

SECOND REGULAR SESSION
[P E R F E C T E D]
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 1235
92ND GENERAL ASSEMBLY

Reported from the Committee on Small Business, Insurance and Industrial Relations, March 8, 2004, with recommendation that the Senate Committee Substitute do pass and be placed on the Consent Calendar.

Senate Committee Substitute adopted March 18, 2004.

Taken up March 18, 2004. Read 3rd time and placed upon its final passage; bill passed, as amended.

4462S.02P

TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 375.246, 375.1198, and 375.1220, RSMo, and to enact in lieu thereof three new sections relating to insurer liquidation law.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 375.246, 375.1198, and 375.1220, RSMo, are repealed and three new sections enacted in lieu thereof, to be known as sections 375.246, 375.1198, and 375.1220, to read as follows:

375.246. 1. Credit for reinsurance shall be allowed a domestic ceding insurer as either an asset or a reduction from liability on account of reinsurance ceded only when the reinsurer meets the requirements of subdivisions (1) to (5) of this subsection. Credit shall be allowed pursuant to subdivision (1), (2) or (3) of this subsection only as respects cessions of those kinds or classes of business which the assuming insurer is licensed or otherwise permitted to write or assume in its state of domicile or, in the case of a United States branch of an alien assuming insurer, in the state through which it is entered and licensed to transact insurance or reinsurance. Credit shall be allowed pursuant to subdivision (3) or (4) of this subsection only if the applicable requirements of subdivision (6) have been satisfied.

(1) Credit shall be allowed when the reinsurance is ceded to an assuming insurer that is licensed to transact insurance in this state;

(2) Credit shall be allowed when the reinsurance is ceded to an assuming insurer that is accredited as a reinsurer in this state. An accredited reinsurer is one that:

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

(a) Files with the director evidence of its submission to this state's jurisdiction;

(b) Submits to the authority of the department of insurance to examine its books and records;

(c) Is licensed to transact insurance or reinsurance in at least one state, or in the case of a United States branch of an alien assuming insurer is entered through and licensed to transact insurance or reinsurance in at least one state;

(d) Files annually with the director a copy of its annual statement filed with the insurance department of its state of domicile and a copy of its most recent audited financial statement; and

(e) Maintains a surplus as regards policyholders in an amount not less than twenty million dollars and whose accreditation has not been denied by the director within ninety days of its submission; or

(f) Maintains a surplus as regards policyholders in an amount less than twenty million dollars and whose accreditation has been approved by the director.

No credit shall be allowed a domestic ceding insurer if the assuming insurer's accreditation has been revoked by the director after notice and hearing;

(3) Credit shall be allowed when the reinsurance is ceded to an assuming insurer that is domiciled in, or in the case of a United States branch of an alien assuming insurer is entered through, a state that employs standards regarding credit for reinsurance substantially similar to those applicable under this statute and the assuming insurer or United States branch of an alien assuming insurer:

(a) Maintains a surplus as regards policyholders in an amount not less than twenty million dollars; except that this paragraph does not apply to reinsurance ceded and assumed pursuant to pooling arrangements among insurers in the same holding company system; and

(b) Submits to the authority of the department of insurance to examine its books and records;

(4) (a) Credit shall be allowed when the reinsurance is ceded to an assuming insurer that maintains a trust fund in a qualified United States financial institution, as defined in subdivision (2) of subsection 3 of this section, for the payment of the valid claims of its United States ceding insurers, their assigns and successors in interest. To enable the director to determine the sufficiency of the trust fund, the assuming insurer shall report annually to the director information substantially the same as that required to be reported on the National Association of Insurance Commissioners' annual statement form by licensed insurers. The assuming insurer shall submit to examination of its books and records by the director.

(b) Credit for reinsurance shall not be granted pursuant to this subdivision unless the form of the trust and any amendments to the trust have been approved by:

a. The commissioner or director of the state agency regulating insurance in the state

where the trust is domiciled; or

b. The commissioner or director of another state who, pursuant to the terms of the trust instrument, has accepted principal regulatory oversight of the trust.

