or a surety undertaking has pledged any collateral (including, but not limited to, a guaranty or a letter of credit) to secure its reimbursement obligation to the insurer, the claims of any 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 its proceeds.
 - (3) In making any distribution to an obligee [or completion contractor], the receiver shall retain a sufficient reserve for any other potential claims against the collateral under Subsection B(2).
 - (4) If the collateral is insufficient to satisfy in full all potential claims against it under Subsection B(2) and B(6), the claims shall be paid on a pro rata basis and the obligees [or completion contractor] shall have claims, subject to allowance pursuant to Section 703, for any deficiency.
 - (5) If the time to assert claims against a surety bond or a surety undertaking has expired, and all the claims have been satisfied in full, any remaining collateral for the surety bond or surety undertaking shall be returned to the principal.
 - (6) 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. To the extent the collateral is sufficient; the guaranty association will be reimbursed for 100 per cent of its payment. If the collateral is insufficient to satisfy in full all potential claims against it under Subsection B(2) and under this paragraph, the guaranty associations that have paid claims on surety bonds shall be entitled to a pro rata share of the available collateral in accordance with Subsection B(4) and the guaranty association or associations shall have claims against the general assets of the estate in accordance with Section 703 for any deficiency. Any payments made to guaranty funds from the collateral shall not be deemed early access or otherwise considered distributions out of the general assets or property of the estate and the guaranty associations shall subtract any payment from the collateral from their final claims against the estate.
- C. The amount determined pursuant to Subsection A shall be credited upon the secured claim, and the claimant may file a proof of claim, subject to all other provisions of this Act, for any deficiency, which shall be treated as an unsecured claim. If the claimant shall surrender the claimant's security to the liquidator, the entire claim shall be treated as if unsecured.
- D. The liquidator may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

Section 711. Qualified Financial Contracts

- A. Notwithstanding any other provision of this Act, including any other provision of this Act permitting the modification of contracts, or other law of a state, no person shall be stayed or prohibited from exercising:
- (1) A contractual right to cause the termination, liquidation, acceleration or close out of obligations under or in connection with any netting agreement or qualified financial contract with an insurer because of:
 - (a) The insolvency, financial condition or default of the insurer at any time, provided that the right is enforceable under applicable law other than this Act; or
 - (b) The commencement of a formal delinquency proceeding under this Act;
 - (2) Any right under a pledge, security, collateral, reimbursement or guarantee agreement or arrangement or any other similar security arrangement or arrangement or other credit enhancement relating to one or more netting agreements or qualified financial contracts;
 - (3) Subject to any provision of Subsection 609B, any 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 the United States or a state or a foreign jurisdiction approved by the Securities Valuation Office (SVO) of the NAIC as eligible for netting; or
 - (4) If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a proceeding under this Act terminates, liquidates, closes out or accelerates the agreement or contract, damages shall be measured as of the date or dates of termination, liquidation, close out or acceleration. The amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with Subsection F below.
- B. Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a non-defaulting party to an insurer against which an application or petition has been filed under this Act shall be transferred to or on the order of the receiver for the insurer, even if the insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For purposes of this subsection, the term “walkaway clause” means a provision in a netting agreement or a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from one of the parties in accordance with its terms upon termination, liquidation or acceleration of the netting agreement or qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the party’s status as a non-defaulting party. Any limited two-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that has defaulted shall be deemed to be a full two-way payment or second method provision as against the defaulting insurer. Any such property or amount 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.

Drafting Note: This provision requires that, upon termination of a netting agreement, the non-defaulting party will be required to pay to the defaulting party (the insurer) any net or settlement amounts owed to the insurer, notwithstanding any provision in the netting agreement that provides that the non-defaulting party is not required to make payments to the defaulting party. In short, this provision renders “limited two-way payment” provisions in master swap agreements unenforceable against a defaulting insurer.

- C. In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a proceeding under this Act, the receiver shall either:
- (1) Transfer to one party (other than an insurer subject to a proceeding under this Act) all netting agreements and qualified financial contracts between a counterparty or any affiliate of the counterparty and the insurer that is the subject of the proceeding, including:
 - (a) All rights and obligations of each party under each netting agreement and qualified financial contract; and

- (b) All property, including any guarantees or other credit enhancement, securing any claims of each party under each netting agreement and qualified financial contract; or
 - (2) Transfer none of the netting agreements, qualified financial contracts, rights, obligations or property referred to in Paragraph (1) of this subsection (with respect to the counterparty and any affiliate of the counterparty).
- D. If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, then 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 12:00 noon (the receiver's local time) on the business day following the transfer. For purposes of this subsection, "business day" means a day other than a Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.
- E. Notwithstanding any other provision of this Act, a receiver may not avoid a transfer of money or other property arising under or in connection with a netting agreement or qualified financial contract (or any pledge, security, collateral or guarantee agreement or any other similar security arrangement or credit support document relating to a netting agreement or qualified financial contract) that is made before the commencement of a formal delinquency proceeding under this Act. However, a transfer may be avoided under Section 606A if the transfer was made with actual intent to hinder, delay or defraud the insurer, a receiver appointed for the insurer, or existing or future creditors.
- F. (1) In exercising the rights of disaffirmance or repudiation of a receiver with respect to any netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:
- (a) Disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or any affiliate of the counterparty and the insurer that is the subject of the proceeding; or
 - (b) Disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in Subparagraph (a) (with respect to the person or any affiliate of the person).
- (2) Notwithstanding any other provision of this Act, any 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 conservation or rehabilitation case shall be determined and shall be allowed or disallowed as if the claim had arisen before the date of the filing of the petition for liquidation or, if a conservation or rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the petition for conservation or rehabilitation. The amount of the 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. The term "actual direct compensatory damages" does not include punitive or exemplary damages, damages for lost profit or lost opportunity or damages for pain and suffering, but does include normal and reasonable costs of cover or other reasonable measures of damages utilized in the derivatives, securities or other market for the contract and agreement claims.

