
WEST VIRGINIA CODE CHAPTER 33
ARTICLE 10

WV Legislature

§33-10-1. Definitions.

For the purpose of this article, the following definitions shall apply:

(a) "Impairment" means a financial situation in which, based upon the financial information which would be required by this chapter for the preparation of the insurer's annual statement, the assets of an insurer are less than the sum of all of its liabilities and required reserves including any minimum capital or surplus or both required of that insurer by this chapter so as to maintain its authority to transact the kinds of business or insurance it is so authorized to transact.

(b) "Insolvency" or "insolvent" means a financial situation in which, based upon the financial information which would be required by this chapter for the preparation of the insurer's annual statement, the assets of the insurer are less than the sum of all of its liabilities and required reserves.

(c) "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and which is or has been subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization or conservation by, the commissioner or the equivalent insurance supervisory official of another state. For purposes of this article, all persons, corporations, associations or entities to whom this article applies and which are subject to delinquency proceedings commenced in this state shall be considered "insurers".

(d) "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this article for the purpose of liquidating, rehabilitating, reorganizing or conserving the insurer and any summary proceeding under section thirty-six of this article. "Formal delinquency proceeding" means any liquidation or rehabilitation proceeding.

(e) "State" means any state, district or territory of the United States.

(f) "Foreign country" means any other jurisdiction not in any state.

(g) "Domiciliary state" means the state in which an insurer is incorporated or organized, or in the case of an alien insurer as defined in section eight, article one of this chapter, the state in which such insurer, having become authorized to do business in such state, has at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States or its state of entry.

(h) "Ancillary state" means any state other than a domiciliary state.

(i) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of the uniform insurers liquidation act, as defined in section twenty-one of this article, are in force, and in which provisions are in force requiring that the Insurance Commissioner or equivalent insurance supervisory official be the receiver of a delinquent

insurer, and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

(j) "General assets" means all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons and as to such specifically encumbered property, the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in more than a single state shall be considered general assets.

(k) "Preferred claim" means any claim with respect to which the terms of this article accord priority of payments from the general assets of the insurer.

(l) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

(m) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claim or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

(n) "Receiver" means receiver, liquidator, rehabilitator or conservator as the context may require.

(o) "Guaranty association" means the West Virginia insurance guaranty association created by article twenty-six of this chapter, the West Virginia life and health insurance guaranty association act created by article twenty-six-a of this chapter and any other similar entity now or hereafter created by the Legislature of this state for the payment of claims of insolvent insurers.

(p) "Foreign guaranty association" means any entities now in existence in or hereafter created by the Legislature of any other state that are similar to the entities described in subsection (o) of this section.

(q) "Surplus" means the amount by which an insurer's assets exceeds its liabilities and required reserves based upon the financial information which would be required by this chapter for the preparation of the insurer's annual statement.

(r) "Affiliate" or a person "affiliated with" a specific person means a person that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with the person specified.

(s) "Control" means the possession, direct or indirect, of the power to direct or cause the

direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not, in fact, exist.

(t) "Transfer" means the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or an interest therein, absolutely or conditionally, voluntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor is considered a transfer suffered by the debtor.

§33-10-2. Jurisdiction, venue and appeal of delinquency proceedings; exclusive remedy.

(a) The circuit courts of this state or the judges thereof in vacation are vested with exclusive original jurisdiction of delinquency proceedings under this article, and are authorized to make all necessary and proper orders to carry out the purposes of this article.

(b) The venue of delinquency proceedings against a domestic insurer shall be in the circuit court of the county of the insurer's principal place of business. The venue of such proceedings against foreign insurers, alien insurers or domestic insurers in which their principal place of business is outside of the State of West Virginia shall be in the circuit court of Kanawha County.

(c) With the exception of administrative supervision pursuant to article thirty-four of this chapter, delinquency proceedings pursuant to this article shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the state on the relation of the Insurance Commissioner.

(d) An appeal shall lie to the West Virginia Supreme Court of Appeals from an order granting or refusing rehabilitation, liquidation or conservation and from every other order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein. Appeals from orders granting or refusing rehabilitation, liquidation or conservation shall be prosecuted pursuant to section four-d of this article.

(e) At any time after an order is made under section ten or eleven of this article, the commissioner may remove the principal office of the insurer proceeded against to Kanawha County. In the event of such removal, the court wherein the proceeding was originally commenced shall, upon the application of the commissioner, direct its clerk to transmit all the pleadings, motions and other papers filed therein with such clerk to the clerk of the circuit court of Kanawha County. The proceeding shall thereafter be subject to the jurisdiction of the Kanawha County circuit court and conducted in the same manner as though it had been commenced in the Kanawha County circuit court.

§33-10-3. Court's seizure order.

(a) The commissioner may file in the appropriate circuit court of this state, as provided in section two of this article, a petition alleging, with respect to a domestic insurer:

(1) That there exist any grounds that would justify a court order for a formal delinquency proceeding against an insurer under this act;

(2) That the interests of policyholders, creditors or the public will be endangered by delay; and

(3) The contents of an order considered necessary by the commissioner.

(b) Upon a filing under subsection (a) of this section, the court may issue forthwith, ex parte and without a hearing, the requested order which shall direct the commissioner to take possession and control of all or a part of the assets, 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 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.

(c) The court shall specify in the order what its duration shall be, which shall be the time as the court considers necessary for the commissioner to ascertain the condition of the insurer. On motion of either party or on its own motion, the court may, from time to time, hold hearings as it considers desirable after notice that it considers appropriate and may extend, shorten or modify the terms of the seizure order. The court shall vacate the seizure order if the commissioner fails to commence a formal delinquency proceeding under this article after having had a reasonable opportunity to do so. An order of the court pursuant to a formal proceeding under this article shall ipso facto vacate the seizure order.

(d) Entry of a seizure order under this section will not constitute an anticipatory breach of any contract of the insurer.

(e) An insurer subject to an ex parte order under this section may petition the court at any time after the issuance of the order for a hearing and review of the order. The court shall hold the hearing and review not more than fifteen days after the request. Subject to the approval of the court, a hearing under this subsection may be held privately in chambers if the insurer proceeded against so requests.

(f) If, at any time after the issuance of such an order, it appears to the court that any person whose interest is or will be substantially affected by the order did not appear at the hearing and has not been served, the court may order that notice be given. An order that notice be given will not stay the effect of any order previously issued by the court.

§33-10-4. Injunctions and other orders.