(c) The form of the trust and any trust amendments shall also be filed with the commissioner or director in every state in which the ceding insurer beneficiaries of the trust are domiciled. The trust instrument shall provide that contested claims shall be valid and enforceable upon the final order of any court of competent jurisdiction in the United States. The trust shall vest legal title to its assets in its trustees for the benefit of the assuming insurer's United States ceding insurers, their assigns and successors in interest. The trust and the assuming insurer shall be subject to examination as determined by the director.

(d) The trust shall remain in effect for as long as the assuming insurer has outstanding obligations due under the reinsurance agreements subject to the trust. No later than February twenty-eighth of each year the trustees of the trust shall report to the director in writing the balance of the trust and listing the trust's investments at the preceding year end and shall certify the date of termination of the trust, if so planned, or certify that the trust will not expire prior to the next following December thirty-first.

(e) The following requirements apply to the following categories of assuming insurers:

a. The trust fund for a single assuming insurer shall consist of funds in trust in an amount not less than the assuming insurer's liabilities attributable to reinsurance ceded by the United States ceding insurers, and, in addition, the assuming insurer shall maintain a trusteed surplus of not less than twenty million dollars;

b. In the case of a group of incorporated and individual unincorporated underwriters:

(i) For reinsurance ceded under reinsurance agreements with an inception, amendment or renewal date on or after August 1, 1995, the trust shall consist of a trusteed account in an amount not less than the group's several liabilities attributable to business ceded by United States domiciled ceding insurers to any member of the group;

(ii) For reinsurance ceded under reinsurance agreements with an inception date on or before July 31, 1995, and not amended or renewed after that date, notwithstanding the other provisions of this section, the trust shall consist of a trustee account in an amount not less than the group's several insurance and reinsurance liabilities attributable to business in the United States; and

(iii) In addition to these trusts, the group shall maintain in trust a trusteed surplus of which one hundred million dollars shall be held jointly for the benefit of the United States domiciled ceding insurers of any member of the group for all years of account;

c. The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of regulation and solvency control by the group's domiciliary regulator as are the

unincorporated members;

d. Within ninety days after its financial statements are due to be filed with the group's domiciliary regulator, the group shall provide to the director an annual certification by the group's domiciliary regulator of the solvency of each underwriter member; or if a certification is unavailable, financial statements, prepared by independent public accountants, of each underwriter member of the group;

(5) Credit:

(a) Shall be allowed when the reinsurance is ceded to an assuming insurer not meeting the requirements of subdivision (1), (2), (3) or (4) of this subsection, but only as to the insurance of risks located in a jurisdiction of the United States where the reinsurance is required by applicable law or regulation of that jurisdiction;

(b) May be allowed in the discretion of the director when the reinsurance is ceded to an assuming insurer not meeting the requirements of subdivision (1), (2), (3) or (4) of this subsection, but only as to the insurance of risks located in a foreign country where the reinsurance is required by applicable law or regulation of that country;

(6) If the assuming insurer is not licensed or accredited to transact insurance or reinsurance in this state, the credit permitted by subdivisions (3) and (4) of this subsection shall not be allowed unless the assuming insurer agrees in the reinsurance agreements:

(a) That in the event of the failure of the assuming insurer to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer shall submit to the jurisdiction of the courts of this state, will comply with all requirements necessary to give such courts jurisdiction, and will abide by the final decisions of such courts or of any appellate courts in this state in the event of an appeal; and

(b) To designate the director or a designated attorney as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the ceding company. This paragraph is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes, if this obligation is created in the agreement and the jurisdiction and situs of the arbitration is, with respect to any receivership of the ceding company, any jurisdiction of the United States;