Drafting Note: The intended effect of this provision is that, except where the receiver has expressly affirmed a netting agreement or qualified financial contract, the claim of a counterparty against the estate of an insolvent insurer (after completion of the netting and setoff processes) will have no greater priority than the claim of a general creditor.

- G. The term "contractual right" as used in this section includes any right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and any right, whether or not evidenced in writing, arising under statutory or common law, or under law merchant, or by reason of normal business practice.

- H. The provisions of this section shall not apply to persons who are affiliates of the insurer that is the subject of the proceeding.
- I. All rights of counterparties under this Act shall apply to netting agreements and qualified financial contracts 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.

Section 712. Administration of Loss Reimbursement Policies

- A. For purposes of this section:
 - (1) “Loss reimbursement policy” means any combination of one or more policies, endorsements, contracts or security agreements in which:
 - (a) The insured has agreed with the insurer to:
 - (i) Pay directly any portion of a loss or loss adjustment expense owed by the insurer under the policy up to a specified dollar amount; or
 - (ii) Reimburse the insurer for its payment of loss and loss adjustment expense under the policy up to a specified dollar amount; and
 - (b) Under which the insurer remains liable for payment of loss and loss adjustment expense under the policy regardless of whether the insured has met its obligations.

A loss reimbursement policy may provide for a specific dollar amount of loss reimbursement applicable to each claim, an aggregate dollar amount applicable to all claims under the policy, or both.

- (2) “Loss reimbursement” means any payment made by the insured to or on behalf of the insurer for loss or loss adjustment expense pursuant to the terms of a loss reimbursement policy, to the extent that the insurer is responsible for payment regardless of whether the insured has met its obligations. Loss reimbursement includes any voluntary or involuntary application of loss reimbursement collateral to the loss reimbursement obligations of the insured. Loss reimbursement does not include:
 - (a) Payments made by the insured pursuant to a deductible arrangement under which the insurer has no obligation to pay or advance the amount of the deductible on behalf of the insured or a self-insurance arrangement under which the insurer has no payment obligation for the obligation of the self-insured;
 - (b) Retrospectively rated premium payments; or
 - (c) Reinsurance claim payments made by a captive reinsurer or other reinsurer affiliated with or funded by the insured or affiliated with the insurer.
- (3) “Loss reimbursement claim” means any claim on a loss reimbursement policy that has been made against the estate, or that was previously paid by the insurer, to the extent that it is subject to an insured’s loss reimbursement obligation. A loss reimbursement claim includes any loss adjustment expenses that are subject to reimbursement by the terms of the policy.
- (4) “Loss reimbursement collateral” means any cash, letters of credit, surety bond or any other form of security provided by the insured to secure its loss reimbursement obligations, regardless of whether the collateral is held by, for the benefit of, or assigned to the insurer, and regardless of whether the collateral also secures other obligations of the insured.
- (5) “Uncovered loss reimbursement claim” means a loss reimbursement claim that is not defined as a covered claim under the relevant guaranty association statute.

- (6) “Other secured obligations” means any obligations, such as reinsurance or retrospective premium obligations, that are payable by the insured to the insurer and which are secured by collateral that also secures a loss reimbursement obligation.
- B.
- (1) Unless otherwise prohibited by law, the receiver may enter into agreements allowing the insured to fund or pay loss reimbursement claims directly or through a third party administrator.
 - (2) Unless otherwise prohibited by law, if the insurer allowed the insured to fund or pay loss reimbursement claims directly or through a third party administrator, the insured shall continue to fulfill its obligations, and the receiver may enforce the funding or payment agreements.
 - (3) The insured’s payment of a loss reimbursement claim in whole or part, including any payment made by a third-party administrator on behalf of the insured, shall extinguish the obligation, if any, of the receiver or any guaranty association to pay that claim or that portion of the claim. Acceptance of the insured’s payment by a claimant in full or final settlement of a claim shall bar the assertion of that claim in the delinquency proceeding.
 - (4) An agreement entered into or reaffirmed under this subsection may be terminated in the manner specified in the agreement.
- C. Any loss reimbursements owed by an insured shall be administered as follows:
- (1) The receiver shall bill an insured for reimbursement of a loss reimbursement claim when i) the insurer paid the claim prior to the commencement of delinquency proceedings; ii) the receiver is notified that a guaranty association has paid a loss reimbursement claim; iii) the receiver has paid a loss reimbursement claim; or iv) a loss reimbursement claim is allowed in liquidation proceedings. Notwithstanding the provisions of this subsection, a guaranty association which pays a loss reimbursement subject to recovery from the insured under statutory net worth provisions shall bill the insured directly and shall provide notice of said billing to the receiver as well as notice to the receiver of any reimbursements collected. Such recoveries pursuant to statutory net worth provisions shall not be general assets of the estate.
 - (2) All loss reimbursements paid to the receiver are general assets of the estate.
 - (3) Any loss reimbursement paid to the receiver that is allocable to a claim paid by a guaranty association shall be immediately distributed to that guaranty association as an early access payment in accordance with Section 803; provided, however, that notwithstanding the provisions of Section 803, receivership court approval shall not be required for early access distributions made pursuant to this section.
 - (4) If the insured does not make payment within the time specified in the loss reimbursement policy, or within sixty (60) days after receipt of the billing if no time is specified, the receiver is authorized to take all commercially reasonable actions necessary to collect any reimbursements owed.
 - (5) The insolvency of the insurer, the receiver’s inability to perform any of the insurer’s obligations under the loss reimbursement policy, or any allegation of improper handling or payment of a loss reimbursement claim by the receiver and/or any guaranty association shall not be a defense to the insured’s reimbursement obligation under the loss reimbursement policy.
- D. Any collateral held under a loss reimbursement policy issued by an insurer subject to a delinquency proceeding under this Act shall be maintained and administered in accordance with the loss reimbursement policy except where the loss reimbursement policy conflicts with this section.
- E. If the loss reimbursement collateral, when combined with loss reimbursement payments that have been made by the insured, is insufficient to reimburse loss reimbursement claims already paid by the insurer, the receiver and guaranty associations, and to discharge all currently and past due loss reimbursement claims and other secured obligations, then the collateral shall be applied first to fully meet all early access obligations to the guaranty associations under paragraph (C)(3).