(a) Upon application by the commissioner for an order under this article:

(1) The court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons from the transaction of its business or the waste or disposition of its property until further order of the court.

(2) The court may at any time during a proceeding under this article issue other injunctions or orders as may be considered necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

(3) The court may order any managing general agent or attorney-in-fact to release to the commissioner any books, records, accounts, documents or other writings relating to the business of such person: Provided, That any of the same or the property of an agent or attorney shall be returned when no longer necessary to the commissioner or at any time the court after notice and hearing shall so direct.

(b) Any person having possession of and refusing to deliver any of the books, records or assets of an insurer against whom a seizure order has been issued by the court is guilty of a misdemeanor and, shall be punished by a fine not exceeding \$1,000 or confined in jail not more than one year, or both fined and confined.

(c) Whenever the commissioner makes any seizure as provided in section three of this article, it is the duty of the sheriff of any county of this state, and of the police department of any municipality therein, to furnish the commissioner, upon demand, with deputies, patrolmen or officers necessary to assist the commissioner in making and enforcing the seizure.

(d) Notwithstanding any other provision of law, no bond is required of the commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this section.

(e) Notwithstanding subsections (a) through (d) of this section or any other provision of this chapter, the commencement of a delinquency proceeding with respect to an insurer-member does not operate as a stay, injunction or prohibition of the exercise by a federal home loan bank of its rights regarding collateral pledged by the insurer-member.

§33-10-4a. 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.
- (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 four of this article.
- (c) Any petition that prays for a temporary restraining order must be verified by the commissioner or the commissioner's designee, but need not plead or prove irreparable harm or inadequate remedy by law. The commissioner shall provide only such notice as the court may require.
- (d) If any temporary restraining order is prayed for:
- (1) The court may issue an initial order containing the relief requested;
 - (2) The order shall state the time and date of its issuance;
 - (3) The court shall set a time and date for the return of summons, not more than ten days from the time and date of the issuance of the initial order, at which time the person proceeded against may appear before the court for a summary hearing;
 - (4) The order shall not continue in effect beyond the time and date set for the return of summons, unless the court shall expressly enter one or more orders extending the restraining order; and
 - (5) The verified petition shall be filed with the clerk of the circuit court and maintained as confidential, except for good cause shown, until service of the petition and summons is effected.
- (e) If no temporary restraining order is requested, the court shall cause a summons to be issued. The summons shall specify a return date not more than thirty days after issuance and that an answer to the petition must be filed at or before the return date.
- (f) Service of process required pursuant to this article shall be upon the person named in the petition in accordance with the West Virginia rules of civil procedure.

§33-10-4b. Return of summons and summary hearing.

(a) The court shall hold a summary hearing at the time and date for the return of summons.

(b) If a person is not served with the petition and summons and fails to appear for the summary hearing, the court shall:

(1) Continue the summary hearing not more than ten days;

(2) Require the commissioner to make additional or alternative attempts at service of the petition and summons upon the person; and

(3) Extend any restraining order.

(c) Upon a showing of good faith efforts to effect service upon a person who has failed to appear for a continued summary hearing, the court shall order notice of the petition to be published. The order and notice shall specify a return date not less than ten nor more than twenty 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 after service of the summons, the court shall enter judgment in favor of the commissioner against that person.

(e) A person who appears for the summary hearing shall file its answer at the hearing and the court shall:

(1) Determine whether to extend any temporary restraining orders pending final judgment; and

(2) Set the case for trial on a date not more than ten days from the summary hearing.

(f) The court shall grant no continuance for filing an answer.

§33-10-4c. Proceedings for expedited trial, continuances, discovery, evidence.

(a) The court shall hear the case at the time and date set forth for trial without a jury and without unnecessary delays. To the extent not inconsistent with other laws or applicable rules, the court shall give priority to the matter over all other matters. To the extent otherwise authorized by law or applicable rules, the court may assign the matter to other judges if necessary to comply with the need for expedited proceedings under this article.

(b) Continuances for trial shall be granted only in extreme circumstances.

(c) The court shall receive as self-authenticated any of the following when offered by the commissioner:

(1) Certified copies of the financial statements made by the person; and

(2) Certified copies of examination reports of the person made by or on behalf of the commissioner.

(d) The facts contained in any such examination report 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 two hundred seventy days before the petition was filed. This presumption shall be rebuttable and shall shift the burden of production and persuasion.

(e) Discovery shall be limited to grounds alleged in the petition, and shall be concluded on an expedited basis.

§33-10-4d. Decision and appeals.

(a) The court shall enter judgment within fifteen days or as soon as practicable after the conclusion of the evidence.

(b) The judgment shall be final when entered. Any appeal shall be prosecuted on an expedited basis and must be filed within five days of entry. No request for reconsideration, review or appeal and no posting of a bond shall dissolve or stay the judgment.

§33-10-4e. Confidentiality.

(a) In all proceedings and judicial reviews under section four of this article, all records of the insurer, other documents and all insurance department files and court records and papers, 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 circuit court shall be held by the clerk in a confidential file, except as is necessary to obtain compliance with any order entered in connection with the proceedings, unless and until:

- (1) The circuit 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 ten or eleven of this article.

(b) The commissioner may share documents, materials or other information in his or her possession or control pertaining to an insurer that is the subject of a proceeding under this article with other state insurance departments, the national association of Insurance Commissioners, and federal banking agencies in accordance with section nineteen, article two of this chapter. No waiver of any applicable privilege or claim of confidentiality shall occur as a result of disclosure by the commissioner under this section or as a result of sharing documents, materials or other information pursuant to this subsection.

§33-10-5. Grounds for rehabilitation of domestic insurers.

The commissioner may apply to the court for an order appointing him or her as receiver of and directing him or her to rehabilitate a domestic insurer or of the United States branch of an alien insurer having trusted assets in this state, upon one or more of the following grounds. That the insurer:

- (a) Is impaired or insolvent.
- (b) Has refused to submit to reasonable examination by the commissioner its property, books, records, accounts or affairs 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 as far as they pertain to the insurer.
- (c) Has failed to comply with an order of the commissioner to make good an impairment of capital or surplus or both.
- (d) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer or other legal entity without having first obtained the written approval of the commissioner.
- (e) Has willfully violated its charter, articles of incorporation, or bylaws, or any law of this state or any valid order of the commissioner.
- (f) Has an officer, director or manager who has refused to be examined under oath concerning its affairs, for which purpose the commissioner is hereby authorized to conduct and to enforce by all appropriate and available means any such examination under oath in any other state or territory of the United States, in which any such officer, director or manager may then presently be, to the full extent permitted by the laws of such other state or territory, this special authorization considered.
- (g) Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or its property otherwise than pursuant to the provisions of this chapter, but only if such appointment has been made or is imminent and its effect is or would be to oust the courts of this state of jurisdiction hereunder.
- (h) Has consented to such an order through a majority of its directors, stockholders, members or subscribers.
- (i) Has failed to pay a final judgment rendered against it in this state upon any insurance contract issued or assumed by it, within thirty days after the judgment became final or within thirty days after the time for taking an appeal has expired or within thirty days after dismissal of an appeal before final determination, whichever date is the later.
- (j) Has been deemed in hazardous financial condition pursuant to the provisions of article

thirty-four-a of this chapter.