(7) If the assuming insurer does not meet the requirements of subdivision (1), (2) or (3) of this subsection, the credit permitted by subdivision (4) of this subsection shall not be allowed unless the assuming insurer agrees in the trust agreements to the following conditions:

(a) Notwithstanding any other provisions in the trust instrument, if the trust fund is inadequate because it contains an amount less than the amount required by paragraph (e) of subdivision (4) of this subsection, or if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation or similar proceedings under the laws

of its state or country of domicile, the trustee shall comply with an order of the commissioner or director with regulatory oversight over the trust or with an order of a court of competent jurisdiction directing the trustee to transfer to the commissioner or director with regulatory oversight all of the assets of the trust fund;

(b) The assets shall be distributed by and claims shall be filed with and valued by the commissioner or director with regulatory oversight in accordance with the laws of the state in which the trust is domiciled that are applicable to the liquidation of domestic insurance companies;

(c) If the commissioner or director with regulatory oversight determines that the assets of the trust fund or any part thereof are not necessary to satisfy the claims of the United States ceding insurers of the grantor of the trust, the assets or part thereof shall be returned by the commissioner or director with regulatory oversight to the trustee for distribution in accordance with the trust agreement; and

(d) The grantor shall waive any right otherwise available to it under United States law that is inconsistent with this subsection.

2. An asset or reduction from liability for the reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of subsection 1 of this section shall be allowed in an amount not exceeding the liabilities carried by the ceding insurer. The reduction shall be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the ceding insurer, under a reinsurance contract with the assuming insurer as security for the payment of obligations thereunder, if the security is held in the United States subject to withdrawal solely by, and under the exclusive control of, the ceding insurer; or, in the case of a trust, held in a qualified United States financial institution, as defined in subdivision (2) of subsection 3 of this section. This security may be in the form of:

(1) Cash;

(2) Securities listed by the securities valuation office of the National Association of Insurance Commissioners and qualifying as admitted assets;

(3) (a) Clean, irrevocable, unconditional letters of credit, as defined in subdivision (1) of subsection 3 of this section, issued or confirmed by a qualified United States financial institution no later than December thirty-first of the year for which filing is being made, and in the possession of, or in trust for, the ceding company on or before the filing date of its annual statement.

(b) Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance or confirmation, notwithstanding the issuing or confirming institution's subsequent failure to meet applicable standards of issuer acceptability, shall continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever first occurs;

(4) Any other form of security acceptable to the director.

3. (1) For purposes of subdivision (3) of subsection 2 of this section, a "qualified United States financial institution" means an institution that:

(a) Is organized or, in the case of a United States office of a foreign banking organization, licensed under the laws of the United States or any state thereof;

(b) Is regulated, supervised and examined by federal or state authorities having regulatory authority over banks and trust companies; and

(c) Has been determined by either the director, or the securities valuation office of the National Association of Insurance Commissioners, to meet such standards of financial condition and standing as are considered necessary and appropriate to regulate the quality of financial institutions whose letters of credit will be acceptable to the director.

(2) A "qualified United States financial institution" means, for purposes of those provisions of this law specifying those institutions that are eligible to act as a fiduciary of a trust, an institution that:

(a) Is organized, or in the case of a United States branch or agency office of a foreign banking organization, licensed under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers; and

(b) Is regulated, supervised and examined by federal or state authorities having regulatory authority over banks and trust companies.

4. The director may adopt rules and regulations implementing the provisions of this section.

5. (1) The director shall disallow any credit as an asset or as a deduction from liability for any reinsurance found by him to have been arranged for the purpose principally of deception as to the ceding company's financial condition as of the date of any financial statement of the company. Without limiting the general purport of this provision, reinsurance of any substantial part of the company's outstanding risks contracted for in fact within four months prior to the date of any such financial statement and canceled in fact within four months after the date of such statement, or reinsurance under which the assuming insurer bears no substantial insurance risk or substantial risk of net loss to itself, shall prima facie be deemed to have been arranged for the purpose principally of deception within the intent of this provision.