- F. If the receiver declines to seek or is unsuccessful in obtaining reimbursement from the insured for a loss reimbursement claim and there is no available collateral, a guaranty association may, after notice to the receiver, seek to collect reimbursement due from the insured on the same basis as the receiver, and with the same rights and remedies including without limitation the right to recover reasonable costs of collection from the insured. The guaranty association shall report any amounts so collected from each insured to the receiver. The receiver shall provide the guaranty association with available information needed to collect a reimbursement due from the insured. Whenever a guaranty association undertakes to collect reimbursements from an insured, it shall notify all other guaranty associations that have paid loss reimbursement claims on behalf of the same insured. Amounts collected by a guaranty association pursuant to this paragraph shall be treated as in accordance with subparagraph C(3) of this section. The expenses incurred by a guaranty association in pursuing reimbursement shall not be permitted as a claim in the delinquency proceeding at any priority; however, a guaranty association may net the expenses incurred in collecting any reimbursement against that reimbursement.
- G. The receiver is entitled to recover through billings to the insured or from loss reimbursement collateral all reasonable expenses that the receiver or guaranty associations incur in fulfilling their responsibilities under this Section. All such deductions or charges shall be in addition to the insured's obligation to reimburse claims and related expenses and shall not diminish the rights of claimants.
- H. [OPTIONAL] The provisions of this section shall be applied in all receiverships pending at the time of enactment.

Drafting Note: Attention should be drawn to whether Section 712 is adopted with IRMA or as a stand-alone. If it is adopted with IRMA, then the provisions in Section 111 of IRMA may apply. States may wish for this particular section to not apply retroactively even if electing to have the rest of IRMA so applied, or may wish to apply 712 retroactively while having the rest of IRMA applying prospectively.

ARTICLE VIII. DISTRIBUTIONS

Section 801. Priority of Distribution

Drafting Note: A state may choose Alternative 1 or Alternative 2 depending how it wishes to classify certain expenses of the guaranty associations. Alternative 1 places expenses of the guaranty associations, including defense and cost containment expenses of property and casualty guaranty associations, in Class 2. Alternative 2 places the defense and cost containment expenses of property and casualty guaranty association expenses in Class 3 with other general policyholder claims, while the remaining expenses of the guaranty associations are in Class 2.

Alternative 1]

The priority of payment of distributions on unsecured claims shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for their payment before the members of the next class receive payment. All claims within a class shall be paid substantially the same percentage. Except as provided in Subsections A(1)(e), K and M, subclasses shall not be established within a class. No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies. The order of distribution of claims shall be:

- A. Class 1.
 - (1) The costs and expenses of administration expressly approved or ratified by the liquidator, including but not limited to the following:
 - (a) The actual and necessary costs of preserving or recovering the property of the insurer;
 - (b) Reasonable compensation for all services rendered on behalf of the administrative supervisor or receiver;
 - (c) Any necessary filing fees;
 - (d) The fees and mileage payable to witnesses;
 - (e) Unsecured loans obtained by the receiver. Any such obligation, unless by its terms otherwise provided, shall have priority over all other costs of administration. Absent agreement to the contrary, all claims in this sub-class shall share pro-rata; and

- (f) Expenses approved by the conservator or rehabilitator of the insurer, if any, incurred in the course of the conservation or rehabilitation that are unpaid at the time of the entry of the order of liquidation.
- (2) Except as expressly approved by the receiver, any expenses arising from a duty to indemnify the directors, officers or employees of the insurer are excluded from this class and, if allowed, are Class 7 claims.

Drafting Note: Implicit in the powers conferred on the liquidator under this Act, and explicitly in Section 504A(3), is the right, subject to approval by the receivership court, to pay Class 1 administrative costs to persons in any priority class where those Class 1 administrative cost payments assist or result in the collection or recovery of property of the insurer for the benefit of creditors of the estate. Payments of administrative costs in these circumstances do not constitute distributions so as to circumvent priority classes or establish subclasses within a class.

- B. Class 2. The reasonable expenses of a guaranty association, including overhead, salaries and other general administrative expenses allocable to the receivership to include administrative and claims handling expenses and expenses in connection with arrangements for ongoing coverage, other than expenses incurred in the performance of duties under Section [insert citation to guaranty fund law detection and prevention powers] or similar duties under the statute governing a similar organization in another state. In the case of property and casualty guaranty associations, the expenses shall include, but not be limited to, loss adjustment expenses, which shall include adjusting and other expenses and defense and cost containment expenses.

Drafting Note: If appropriate, states may add to Class 2: “This class shall also include the reasonable expenses of any entity responsible for the payment of claims or continuation of coverage of an insolvent health maintenance organization.”