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§33-10-6. Grounds for liquidation.

The commissioner may apply to the court for an order appointing him as receiver (if his appointment as receiver shall not be then in effect) and directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusted assets in this state, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in section five of this article, or if such insurer:

(a) Has ceased transacting business for a period of one year, or

(b) Is an insolvent insurer and has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any law except this chapter.

§33-10-7. Grounds for conserving assets of foreign insurers.

The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver, and directing him to conserve the assets within this state, of a foreign insurer upon any of the following grounds:

- (a) Upon any of the grounds specified in sections five or six of this article; or
- (b) Upon the ground that its property has been sequestered in its domiciliary state or in any other state.

§33-10-8. Grounds for conserving assets of alien insurers.

The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver, and directing him to conserve the assets within this state, of any alien insurer upon any of the following grounds:

- (a) Upon any of the grounds specified in sections five or six of this article,
- (b) Upon the ground that the insurer has failed to comply, within the time designated by the commissioner, with an order made by him to make good an impairment of its trusteed funds, or
- (c) Upon the ground that the property of the insurer has been sequestered in a country other than the United States.

§33-10-9. Grounds for ancillary liquidation of foreign insurers.

The commissioner may apply to the court for an order appointing him as ancillary receiver of and directing him to liquidate the business of a foreign insurer having assets, business, or claims in this state upon the appointment in the domiciliary state of such insurer of a receiver, liquidator, conservator, rehabilitator or other officer by whatever name called for the purpose of liquidating the business of such insurer.

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§33-10-10. Order of rehabilitation.

(a) An order to rehabilitate a domestic insurer or the United States branch of an alien insurer having trusteed assets in this state shall direct the commissioner forthwith to take possession of the assets of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(b) If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he or she may apply to the court for an order of liquidation.

(c) The commissioner, or any interested person upon due notice to the commissioner, at any time may apply to the court for an order terminating the rehabilitation proceedings and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceeding have been fully accomplished.

§33-10-11. Order of liquidation of domestic insurer.

(a) An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to take possession of the assets of the insurer, to liquidate its business, to deal with the insurer's property and business in his or her own name as Insurance Commissioner or in the name of the insurer, as the court may direct, and to give notice to all creditors who may have claims against the insurer to present their claims.

(b) The commissioner may apply for and secure an order dissolving the corporate existence of a domestic insurer upon his or her application for an order of liquidation of the insurer or at any time after such order has been granted.

§33-10-12. Order of liquidation of alien insurers.

An order to liquidate the business of a United States branch of an alien insurer having trusted assets in this state shall be in the same terms as those prescribed for domestic insurers, save and except only that the assets of the business of such United States branch shall be the only assets included therein.

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§33-10-13. Order of conservation or ancillary liquidation of foreign or alien insurers.

(a) An order to conserve the assets of a foreign or alien insurer shall require the commissioner forthwith to take possession of the assets of the insurer within this state and to conserve it, subject to the further direction of the court.

(b) An order to liquidate the assets in this state of a foreign insurer shall require the commissioner forthwith to take possession of the assets of the insurer within this state and to liquidate it subject to the orders of the court and with due regard to the rights and powers of the domiciliary receiver, as provided in this article.

§33-10-14. Conduct of delinquency proceedings against domestic or alien insurers.

(a) Whenever under this article a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the Insurance Commissioner as the receiver. The court shall order the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

(b) As domiciliary receiver, the commissioner shall be vested by operation of law with the title to all the property, contracts and rights of action and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing him or her to rehabilitate or liquidate a domestic insurer or to liquidate the United States branch of an alien insurer domiciled in this state and he or she shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in this section for ancillary receivers appointed in this state as to assets located in this state.

(c) The recording of a certified copy of the order directing possession to be taken in the office of the clerk of the county commission of the county where the proceedings are pending and in the office of the clerk of the county commission of any county wherein the insurer has property or other assets, recorded in the same manner as deeds to real property are recorded, shall impart the same notice as would be imparted by a deed, bill of sale or other evidence of title duly recorded or filed.

(d) The commissioner as domiciliary receiver shall be responsible for the proper administration of all assets coming into his or her possession or control. The court may at any time require a bond from the commissioner or his or her deputies if considered desirable for the protection of the assets. The cost of the bond shall be paid out of the assets of the insurer as a cost of administration.

(e) Upon taking possession of the assets of an insurer, the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by this article for the purpose of rehabilitating, liquidating or conserving the affairs or assets of the insurer.

(f) In connection with delinquency proceedings, the commissioner may appoint one or more special deputy commissioners of insurance to act for him or her and may employ such counsel, clerks and assistants as he or she considers necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court and shall be paid out of the funds or assets of the insurer. In the event the property of such person does not contain cash or liquid assets sufficient to defray the cost of the service required to be performed under the terms of this article, the commissioner may pay the cost of the services first out of the commissioner's closed estate fund account. If the moneys in the closed estate fund account are insufficient to fully defray

the cost of the services required under the terms of this article, the commissioner may pay the costs out of the commissioner's "operating - additional fees" account. Any amount so paid from either account shall be considered to be expenses of administration and shall be repaid to the appropriate account out of the first available moneys in the estate.

(g) Within the limits of duties imposed upon them, special deputies shall possess all the powers given to and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings. All transactions involving estate accounts shall be reconciled quarterly by a special deputy commissioner appointed pursuant to subsection (f) of this section and reported to the commissioner. An annual audit of any special deputy commissioner appointed under this section may be conducted, at the discretion of the commissioner, by an independent, outside certified public accountant. The cost of this audit shall be allocated among the estates of the companies in conservation, rehabilitation or liquidation on a basis of allocation established by the commissioner.

§33-10-15. Conduct of delinquency proceedings against foreign insurers.