(2) (a) The director shall also disallow as an asset or deduction from liability to any ceding insurer any credit for reinsurance unless the reinsurance is payable to the ceding company, and if it be [impaired or] insolvent to its receiver, by the assuming insurer on the basis of the liability of the ceding company under the contracts reinsured without diminution because of the insolvency of the ceding company.

(b) Such payments shall be made directly to the ceding insurer or to its domiciliary liquidator except:

a. Where the contract of insurance or reinsurance specifically provides for payment to the named insured, assignee or named beneficiary of the policy issued by the ceding insurer in the event of the insolvency of the ceding insurer; or

b. Where the assuming insurer, with the consent of it and the direct insured or insureds in an assumption reinsurance transaction subject to sections 375.1280 to 375.1295, has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

(c) Notwithstanding paragraphs (a) and (b) of this subdivision, in the event that a life and health insurance guaranty association has made the election to succeed to the rights and obligations of the insolvent insurer under the contract of reinsurance, then the reinsurer's liability to pay covered reinsured claims shall continue under the contract of reinsurance, subject to the payment to the reinsurer of the reinsurance premiums for such coverage. Payment for such reinsured claims shall only be made by the reinsurer pursuant to the direction of the guaranty association or its designated successor. Any payment made at the direction of the guaranty association or its designated successor by the reinsurer will discharge the reinsurer of all further liability to any other party for such claim payment.

(d) The reinsurance agreement may provide that the domiciliary liquidator of an insolvent ceding insurer shall give written notice to the assuming insurer of the pendency of a claim against such ceding insurer on the contract reinsured within a reasonable time after such claim is filed in the liquidation proceeding. During the pendency of such claim, any assuming insurer may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated any defenses which it deems available to the ceding insurer, or its liquidator. Such expense may be filed as a claim against the insolvent ceding insurer to the extent of a proportionate share of the benefit which may accrue to the ceding insurer solely as a result of the defense undertaken by the assuming insurer. Where two or more assuming insurers are involved in the same claim and a majority in interest elect to interpose a defense to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance agreement as though such expense had been incurred by the ceding insurer.

6. To the extent that any reinsurer of an insurance company in liquidation would have been required under any agreement pertaining to reinsurance to post letters of credit or other security prior to an order of liquidation to cover such reserves reflected upon the last financial statement filed with a regulatory authority immediately prior to receivership, such reinsurer shall be required to post letters of credit or other security to cover reserves after a company has been placed in liquidation or receivership. If a reinsurer shall fail to post letters of credit or other security as required by a reinsurance agreement or the provisions of this subsection, the director may consider disallowing as a credit or asset, in whole or in

part, any future reinsurance ceded to such reinsurer by a ceding insurance company that is incorporated under the laws of the state of Missouri.

7. The provisions of section 375.420 shall not apply to any action, suit or proceeding by a ceding insurer against an assuming insurer arising out of a contract of reinsurance effectuated in accordance with the laws of Missouri.

8. The provisions of this section shall become effective on January 1, 2003, and shall be applicable to the financial statements of a reinsurer as of December 31, 2002.

375.1198. 1. Mutual debts or mutual credits, whether arising out of one or more contracts, between the insurer and another person in connection with any action or proceeding under sections 375.1150 to 375.1246, sections 374.216 and 374.217, RSMo, and section 382.302, RSMo, shall be set off and the balance only shall be allowed or paid, except as provided in subsections 2, 3, 4, 5 and 6 of this section and section 375.1204.

2. No setoff shall be allowed in favor of any person where:

(1) The obligation of the insurer to the person would not as of the date of the filing of a petition for liquidation entitle the person to share as a claimant in the assets of the insurer; or

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

(3) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

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

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

(6) The obligations between the person and the insurer arise from reinsurance relationships resulting in business [which is both ceded to and assumed from the insurer] **where either the person or the insurer has assumed risks and obligations from the other party and then has ceded back to that party substantially the same risks and obligations.**

3. [As soon as practicable, the receiver shall provide persons who assumed business from the insurer as reinsurers with statements of account identifying debts which are currently due and payable to the insurer. Such persons may set off against such debts only mutual credits which are currently due and payable by the insurer to such persons for the period covered by the accounting statements.