- C. Class 3. All claims under policies of insurance including third party claims, claims under annuity contracts and funding agreements, claims under non-assessable policies for unearned premium, claims of obligees (and, subject to the discretion of the receiver, completion contractors) under surety bonds and surety undertakings (not to include bail bonds, mortgage or financial guaranty or other forms of insurance offering protection against investment risk, or warranties), claims by principals under surety bonds and surety undertakings for wrongful dissipation of collateral by the insurer or its agents, and claims incurred during the extension of coverage provided for in Section 502. All other claims incurred in fulfilling the statutory obligations of a guaranty association not included in Class 2, including but not limited to indemnity payments on covered claims and, in the case of a life, health and annuity guaranty association, all claims as a creditor of the impaired or insolvent insurer for all payments of and liabilities incurred on behalf of covered claims or covered obligations of the insurer and for the funds needed to reinsure those obligations with a solvent insurer.

Notwithstanding any other provision of this Act, the following claims shall be excluded from Class 3 priority and paid as claims in Class 7, except as otherwise provided in this section:

Drafting Note: If appropriate, states may add to Class 3: “This class shall also include indemnity payments on covered claims, unearned premiums, and payments for the continuation of coverage made by any entity responsible for the payment of claims or continuation of coverage of an insolvent health maintenance organization.”

- (1) Obligations of the insolvent insurer arising out of reinsurance contracts;
- (2) Obligations incurred pursuant to an occurrence policy, or reported pursuant to a claims made policy, after the expiration date of the insurance policy or after the policy has been replaced by the insured or canceled at the insured’s request or after the policy has been canceled as provided in this Act. Notwithstanding this subsection, unearned premium claims on policies, other than reinsurance agreements, shall not be excluded;
- (3) Obligations to insurers, insurance pools or underwriting associations and their claims for contribution, indemnity or subrogation, equitable or otherwise, except for direct claims under policies where the insurer is the named insured;
- (4) Any amount accrued as punitive or exemplary damages unless expressly covered under the terms of the policy, which shall be paid as claims in Class 9;

Drafting Note: In some jurisdictions the courts have held that coverage for punitive or exemplary damages may not be excluded from liability policies.

- (5) Tort claims of any kind against the insurer, and claims against the insurer for bad faith or wrongful settlement practices; and
 - (6) Claims of the guaranty associations for assessments not paid by the insurer.
- D. Class 4. All claims under policies of insurance for mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risk, or warranties.

Drafting Note: If warranties are regulated as insurance, claims under those instruments should be afforded Class 4 priority. Otherwise, claims under warranties should not be included as Class 4 claims and should also be excluded from Class 3.

- E. Class 5. Claims of the federal government not included in Classes 3 or 4.
- F. Class 6. Debts due employees for services or benefits to the extent that they do not exceed \$5,000 or two (2) months' salary, whichever is the lesser, and represent payment for services performed within one year before the entry of the initial order of receivership. This priority is in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.
- G. Class 7. Claims of other unsecured creditors not included in Classes 1 through 6, including claims under reinsurance contracts, claims of guaranty associations for assessments not paid by the insurer, and other claims excluded from Classes 3 or 4 above, unless otherwise assigned to Classes 8 through 13.

Drafting Note: If appropriate, states may add to Class 7: "all other claims of any entity responsible for the payment of claims of an insolvent health maintenance organization."

- H. Class 8. Claims of any state or local governments, except those specifically classified elsewhere in this section. Claims for services rendered and expenses incurred in opposing a formal delinquency proceeding. In order to prove the claim, the claimant must show that the insurer that is the subject of the delinquency proceeding incurred the fees and expenses based on its best knowledge, information and belief, formed after reasonable inquiry indicating opposition was in the best interests of the insurer, was well grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that opposition was not pursued for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.
- I. Class 0. Claims for penalties, punitive damages or forfeitures, unless expressly covered under the terms of a policy of insurance.
- J. Class 10. Except as provided in Subsections 701B and C, late filed claims that would otherwise be classified in Classes 3 through 9.
- K. Class 11. Surplus notes, capital notes or contribution notes or similar obligations, and premium refunds on assessable policies, and any other claims specifically assigned to this class. Claims in this class shall be subject to any subordination agreements, related to other claims in this class, which existed prior to the entry of a liquidation order.
- L. Class 12. Interest on allowed claims of Classes 1 through 11, according to the terms of a plan to pay interest on allowed claims proposed by the liquidator and approved by the receivership court.
- M. Class 13. Claims of shareholders or other owners arising out of their capacity as shareholders or other owners, or any other capacity except as they may be qualified in Class 3, 4, 7 or 12 above. Claims in this class shall be subject to any subordination agreements, related to other claims in this class, that existed prior to the entry of a liquidation order.

[Alternative 2]

The priority of payment of distributions on unsecured claims shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for their payment before the members of the next class receive payment. All claims within a class shall be paid substantially the same percentage. Except as provided in Subsections A(1)(e), K and M, subclasses shall not be established within a class. No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies. The order of distribution of claims shall be:

A. Class 1.

- (1) The costs and expenses of administration expressly approved or ratified by the liquidator, including but not limited to the following:
 - (a) The actual and necessary costs of preserving or recovering the property of the insurer;
 - (b) Reasonable compensation for all services rendered on behalf of the administrative supervisor or receiver;
 - (c) Any necessary filing fees;
 - (d) The fees and mileage payable to witnesses;
 - (e) Unsecured loans obtained by the receiver. Any such obligation, unless by its terms otherwise provided, shall have priority over all other costs of administration. Absent agreement to the contrary, all claims in this sub-class shall share pro-rata; and
 - (f) Expenses approved by the conservator or rehabilitator of the insurer, if any, incurred in the course of the conservation or rehabilitation that are unpaid at the time of the entry of the order of liquidation.
- (2) Except as expressly approved by the receiver, any expenses arising from a duty to indemnify the directors, officers or employees of the insurer are excluded from this class and, if allowed, are Class 7 claims.