(a) Whenever under this article an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the Insurance Commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment on the grounds set forth in section nine of this article if he finds that there are sufficient assets of the insurer located in this state to justify the appointment of an ancillary receiver, or if ten or more persons resident in this state having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.

(b) The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state 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 located in this state, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He shall also be entitled to recover the other assets of the insurer located in this state, except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets as a receiver of an insurer domiciled in this state.

(c) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which he may be entitled under the laws of this state.

§33-10-16. Claims of nonresidents against domestic insurers.

(a) In a delinquency proceeding begun in this state against a domestic insurer, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in reciprocal states may either be proved in this state, or if ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state as provided in section seventeen of this article with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

§33-10-17. Claims against foreign insurers.

(a) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in this state may either be proved in the domiciliary state as provided by the law of that state, or if ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this state, he shall file his claim with the ancillary receiver and shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least forty days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver within thirty days after the giving of such notice shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this state involving adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state.

§33-10-18. Proof of claims.

(a) All claims against an insurer against which delinquency proceedings have begun shall set forth all of the following that are applicable:

(1) In reasonable detail, the amount of the claim, or the basis upon which the amount can be ascertained;

(2) The facts upon which the claim is based, including any consideration given for it;

(3) The priorities asserted, if any;

(4) The identity and amount of any security on the claim;

(5) The payments made on the debt, if any; and

(6) A statement that the sum claimed is justly owing and whether there is a right of setoff, counterclaim or defense to the claim.

(b) All claims shall be verified by the affidavit of the claimant, or someone authorized to act on his or her behalf and having knowledge of the facts and shall be supported by any documents as may be material thereto.

(c) All claims filed in this state shall be filed with the receiver, whether domiciliary or ancillary, in this state on or before the last date for filing as specified in this article.

(d) When a claim is denied, in whole or in part, by the liquidator, written notice of the determination shall be given to the claimant or his or her attorney by first class mail at the address shown in the proof of claim. Within sixty days from the mailing of the notice, the claimant may file his or her objections with the liquidator. If no such filing is made, the claimant may not further object to the determination.

(e) Whenever objections are filed with the liquidator and the liquidator does not alter his or her denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his or her attorney and to any other persons directly affected, not less than ten nor more than thirty days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee who shall submit findings of fact along with his or her recommendation. Upon receipt of the report, the court shall fix a time for hearing the claim and shall direct that the claimant or the receiver, as the court shall specify, shall give such notice as the court shall determine to any persons as shall appear to the court to be interested therein. All such notices shall specify the time and place of the hearing and shall concisely state the amount and nature of the claim, the priorities asserted, if any, and the recommendation of the receiver with reference thereto.

(f) At the hearing, all persons interested shall be entitled to appear and the court shall enter

an order allowing, allowing in part, or disallowing the claim. Any such order shall be considered an appealable order.

WV Legislature

§33-10-19. Priority of certain claims.

(a) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(b) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

(c) The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

(d) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this article or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amounts shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

§33-10-19a. Priority of distribution.

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses may be established within any class. No claim by a shareholder, policyholder or other creditor may be permitted to circumvent the priority classes through the use of equitable remedies. The order of distribution shall be:

(a) Class I. The costs and expenses of administration, including, but not limited to, the following:

(1) The actual and necessary costs of preserving or recovering the assets of the insurer;

(2) Compensation for all authorized services rendered in the liquidation;

(3) Any necessary filing fees;

(4) The fees and mileage payable to witnesses;

(5) Reasonable attorney's fees and fees for other professional services rendered in the proceeding; and

(6) All expenses incurred by the department of insurance arising out of the enforcement of chapter thirty-three and its rules.

(b) Class II. All claims for refund of unearned premiums under nonassessable policies and all claims of policyholders including claims of the federal or any state or local government as policyholders for losses incurred; third party claims of an insolvent insurer; and all reasonable claims of the West Virginia insurance guaranty associations and associations or entities performing a similar function in other states.

(c) Class III. Claims of the federal government other than as an insured policyholder.

(d) Class IV. Debts due to employees for compensation, which may not exceed two months of monetary compensation and must represent payment for services performed within six months before the filing of the petition for liquidation, or, if rehabilitation preceded liquidation, within one year before the filing of the petition for rehabilitation. Principal officers and directors shall not be entitled to the benefit of this priority except as otherwise approved by the liquidator and the court. This priority shall be in lieu of any other similar priority which may be authorized by law as to wages or compensation of employees.

(e) Class V. Claims of general creditors including claims of ceding and assuming companies in their capacity as such.

(f) Class VI. Claims of any state or local government. Claims, including those of any

governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under subsection (h) of this section.

(g) Class VII. Claims filed late or any other claims other than claims under subsection (h) of this section.

(h) Class VIII. Surplus or contribution notes, or similar obligations and premium refunds on assessable policies. Payments to members of domestic mutual corporations shall be limited in accordance with law.

(i) Class IX. The claims of shareholders or other owners.

§33-10-20. Attachment, garnishment or execution.

During the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

WV Legislature

§33-10-21. Uniform Insurers Liquidation Act.

(a) Paragraphs (b) to (m), inclusive, of section one of this article, together with sections four, and fourteen to twenty, inclusive, of this article constitute and may be referred to as the Uniform Insurers Liquidation Act.

(b) The Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions when applicable conflict with other provisions of this article the provisions of such act shall control.

§33-10-22. Deposit of moneys collected.

The moneys collected by the commissioner in a proceeding under this article shall be from time to time deposited in one or more state or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depository which is an institution organized and supervised under the laws of this state, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking laws of this state. The commissioner may in his discretion deposit such moneys or any part thereof in a national bank or trust company as a trust fund.

§33-10-23. Exemption of commissioner from fees.

The commissioner shall not be required to pay any fee to any public officer in this state for filing, recording, issuing a transcript or certificate or authenticating any paper or instrument pertaining to the exercise by the commissioner of any of the powers or duties conferred upon him under this article, whether or not such paper or instrument be executed by the commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of any action or proceeding by or against the commissioner, or with the subsequent conduct of such action or proceeding.

§33-10-24. Borrowing on pledge of assets.

For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this article, the commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust, or hypothecation of any or all of the property, whether real, personal or mixed, of such insurer, and the commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loan and to provide for the repayment thereof. The commissioner shall be under no obligation personally or in his official capacity to repay any loan made pursuant to this section.

§33-10-25. Date rights fixed on liquidation.

The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers, and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is entered in the office of the clerk of the court which made the order, subject to the provisions of this article with respect to the rights of claimants holding contingent claims.