4. A person who ceded business to the insurer may set off debts due the insurer against only those mutual credits which the person has paid or which have been allowed in a delinquency proceeding.

5. Notwithstanding the foregoing, a setoff of sums due on obligations in the nature of those prescribed in subdivision (6) of subsection 2 of this section shall be allowed for those debts accruing from business written under reinsurance contracts which were entered into, renewed or extended with the express written approval of the director where Missouri is the state of domicile of the insolvent insurer and when in the judgment of the director such action is deemed necessary or advisable in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer, in connection with supervision or conservation proceedings pursuant to this act or otherwise in connection with the exercise of the director's regulatory responsibilities concerning a threatened impairment or insolvency without the institution of any delinquency proceedings.

6.] The provisions of this section shall apply to all obligations incurred under contracts entered into, renewed, or extended on or after July 1, 1992, and to any existing contract with a termination date longer than one year from January 1, 1993[, and shall supersede any contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer; provided that the provisions of subdivision (6) of subsection 2 and subsections 3, 4 and 5 of this section shall not apply to insurers or reinsurers until such time that the director determines that substantially similar provisions are effective in a sufficient number of states so as not to place domestic insurers or reinsurers at a competitive disadvantage. The director shall promulgate a rule announcing any determination as is necessitated by this subsection].

375.1220. 1. The liquidator shall review all claims duly filed in the liquidation and shall make such further investigation as the liquidator shall deem necessary. The liquidator may compound, compromise or in any other manner negotiate the amount for which claims will be allowed, under the supervision of the court, except where the liquidator is required by law to accept claims as settled by any person or organization. Unresolved disputes shall be determined pursuant to section 375.1214. No claim under a policy of insurance shall be allowed for any amount in excess of the applicable policy limits or without regard to policy deductibles.

2. If the fixing or liquidation of any claim or claims would unduly delay the administration of the liquidation or if the administrative expense of processing and adjudication of a claim or group of claims of a similar type would be unduly excessive when compared with the moneys which are estimated to be available for distribution with respect to such claim or group of claims, the determination and allowance of such claim or claims may be made by an estimate. Any such estimate shall be based upon an actuarial evaluation made with reasonable actuarial certainty or upon another accepted method of valuing claims with reasonable certainty.

3. The estimation of contingent liabilities permitted by subsection 2 of this section or any other section of this chapter may be used for the purpose of fixing a creditor's claim

in the estate, and for determining the percentage of partial or final dividend payments to be paid to creditors with reported allowed claims. However, nothing in subsection 2 of this section or any other section in this chapter shall be construed as authorizing the receiver, or any other entity, to compel payment from a reinsurer on the basis of estimated incurred but not reported losses and, except with respect to claims made pursuant to section 375.1212, outstanding reserves. Nothing in this subsection shall be construed to impair any obligation arising pursuant to any insurance agreement. **Expert testimony concerning estimates of incurred but not reported losses may be received in evidence in any tribunal whether offered by the receiver or by the reinsurer, if such testimony is otherwise admissible pursuant to section 490.065, RSMo.**

4. Notwithstanding the provisions of this section or any other section of this chapter to the contrary, the liquidator may negotiate a voluntary commutation and release of all obligations arising from reinsurance contracts or other agreements.

5. The provisions of subsection 3 of this section shall not apply to and have no force and effect regarding any formal delinquency proceeding in which, prior to August 28, 1999, the court in which such proceeding was or is pending issued any order or decree construing or applying the provisions of this section.

[6. Subsections 3 and 5 of this section shall terminate on December 31, 2005.]

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