Drafting Note: Implicit in the powers conferred on the liquidator under this Act, and explicitly in Section 504A(3), is the right, subject to approval by the receivership court, to pay as Class 1 administrative costs to persons in lower priority classes where those Class 1 administrative cost payments assist or result in the collection or recovery of property of the insurer for the benefit of creditors of the estate. Payments of administrative costs in these circumstances do not constitute distributions so as to circumvent priority classes or establish subclasses within a class.

- B. Class 2. The reasonable expenses of the guaranty association, including overhead, salaries and other general administrative expenses and claims handling expenses and expenses in connection with arrangements for ongoing coverage that are of the type and nature that, but for the activities of the guaranty association, otherwise would have been incurred or allocable to the receiver. The expenses allowed under this subsection shall not include: (i) expenses incurred in the performance of duties under Section [insert citation to state guaranty fund law detection and prevention powers], (ii) expenses related to defense and cost containment, in accordance with the NAIC Statements of Statutory Accounting Principles as incorporated in this state by [cite state's insurance statute incorporating the NAIC Statements of Statutory Accounting Principles]; (iii) any other expenses required to be paid or incurred as direct policy benefits by the terms of a policy; (iv) expenses related to coverage issues between the guaranty association and the liquidator.

Drafting Note: If appropriate, states may add to Class 2: "This class shall also include the reasonable expenses of any entity responsible for the payment of claims or continuation of coverage of an insolvent health maintenance organization."

- C. Class 3. All claims under policies of insurance including third party claims, claims under annuity contracts and funding agreements, claims under non-assessable policies for unearned premium, claims of obligees (and, subject to the discretion of the receiver, completion contractors) under surety bonds and surety undertakings (not to include bail bonds, mortgage or financial guaranty or other forms of insurance offering protection against investment risk, or warranties), claims by principals under surety bonds and surety undertakings for wrongful dissipation of collateral by the insurer or its agents, and claims incurred during the extension of coverage provided for in Section 502. All other claims incurred in fulfilling the statutory obligations of a guaranty association not included in Class 2, including but not limited to expenses related to defense and cost containment, in accordance with the NAIC Statements of Statutory Accounting Principles as incorporated in this state by [cite state's insurance statute incorporating the NAIC Statements of Statutory Accounting Principles]; expenses related to coverage issues between the guaranty association and the liquidator; indemnity payments on covered claims and, in the case of a life, health and annuity guaranty association, all claims as a creditor of the impaired or insolvent insurer for all payments of and liabilities incurred on behalf of covered claims or covered obligations of the insurer and for the funds needed to reinsure those obligations with a solvent insurer.
- Notwithstanding any other provision of this Act, the following claims shall be excluded from Class 3 priority and paid as claims in Class 7, except as otherwise provided in this section:

Drafting Note: If appropriate, states may add to Class 3: "This class shall also include indemnity payments on covered claims, unearned premiums, and payments for the continuation of coverage made by any entity responsible for the payment of claims or continuation of coverage of an insolvent health maintenance organization."

- (1) Obligations of the insolvent insurer arising out of reinsurance contracts;
- (2) Obligations incurred pursuant to an occurrence policy, or reported pursuant to a claims made policy, after the expiration date of the insurance policy or after the policy has been replaced by the insured or canceled at the insured's request or after the policy has been canceled as provided in this Act.

Notwithstanding this subsection, unearned premium claims on policies, other than reinsurance agreements, shall not be excluded;

- (3) Obligations to insurers, insurance pools or underwriting associations and their claims for contribution, indemnity or subrogation, equitable or otherwise, except for direct claims under policies where the insurer is the named insured;
- (4) Any amount accrued as punitive or exemplary damages unless expressly covered under the terms of the policy, which shall be paid as claims in Class 9;

Drafting Note: In some jurisdictions the courts have held that coverage for punitive or exemplary damages may not be excluded from liability policies.

- (5) Tort claims of any kind against the insurer, and claims against the insurer for bad faith or wrongful settlement practices; and
- (6) Claims of the guaranty associations for assessments not paid by the insurer.

- D. Class 4. All claims policies of insurance for mortgage guaranty, financial guaranty insurance or other forms of insurance offering protection against investment risk, or warranties.

Drafting Note: If warranties are regulated as insurance, claims under those instruments should be afforded Class 4 priority. Otherwise, claims under warranties should not be included as Class 4 claims and should also be excluded from Class 3.

- E. Class 5. Claims of the federal government not included in Classes 3 or 4.
- F. Class 6. Debts due employees for services or benefits to the extent that they do not exceed \$5,000 or two (2) months' salary, whichever is the lesser, and represent payment for services performed within one year before the entry of the initial order of receivership. This priority is in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.

- G. Class 7. Claims of other unsecured creditors not included in Classes 1 through 6, including claims under reinsurance contracts, claims of guaranty associations for assessments not paid by the insurer, and other claims excluded from Classes 3 or 4 above, unless otherwise assigned to Classes 8 through 13.

Drafting Note: If appropriate, states may add to Class 7: “all other claims of any entity responsible for the payment of claims of an insolvent health maintenance organization.”