WV Legislature

§33-10-26. Voidable preferences and liens.

(a) A preference is a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the insurer within one year before the filing of a successful petition for liquidation under this article, the effect of which transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would have otherwise received. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, then the transfers are preferences if made or suffered within one year before the filing of the successful petition for rehabilitation, or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the liquidator if the insurer was insolvent at the time of the transfer; and

(1) The transfer was made within four months before the filing of the petition; or

(2) The creditor receiving it or to be benefitted thereby or his or her agent acting with reference thereto 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

(3) The creditor receiving it was an officer, or any employee or attorney or other person who was in fact in a position of comparable influence in the insurer to an officer whether or not he or she held such position, or any shareholder holding directly or indirectly more than five percent of any class of any equity security issued by the insurer, or any other person, firm, corporation, association or aggregation of persons with whom the insurer did not deal at arm's length.

(c) (1) Notwithstanding subsections (a) and (b) of this section or any other provision of this chapter, the receiver for an insurer-member subject to a delinquency proceeding may not void a transfer made to a federal home loan bank in the ordinary course of business within four months of the commencement of the delinquency proceedings or which received prior approval of the receiver: Provided, That a transfer may be voided under this section if the transfer was made with actual intent to hinder, delay or defraud the insurer-member, a receiver appointed for the insurer-member or existing or future creditors.

(2) Following the appointment of a receiver for an insurer-member and upon request of the receiver, the federal home loan bank shall, within ten days of the request, provide a process and establish timing for:

(A) The release of collateral that exceeds the lending value, as determined in accordance with the advance agreement with the federal home loan bank, required to support secured obligations remaining after any repayment of advances;

(B) The release of any collateral remaining in the federal home loan bank's possession

following repayment of all outstanding secured obligations in full;

(C) The payment of fees and the operation of deposits and other accounts with the federal home loan bank; and

(D) The possible redemption or repurchase of federal home loan bank stock or excess stock of any class that an insurer-member is required to own.

(3) Upon the request of the receiver for an insurer-member, the federal home loan bank shall provide any available options for the insurer-member to renew or restructure an advance to defer associated prepayment fees, to the extent that market conditions, the terms of the advance outstanding to the insurer-member, the applicable policies of the federal home loan bank and compliance with the Federal Home Loan Bank Act and corresponding regulations permit.

(4) Nothing in this subsection affects the receiver's rights pursuant to 12 C.F.R. § 1266.4 regarding advances to an insurer-member in delinquency proceedings.

(d) Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property; except where a bona fide purchaser or lienor has given less than fair equivalent value, the purchaser or lienor shall have a lien upon the property to the extent of the consideration actually given. Where a preference by way of lien or security title is voidable, the court may on due notice order the lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator.

(e) A transfer under this section is considered to have been made as follows:

(1) A transfer of property other than real property is 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 is 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 which creates an equitable lien is not 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 liquidation is made immediately before the filing of the successful petition.

(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.

(f) (1) A lien obtainable by legal or equitable proceedings upon a simple contract is one

arising in the ordinary course of the 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 which under applicable law are given a special priority over other liens which are prior in time.

(2) A lien obtainable by legal or equitable proceedings becomes superior to the rights of a transferee, or a purchaser obtains rights superior to the rights of a transferee within the meaning of subsection (e) of this section, if the consequences 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. A lien does not, however, become superior and the purchase does not create superior rights for the purpose of subsection (e) of this section through any acts subsequent to the obtaining of the lien or subsequent to the purchase which require the agreement or concurrence of any third party or which require any further judicial action or ruling.

(g) A transfer of property for or on account of a new and contemporaneous consideration which is considered under subsection (e) of this section 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 days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if the loan is actually made, or a transfer which becomes security for a future loan, has the same effect as a transfer for or on account of a new and contemporaneous consideration.

(h) If any lien that is voidable under subsection (b) of this section 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 under this article which results in a liquidation order, the indemnifying transfer or lien is also considered voidable.

(i) The property affected by any lien considered voidable under subsections (a), (b) and (h) of this section 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 liquidator, except that the court may on due notice order the lien to be preserved for the benefit of the estate and the court may direct that the conveyance be executed as may be proper or adequate to evidence the title of the liquidator.

(j) The circuit court has summary jurisdiction of any proceeding by the liquidator to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding shall be given to all parties in interest, 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 court, upon application of any party in interest, shall 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 court, to the liquidator within reasonable times the court fixes.

(k) The liability of the surety under a releasing bond or other like obligation is discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the liquidator or where the property is retained under subsection (j) of this section to the extent of the amount paid to the liquidator.

(l) If a creditor has been preferred, and afterward in good faith gives the insurer further credit without security of any kind, for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from him or her.

(m) If an insurer, directly or indirectly, within four months before the filing of a successful petition for liquidation under this article, or at any time in contemplation of a proceeding to liquidate it, pays money or transfers property to an attorney-at-law for services rendered or to be rendered, the transactions may be examined by the court on its own motion or shall be examined by the court on petition of the liquidator and may be held valid only to the extent of a reasonable amount to be determined by the court and the excess may be recovered by the liquidator for the benefits of the estate provided that where the attorney is in a position of influence in the insurer or an affiliate thereof payment of any money or the transfer of any property to the attorney-at-law for services rendered or to be rendered shall be governed by the provision of subdivision (3), subsection (b) of this section.

(n) (1) Every officer, manager, employee, shareholder, member, subscriber, attorney or any other person acting on behalf of the insurer who knowingly participates in giving any preference when he or she has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference is personally liable to the liquidator for the amount of the preference. It is permissible to infer that there is a reasonable cause to so believe if the transfer was made within four months before the date of filing of this successful petition for liquidation.

(2) Every person receiving any property from the insurer or the benefit thereof as a preference voidable under subsections (a) and (b) of this section is personally liable therefor and is bound to account to the liquidator.

(3) Nothing in this subsection prejudices any other claim by the liquidator against any person.

§33-10-26a. Fraudulent transfers prior to petition.

(a) Every transfer made or suffered and every obligation incurred by an insurer within one year prior to the filing of a successful petition for rehabilitation or liquidation under this article is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay or defraud either existing or future creditors. A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under this article, which is fraudulent under this section, may be avoided by the receiver, except as to a person who in good faith is a purchaser, lienor or obligee for a present fair equivalent value and except that any purchaser, lienor or obligee, who in good faith has given a consideration less than fair for such transfer, lien or obligation, may retain the property, lien or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate and in that event, the receiver shall succeed to and may enforce the rights of the purchaser, lienor or obligee.