- H. Class 8. Claims of any state or local governments, except those specifically classified elsewhere in this section. Claims for services rendered and expenses incurred in opposing a formal delinquency proceeding. In order to prove the claim, the claimant must show that the insurer that is the subject of the delinquency proceeding incurred the fees and expenses based on its best knowledge, information and belief, formed after reasonable inquiry indicating opposition was in the best interests of the insurer, was well grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that opposition was not pursued for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.
- I. Class 9. Claims for penalties, punitive damages or forfeitures, unless expressly covered under the terms of a policy of insurance.
- J. Class 10. Except as provided in Subsections 701B and C, late filed claims that would otherwise be classified in Classes 3 through 9.
- K. Class 11. Surplus notes, capital notes or contribution notes or similar obligations, and premium refunds on assessable policies, and any other claims specifically assigned to this class. Claims in this class shall be subject to any subordination agreements, related to other claims in this class, which existed prior to the entry of a liquidation order.
- L. Class 12. Interest on allowed claims of Classes 1 through 11, according to the terms of a plan to pay interest on allowed claims proposed by the liquidator and approved by the receivership court.
- M. Class 13. Claims of shareholders or other owners arising out of their capacity as shareholders or other owners, or any other capacity except as they may be qualified in Class 3, 4, 7 or 12 above. Claims in this class shall be subject to any subordination agreements, related to other claims in this class, that existed prior to the entry of a liquidation order.

Section 802. Partial and Final Distributions of Assets

- A. With the approval of the receivership court, a liquidator may declare and pay one or more partial distributions on claims as those claims are allowed and a final distribution. All claims allowed within a priority class shall be paid at substantially the same percentage. Distributions under this section to guaranty associations are not advances under Section 803.
- B. In determining the percentage of distributions to be paid on these claims, the liquidator may consider the estimated value of the insurer’s property (including estimated reinsurance recoverables in connection with the insurer’s estimated liabilities for unpaid losses and loss expenses and for incurred but not reported losses and loss expenses) and the estimated value of the insurer’s liabilities (including estimated liabilities for unpaid losses and loss expenses and for incurred but not reported losses and loss expenses).
- C. Distribution of property in kind may be made at valuations set by agreement between the liquidator and the creditor and as approved by the receivership court.
- D. (1) Notwithstanding the provisions of Subsection A and Article VII, the liquidator is authorized to pay benefits under workers compensation policies after the entry of the liquidation order if:
 - (a) There has been an acceptance of liability by the insurer, and no bona fide dispute exists;
 - (b) Payments were commenced prior to the entry of the liquidation order; and
 - (c) Future or past indemnity or medical payments are due.

- (2) Claim payments under this subsection may continue until the applicable guaranty association assumes responsibility for claim payments or determines the claim is not a covered claim under its guaranty association law. Any claim payments and related expenses made under this section may be treated as early access distributions under Section 803 in accordance with an agreement with the guaranty association responsible for the payments.

Section 803. Early Access Disbursements

- A.
 - (1) Early access payments to guaranty associations shall be made as soon as possible after the entry of a liquidation order and as frequently as possible thereafter, but at least annually if assets are available to be distributed to the guaranty associations (“distributable assets”), and shall be in amounts consistent with the provisions of this section. Amounts advanced to an affected guaranty association pursuant to this section shall be accounted for as advances against distributions to be made under Section 802.
 - (2) Distributable assets means all general assets of the liquidation estate less:
 - (a) Amounts reserved, to the extent necessary and appropriate, for the entire Section 801A expenses of the liquidation through and after its closure; and
 - (b) To the extent necessary and appropriate, reserves for distributions on claims other than those of the guaranty associations falling within the priority classes of claims established in Subsection 801C.
 - (3) Where sufficient distributable assets are available, amounts advanced need not be limited to the claims and expenses paid to date by the guaranty associations. However, the liquidator shall not distribute distributable assets to the guaranty associations in excess of the anticipated entire claims of the guaranty associations falling within the priority classes of claims established in Subsections 801B and C.
- B. Within 120 days after the entry of an order of liquidation by the receivership court, and at least annually thereafter, the liquidator shall apply to the receivership court for approval to make early access payments out of the general assets of the insurer to any guaranty associations having obligations arising in connection with the liquidation or report that the liquidator has determined that there are no distributable assets at that time based on financial reporting as required in Section 117. The liquidator may apply to the receivership court for approval to make early access payments more frequently than annually based on additional information or the recovery of material assets.
- C. Within sixty (60) days after approval by the receivership court of the applications in Subsection B, the liquidator shall make any early access payments to the affected guaranty associations as indicated in the approved application.
- D. Notice of each application for early access payments, or of any report required pursuant to this section, shall be given in accordance with Section 107 to the guaranty associations that may have obligations arising from the liquidation. Notwithstanding the provisions of Section 107, the liquidator shall provide these guaranty associations with at least thirty (30) days actual notice of the filing of the application with a complete copy of the application prior to any action by the receivership court. Any guaranty association that may have obligations arising in connection with the liquidation shall have:
 - (1) The right to request additional information from the liquidator, who shall not unreasonably deny such request; and
 - (2) The right to object as provided in Section 107 to any part of each application or to any report filed by the liquidator pursuant to this section.

- E. In each application regarding early access payments, the liquidator shall, based on the best information available to the liquidator at the time, provide at a minimum the following:
 - (1) To the extent necessary and appropriate, the amount reserved for the entire expenses of the liquidation through and after its closure and for distributions on claims falling within the priority classes of claims established in Section 801B and C;
 - (2) The calculation of distributable assets and the amount and method of equitable allocation of early access payments to each of the guaranty associations; and
 - (3) The most recent financial information filed with the National Association of Insurance Commissioners by the liquidator.
- F. Each guaranty association that receives any payments pursuant to this section agrees, upon depositing the payment in any account to its benefit, to return to the liquidator any amount of these payments that may be required to pay claims of secured creditors and claims falling within the priority classes of claims established in Section 801A, B or C. No bond shall be required of any guaranty association.
- G. Without the consent of the affected guaranty associations or an order of the receivership court, the liquidator may not offset the amount to be disbursed to any guaranty association by the amount of any special deposit or any other statutory deposit or asset of the insolvent insurer held in that state unless the association has actually received such deposit or asset.

Section 804. Unclaimed and Withheld Funds

[Alternative 1]

- A. If any funds of the receivership estate remain unclaimed after the final distribution under Section 802, the funds shall be placed in a segregated unclaimed funds account held by the commissioner. If the owner of any of these funds presents proof of ownership satisfactory to the commissioner within two (2) years after the termination of the delinquency proceeding, the commissioner shall remit the funds to the owner. The interest earned on funds held in the unclaimed funds account may be used to pay any administrative costs related to the handling or return of unclaimed funds.
- B. If any amounts held in the unclaimed funds account remain unclaimed for two (2) years after the termination of the delinquency proceeding, the commissioner may file a motion for an order directing the disposition of the funds in the court in which the delinquency proceeding was pending. Any costs incurred in connection with the motion may be paid from the unclaimed funds account. The motion shall identify the name of the insurer, the names and last known addresses of the persons entitled to the unclaimed funds, if known, and the amount of the funds. Notice of the motion shall be given as directed by the court. Upon a finding by the court that the funds have not been claimed within two (2) years after the termination of the delinquency proceeding, the court shall order that any claims for unclaimed funds, a interest earned thereon that has not been expended under Subsection A, are abandoned and the funds shall be disbursed under one of the following methods:
 - (1) The amounts may be deposited in the general receivership expense account under Subsection C;
 - (2) The amounts may be transferred to the State Treasurer, and deposited into the state general fund;
or
 - (3) The amounts may be used to reopen the receivership in accordance with Section 903, and be distributed to the known claimants with approved claims.
- C. The commissioner may establish an account for the following purposes:
 - (1) To pay general expenses related to the administration of receiverships; or
 - (2) To advance funds to any receivership that does not have sufficient cash to pay its operating expenses.

- D. Any advance to a receivership estate under Subsection C(2) may be treated as a claim under Section 801 as may be agreed at the time the advance is made or, in the absence of such agreement, in a priority determined to be appropriate by the receivership court.
- E. If the commissioner determines at any time that the funds in the account exceed the amount required, the commissioner may transfer the funds or any part thereof to the State Treasurer, and the transferred funds shall be deposited into the state general fund.

[Alternative 2]

If any funds of the receivership estate remain unclaimed after the final distribution under Section 802, the funds shall be handled in accordance with [cite to state's unclaimed property laws].

ARTICLE IX. DISCHARGE

Section 901. Condition on Release from Delinquency Proceedings

Until all payments of or on account of the insurer's contractual obligations by all guaranty associations, along with all expenses thereof and interest on all the payments and expenses, shall have been repaid to the guaranty associations unless otherwise provided in a plan approved by the guaranty association, an insurer that is subject to any formal delinquency proceedings shall not:

- A. Be permitted to solicit or accept new business or request or accept the restoration of any suspended or revoked license or certificate of authority;
- B. Be returned to the control of its shareholders or private management; or
- C. Have any of its assets returned to the control of its shareholders or private management.

Section 902. Termination of Liquidation Proceedings

When all property justifying the expense of collection and distribution have been collected and distributed under this Act, the liquidator shall apply to the receivership court for an order discharging the liquidator and terminating the proceeding. The receivership court may grant the application and make any other orders, including orders to transfer any remaining funds that are uneconomic to distribute or, pursuant to Subsection 802C, assign any assets that remain unliquidated, including claims and causes of action, as may be deemed appropriate.

Section 903. Reopening Liquidation

After the liquidation proceeding has been terminated and the liquidator discharged, the commissioner or other interested party may at any time petition the court that was the receivership court to reopen the proceedings for good cause, including the discovery of additional property. If the court is satisfied that there is justification for reopening, it shall so order.

Section 904. Disposition of Records During and After Termination of Liquidation

- A. Whenever it shall appear to the receiver that the records of the insurer in receivership are no longer useful, he or she may recommend to the receivership court, and the receivership court shall direct, what records shall be destroyed.
- B. If the receiver determines that any records should be maintained after the closing of the delinquency proceeding, the receiver may reserve property from the receivership estate for the maintenance of the records. Any amounts so retained shall be administrative expenses of the estate under Section 801A. Any records retained pursuant to this subsection shall be transferred to the custody of the commissioner, and the commissioner may retain or dispose of the records as appropriate, at the commissioner's discretion. Any records of a delinquent insurer that are transferred to the commissioner shall not be considered as records of the Department of Insurance for any purposes, and the [reference applicable public records act] shall not apply to those records.

Drafting Note: The recommendation should conform to whatever general record destruction laws exist in the particular state.

Section 905. External Audit of the Receiver's Books

The receivership court may, as it deems desirable, order audits to be made of the books of the receiver relating to any receivership established under this Act, and a report of each audit shall be filed with the commissioner and with the receivership court. The books, records and other documents of the receivership shall be made available to the auditor at any time without notice. The expense of each audit shall be considered a cost of administration of the receivership.