(b) A transfer under this section will be considered to have been made as follows:

(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 under subsection (e), section twenty-six of this article.

(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 which 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) Any transfer not perfected prior to the filing of a petition for liquidation shall be deemed to be made immediately before the filing of the successful petition.

(5) The provisions of this subsection apply whether or not there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers.

(c) Any transaction of the insurer with a reinsurer shall be deemed fraudulent and may be avoided by the receiver under subsection (a) of this section if:

(1) The transaction consists of the termination, adjustment or settlement of a reinsurance contract in which the reinsurer is released from any part of its duty to pay the originally specified share of losses that had occurred prior to the time of the transactions, unless the reinsurer gives a present fair equivalent value for the release; and

(2) Any part of the transaction took place within one year prior to the date of filing of the petition through which the receivership was commenced.

(d) Every person receiving any property from the insurer or any benefit thereof which is a fraudulent transfer under subsection (a) of this section shall be personally liable therefore and shall be bound to account to the liquidator.

WV Legislature

§33-10-26b. Recoupment from affiliates.

(a) If an order instituting a delinquency proceeding against an insurer authorized to do business in this state is entered under this article, the receiver appointed under the order has a right to recover on behalf of the insurer from any affiliate that controlled the insurer the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation, rehabilitation or conservation. This recovery is subject to the limitations of subsections (b) through (g), inclusive, of this section.

(b) No dividend is recoverable if the recipient shows that, when paid, the distribution was lawful and reasonable and that the insurer did not know and could not reasonably have known that the distribution might adversely affect its solvency.

(c) The maximum amount recoverable under this section is the amount needed, in excess of all other available assets, to pay all claims under the receivership, reduced for each recipient by any amount the recipient has already paid to receivers under similar laws of other states.

(d) Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions the person would have received if the distributions had been paid immediately. If two or more persons are liable regarding the same distributions, they are jointly and severally liable.

(e) If any person liable under subsection (d) of this section is insolvent, all affiliates that controlled that person at the time the dividend was declared or paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

(f) This section does not reduce the personal liability of a director under existing law.

(g) An action or proceeding under this section may not be commenced after the earlier of:

(1) Two years after the appointment of a liquidator pursuant to this article; or

(2) The date the rehabilitation or liquidation is terminated.

§33-10-26c. Fraudulent transfer after petition.

(a) After a petition for rehabilitation or liquidation has been filed, a transfer of any of the real property of the insurer made to a person acting in good faith shall be valid against the receiver if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefore, for which amount the transferee shall have a lien on the property so transferred. The commencement of a proceeding in rehabilitation or liquidation shall be constructive notice upon the recording of a copy of the petition for or order of rehabilitation or liquidation with the clerk of the county commission of the county where any real property in question is located. The exercise by a court of the United States or any state or jurisdiction to authorize or effect a judicial sale of real property of the insurer within any county in any state shall not be impaired by the pendency of such a proceeding unless the copy is recorded in the county prior to the consummation of the judicial sale.

(b) After a petition for rehabilitation or liquidation has been filed and before either the receiver takes possession of the property of the insurer or an order of rehabilitation or liquidation is granted:

(1) A transfer of any of the property of the insurer, other than real property, made to a person acting in good faith shall be valid against the receiver if made for a present fair equivalent value; or, if made for less than a present fair equivalent value, then to the extent of the present consideration actually paid therefore, for which amount the transferee shall have a lien on the property so transferred;

(2) A person indebted to the insurer or holding property of the insurer may, if acting in good faith, pay the indebtedness or deliver the property, or any part thereof, to the insurer or upon his or her order, with the same effect as if the petition were not pending;

(3) A person having actual knowledge of the pending rehabilitation or liquidation shall be considered not to act in good faith;

(4) A person asserting the validity of a transfer under this section shall have the burden of proof. Except as elsewhere provided in this section, no transfer by or on behalf of the insurer after the date of the petition for liquidation by any person other than the liquidator shall be valid against the liquidator.

(c) Every person receiving any property from the insurer or any benefit thereof which is a fraudulent transfer under this section shall be personally liable therefore and shall be bound to account to the liquidator.

(d) Nothing in this article shall impair the negotiability of currency or negotiable instruments.

§33-10-26d. Claims of holders of void or voidable rights.

(a) No claim of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment or encumbrance voidable under this article shall be allowed 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 will not be allowed unless the money is paid or the property is delivered to the liquidator within thirty days from the date of entry of the final judgment, except that the court having jurisdiction over the liquidation may allow further time if there is an appeal or other continuation of the proceeding.

(b) A claim allowable under subsection (a) of this section by reason of the avoidance, whether voluntary or involuntary, of a preference, lien, conveyance, transfer, assignment or encumbrance, may be filed as a late filing if filed within thirty days from the date of the avoidance, or within the further time allowed by the court under subsection (a) of this section. A claimant having a late filed claim under this section may be permitted by the liquidator to share in distribution as though the claim were not late, to the extent that the payment will not interfere with the orderly administration of the liquidation.

§33-10-27.

Repealed.

Acts, 2004 Reg. Sess., Ch. 143.

WV Legislature

§33-10-28. Setoffs.

(a) In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this article, the credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection (b), below.

(b) No setoff may be allowed in favor of any such person where:

(1) The obligation of the insurer to the person would not at the date of the entry of any liquidation order or otherwise, as provided in section twenty-five of this article, entitle him or her to share as a claimant in the assets of the insurer;

(2) The obligation of the insurer to the person was purchased by or transferred to the person with a view of its being used as a setoff;

(3) The obligation of the person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon the subscription to the capital stock of a stock insurer;

(4) The obligation of the insurer is owed to an affiliate of such person, or any other entity or association other than the person;

(5) The obligation of the person is owed to an affiliate of the insurer, or any other entity or association other than the insurer; or

(6) The obligations between the person and the insurer arise from transactions by which the person or the insurer assumed risk and obligations from the other party and ceded back substantially the same risks and obligations except the receiver may permit setoffs if in his or her discretion, a setoff is appropriate because of specific circumstances.

(c) Notwithstanding the provisions of subsection (b) of this section, a setoff of sums due on obligations in the nature of those set forth in subdivision (6), subsection (b) of this section shall be allowed for those sums accruing from business written where the contracts were entered into, renewed or extended with the approval of the commissioner of insurance of the state of domicile of the now insolvent insurer, when in the judgment of such commissioner it was necessary to provide reinsurance in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer in connection with the exercise of the commissioner's regulatory responsibilities.