ARTICLE X. INTERSTATE RELATIONS

Section 1001. Ancillary Conservation of Foreign Insurers

- A. The commissioner may initiate an action against a foreign insurer pursuant to Section 201 on any of the grounds stated in that section or on the basis that:
 - (1) Any of its property has been sequestered, garnished or seized by official action in its domiciliary state, or in any other state;
 - (2) Its certificate of authority to do business in this state has been revoked or that none was ever issued and there are residents of this state with unpaid claims or in-force policies; or
 - (3) It is necessary to enforce a stay under [cite applicable guaranty fund acts].
- B. If a domiciliary receiver has been appointed, the commissioner may initiate an action against a foreign insurer under this section only with the consent of the domiciliary receiver.
- C. An order entered pursuant to this section shall appoint the commissioner as conservator. The conservator's title to assets shall be limited to the insurer's property and records located in this state.
- D. Notwithstanding the provisions of Section 201D, the conservator shall hold and conserve the assets located in this state until the commissioner in the insurer's domiciliary state is appointed its receiver or until an order terminating conservation is entered under Subsection G. Once a domiciliary receiver is appointed, the conservator shall turn over to the domiciliary receiver all property subject to an order under this section.
- E. The conservator may liquidate such property of the insurer as may be necessary to cover the costs incurred in the initiation or administration of a proceeding under this section.
- F. The court in which an action under this section is pending may issue a finding of insolvency or an ancillary liquidation order. Any ancillary liquidation order shall be entered for the limited purposes of:
 - (1) Liquidating assets in this state to pay costs under Subsection E; or
 - (2) Activating applicable guaranty associations in this state to pay valid claims that are not being paid by the insurer.
- G. The conservator may at any time petition the receivership court for an order terminating an order entered under this section.

Section 1002. Domiciliary Receivers Appointed in Other States

- A. A domiciliary receiver appointed in another state shall be vested by operation of law with title to, and may summarily take possession of, all property and records of the insurer in this state. Notwithstanding any other provision of law regarding special deposits, special deposits held in this state for this state's guaranty association as the only beneficiary shall be, upon the entry of an order of liquidation with a finding of insolvency, distributed to the guaranty associations in this state as early access, subject to Section 803, in relation to the lines of business for which the special deposits were made. The holder of any special deposit shall account to the domiciliary receiver for all distributions from the special deposit at the time of the distribution. The statutory provisions of another state and all orders entered by courts of competent jurisdiction in relation to the appointment of a domiciliary receiver of an insurer and any related proceedings in another state shall be given full faith and credit in this state. For purposes of this Act, another state means any state other than this state. This state will treat all foreign states as reciprocal states.
- B. Upon appointment of a domiciliary receiver in another state, the commissioner shall, unless otherwise agreed by the receiver, immediately transfer title to and possession of all property of the insurer under his or her control, including all statutory general or special deposits other than special deposits where that state's guaranty association is the only beneficiary, to the receiver.
- C. Except as provided in Subsection A, the domiciliary receiver shall handle special deposits and special deposit claims in accordance with the statutes pursuant to which the special deposits were required and applicable federal law. All amounts in excess of the estimated amount necessary to administer the special deposit and pay the unpaid special deposit claims shall be deemed general assets of the estate. If there is a deficiency in any special deposit so that the claims secured thereby are not fully discharged from the deposit, the claimants may share in the general assets of the insurer to the extent of the deficiency at the same priority as other claimants in their class of priority under Section 801, but the sharing shall be deferred until the other claimants of their class have been paid percentages of their claims equal to the percentage paid from the special deposit. The intent of this provision is to equalize to this extent the advantage gained by the security provided by the special deposits.

ARTICLE XI. SEPARABILITY AND EFFECTIVE DATE

Section 1101. Separability

If any provision of this Act or its application to any person or circumstance is for any reason held to be invalid, the remainder of the Act and the application of the provision to other persons or circumstances shall not be affected.

Section 1102. Effective Date

This Act shall take effect immediately and shall be applicable to ongoing delinquency proceedings in accordance with Section 111 of this Act.

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

2005 Proc. 4th Quarter 32,48-122 (adopted).

2007 Proc. 1st Quarter 291-297, 298-307,1303-1305, 1320-1321 (amended).

This model was designed to replace an earlier NAIC model.

1936 Proc. I 29, 30-32, 33 (adopted first liquidation statute).

1969 Proc. I 168, 241, 271 (recommended the adoption of the Wisconsin Liquidation Act by states).

1978 Proc. I 13, 15, 211, 238-241, 242-275 (adopted new model).

1986 Proc. II 410-411 (amendments adopted later are printed here).

1987 Proc. I 11, 18, 161, 420-421, 423-424 (amended).

1989 Proc. II 13, 23, 227-228, 338, 379-381 (amended).

1990 Proc. I 6, 26, 172, 398, 407-410 (amended).

1990 Proc. II 7, 14-15, 202-204, 224-251, 529-531 (amended and reprinted).

1991 Proc. II 25, 56-57, 322, 560, 577, 604 (amended).

1992 Proc. I 77, 78-79, 769 (amended at special plenary session in September 1991).

1993 Proc. I 8, 136, 277, 741, 746-748 (amended).

1994 Proc. 4th Quarter 14, 20, 593-594, 596-634 (amended and reprinted).

1996 Proc. 1st Quarter 29-30, 123, 562, 565-566 (amended).

1996 Proc. 4th Quarter 9, 44, 938, 945, 953-955 (amended).

1997 Proc. 2nd Quarter 25-26, 539-546 (amended).

1997 Proc. 3rd Quarter 25, 26, 1076, 1124, 1124-1126 (amended).

1999 Proc. 4th Quarter 15, 805, 812-814 (amended).