(d) The provisions of this section shall supersede any agreements or contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer.

§33-10-29. Allowance of certain claims.

(a) No contingent claim may share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to this article, except that such claim shall be considered, if properly presented, and may be allowed to share where:

- (1) It does not prejudice the orderly administration of the liquidation; or
- (2) There is a surplus and the liquidation is thereafter conducted upon the basis that the insurer is solvent.

(b) Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of the insurer under a policy issued by the insurer shall have the right to file a claim in the liquidation proceeding, regardless of the fact that the claim may be contingent and the claim may be allowed:

- (1) If it may be reasonably inferred from the proof presented upon the claim that such person would be able to obtain a judgment upon the cause of action against the insured; and
- (2) If such person furnishes suitable proof, unless the court for good cause shown otherwise directs, that no further valid claim against the insurer arising out of his or her cause of action other than those already presented can be made; and
- (3) If the total liability of the insurer to all claimants arising out of the same act of its insured is no greater than its maximum liability would be were it not in liquidation.

(c)(1) No judgment against such an insured taken after the date of entry of the liquidation order may be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default or by collusion prior to the entry of the liquidation order may be considered as conclusive evidence in the liquidation proceedings, either of the liability of the insured to the person upon the cause of action or of the amount of damages to which the person is therein entitled.

(2) A claim by a third party founded upon a policy may be allowed without requiring the claim to be reduced to judgment, provided it can be reasonably inferred from the proof presented that the claimant would be able to obtain a judgment upon his or her cause of action against the insured and that the judgment would represent a liability of the insurer in liquidation under the policy upon which the claim is founded.

(d) No claim of any secured claimant may be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of the entry of the order of liquidation or such other date set by the court for determining rights and liabilities as provided in section twenty-five of this article unless the claimant surrenders his or her security to the commissioner, in which event the claim shall be allowed in the full amount for which it is valued.

(e) Whenever a creditor, whose claim against an insurer is secured, in whole or in part, by the undertaking of another person, fails to prove and file that claim, the other person may do so in the creditor's name and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name, to the extent that he or she discharges the undertaking. In the absence of an agreement with the creditor to the contrary, the other person shall not be entitled to any distribution, however, until the amount paid to the creditor on the undertaking plus the distributions paid on the claim from the insurer's estate to the creditor equals the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him or her in trust for such other person. The term "other person", as used in this section, is not intended to apply to a guaranty association or foreign guaranty association.

(f) Unless such claim is filed in the manner and within the time provided in sections eighteen and thirty of this article, it shall not be entitled to filing or allowance and no action may be maintained thereon. In the liquidation, pursuant to the provisions of this article, of any domestic insurer which has issued policies insuring the lives of persons, the commissioner shall, within thirty days after the last day set for the filing of claims, make a list of the persons who have not filed proofs of claim with him or her and to whom, according to the books of the insurer, there are amounts owing under such policies and he or she shall set opposite the name of each person the amount so owing to the person. Each person whose name appears upon the list shall be considered to have duly filed, prior to the last day set for the filing of claims, a claim for the amount set opposite his or her name on the list.

(g)(1) Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section nineteen-a of this article until the claims have been definitely determined, proved and allowed. Thereafter, the claims shall share ratably with other claims of the same class in all subsequent distributions.

(2) An unliquidated or undetermined claim or demand within the meaning of this article shall be considered to be any claim or demand upon which a right of action has accrued at the date of the order of liquidation and upon which the liability has not been determined or the amount thereof liquidated.

(h) The commissioner may require, as a condition of payment of the final liquidation dividend to a lender, or his or her assignee, who has filed a claim for an unearned premium as an assignee of the insured for valuable consideration:

(1) That such assignee of the insured shall assign to the liquidator all his or her right, title and interest in any unsatisfied debt of the insured to the assignee, pertaining to policies of the insolvent insurer, remaining unpaid after crediting the final liquidation dividend, if the amount of the unsatisfied debt is less than \$100.01; and

(2) That all of the documents giving rise to the debt be delivered to him or her.

(i) The commissioner may determine whether or not it will be feasible to attempt to collect any assigned debt. If the commissioner determines not to pursue collection of any such debt, he or she shall file a declaration to that effect with the liquidation court and be relieved of any further responsibility in respect to the debt.

(j) As used in this section, "insured" means a natural person who purchased insurance or coverage from the insolvent insurer for personal, family, or household purposes.

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§33-10-30. Time within which claims to be filed.

(a) If upon the granting of an order of liquidation under this article or at any time thereafter during the liquidation proceeding, the insurer shall not be clearly solvent, the court shall, after notice and hearing as provided in this article, make an order declaring the insurer to be insolvent. Thereupon regardless of any prior notice which may have been given to creditors, the commissioner shall notify all persons who may have claims against the insurer and who have not filed proper proofs thereof to present the same to him or her, at a place specified in the notice, within four months from the date of entry of the order, or if the commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for filing of proofs of claims shall be specified in the notice and notice shall be given in a manner to be determined by the court.

(b) Proofs of claim may be filed subsequent to the date specified, but no such claim may share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full with interest, except as provided in section twenty-six-d of this article.

§33-10-31. Report for assessment against members or subscribers of mutual or reciprocal insurers.

Within three years from the date an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer was entered in the office of the clerk of the court by which such order was made, the commissioner may make a report to the court setting forth:

- (a) The reasonable value of the assets of the insurer,
- (b) The insurer's probable liabilities, and
- (c) The probable necessary assessment, if any, to pay all claims and expenses in full, including expenses of administration.

§33-10-32. Levy of assessment.

(a) Upon the basis of the report provided for in section thirty-one of this article, including any amendments thereof, the court, ex parte, may levy one or more assessments against all members of such insurer who, as shown by the records of the insurer, were members (if a mutual insurer) or subscribers (if a reciprocal insurer) at any time within one year prior to the date of issuance of the order to show cause under section three of this article.

(b) Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with estimated cost of collection and percent of uncollectibility thereof. The total of all assessments against any member or subscriber with respect to any policy, whether levied pursuant to this article or pursuant to any other provision of this chapter, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this chapter, except that if the court finds that the policy was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, the court may determine the upper limit of such assessment upon the basis of such minimum rate.

(c) No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this chapter.

§33-10-33. Order to pay assessment.

After levy of assessment as provided in section thirty-two of this article, upon the filing of a further detailed report by the commissioner the court shall issue an order directing each member (if a mutual insurer) or each subscriber (if a reciprocal insurer), if he shall not pay the amount assessed against him to the commissioner on or before a day to be specified in the order, to show cause why he should not be held liable to pay such assessment, together with costs as provided in section thirty- five of this article, and to show cause why the commissioner should not have judgment therefor.

§33-10-34. Publication and service of assessment order.

The commissioner shall cause a notice of such assessment order, setting forth a brief summary of the contents of such order, to be (a) published in such manner as shall be directed by the court, and (b) enclosed in a sealed envelope, addressed and mailed postage prepaid, to each member or subscriber liable thereunder at his last-known address as it appears on the records of the insurer, at least twenty days before the return day of the order to show cause provided for in section thirty-three of this article.

§33-10-35. Judgment upon the assessment.

(a) Upon the return day of the order to show cause provided for in section thirty-three of this article, if the member or subscriber does not appear and serve duly verified objections upon the commissioner, the court shall make an order adjudging that such member or subscriber is liable for the amount of the assessment against him together with costs, and that the commissioner may have judgment against the member or subscriber therefor.

(b) If, on such return day, the member or subscriber shall appear and serve duly verified objections upon the commissioner, there shall be a full hearing before the court which, after such hearing, shall make such order as the facts shall warrant.

(c) Any such order shall have the same force and effect, shall be entered and docketed and may be appealed from, as if it were a judgment in an original action brought in the court in which the proceeding is pending.

§33-10-36. Early access to distribution.

(a) Within one hundred twenty days of a final determination of insolvency of an insurance company by the circuit court, the commissioner shall make application to the court for approval of a proposal to disburse assets out of the company's marshaled assets, from time to time as such assets become available, to the appropriate guaranty association having obligations because of the insolvency. "Appropriate guaranty association" means guaranty association and foreign guaranty association as those terms are defined in section one of this article. If the commissioner determines that there are insufficient assets to disburse, the application required by this section shall be satisfied by a filing by the commissioner stating the reasons for this determination.

(b) The proposal shall at least include provisions for:

(1) Reserving amounts for the payment of expenses of administration and of claims falling within the priorities established in section nineteen-a of this article but only with respect to such priorities higher than that of the associations;

(2) Disbursement of the assets marshaled to date and subsequent disbursement of assets as they become available;

(3) Equitable allocation of disbursements to each of the associations entitled thereto;

(4) The securing by the commissioner from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the commissioner such assets, together with income earned on assets previously disbursed, as may be required to pay claims of secured creditors and claims falling within the priorities established in section nineteen-a of this article but only with respect to such priorities higher than that of the associations. No bond shall be required of any such association; and

(5) A full report to be made by the association to the commissioner accounting for all assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on such assets and any other matter as the court may direct.

(c) The commissioner's proposal shall provide for disbursements to the association in amounts estimated at least equal to the claim payments made or to be made thereby for which the association could assert a claim against the commissioner, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of the claim payments made or to be made by the association, then disbursements shall be in the amount of available assets.

(d) Notice of the commissioner's application shall be given to the associations in and to the commissioners of insurance of each of the states. Any such notice shall be considered to have been given when deposited in the United States mail, first class postage prepaid, at least thirty days prior to submission of the application to the court. Action on the application

may be taken by the court provided the notice required in this subsection has been given and provided that the commissioner's proposal complies with subdivisions (1) and (2), subsection (b) of this section.

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§33-10-37. Distribution of assets.

Under the direction of court, the liquidator shall pay distributions in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims. Distribution of assets in kind may be made at valuations set by agreement between the liquidator and the creditor and approved by the court.

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§33-10-38. Unclaimed and withheld funds; termination of proceedings.

(a) All unclaimed funds subject to distribution remaining in the liquidator's hands when he or she is ready to apply to the court for discharge, including the amount distributable to any creditor, shareholder, member or other person who is unknown or cannot be found, shall be deposited with the state Treasurer and shall be paid without interest to the person entitled thereto or his or her legal representative upon proof satisfactory to the state Treasurer of his or her right thereto. Any amount on deposit not claimed within six years from the discharge of the liquidator shall be considered to have been abandoned and shall be escheated to the State of West Virginia without formal escheat proceedings and be deposited with the General Fund.

(b) When all assets justifying the expense of collection and distribution have been marshaled and distributed under this article, the liquidator shall petition the circuit court to terminate the liquidation proceeding and to close the estate and for other relief as may be appropriate. Subject to approval of the circuit court, after the completion of all post-closure activities for which moneys were reserved, the liquidator is authorized to deposit any remaining assets reserved for administrative expenses incurred in the closing of the estate that may not be practicably or economically distributed to claimants into a segregated account to be known as the closed estate fund account. The commissioner may thereafter use moneys held in the account to fund the administrative expenses of proceedings against insurers subject to this article that lack sufficient assets to fund administration.

§33-10-39. Immunity in receivership proceedings and representation of the special deputy supervisor.

(a) No claim of any nature whatsoever that is directly related to the receivership of an insurer shall arise against and no liability shall be imposed upon, the Insurance Commissioner, special deputy commissioner, or any person or entity acting as a receiver of an insurer, including surety, in rehabilitation, liquidation or conservation as a result of a court order issued on or after the effective date of this article for any statement made or actions taken or not taken in the good faith exercise of their powers under law. However, this immunity shall not extend to acts or omissions which are malicious or grossly negligent. This qualified immunity extends to agents and employees of the receiver.

(b) In any civil proceeding filed against a special deputy commissioner appointed pursuant to this article, the special deputy commissioner shall be entitled to be represented by the Attorney General.

§33-10-40. Applicability of amendments.

From and after July 1, 2004, any delinquency proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving the insurer shall be undertaken pursuant to this article. Any delinquency proceeding pending against an insurer under this article on June 30, 2004, will be administered and concluded under the law in effect at the time the delinquency proceeding was commenced.

WV Legislature

§33-10-41. Reinsurer's liability.

The amount recoverable by the liquidator from reinsurers may not be reduced as a result of delinquency proceedings unless the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable under a contract reinsured by the assuming insurer on the basis of reported claims allowed by the liquidation court, without diminution because of the insolvency of the ceding insurer. The payments shall be made directly to the ceding insurer or to its domiciliary liquidator except: (1) Where the contract or other written agreement specifically provides another payee of the reinsurance in the event of the insolvency of the ceding insurer; or (2) where the assuming insurer, with the consent of the direct insured, has assumed the policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under the policies and in substitution for the obligations of the ceding insurer to the payees.