CHAPTER 27

Insurers’ Rehabilitation and Liquidation Act

CROSS REFERENCES

Application of this chapter to Special Purpose Reinsurance Vehicles, see Section 38‑14‑150.

ARTICLE 1

General Provisions

**SECTION 38‑27‑10.** Short title.

 This chapter may be cited as the “Insurers Rehabilitation and Liquidation Act”.

HISTORY: Former 1976 Code Section 38‑27‑10 [1962 Code Section 37‑1302; 1967 (55) 273] recodified as Section 38‑1‑20 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1810 [En, 1982 Act No. 384, Section 1] recodified as Section 38‑27‑10 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 16; 1993 Act No. 181, Section 609.

CROSS REFERENCES

Administrative supervision of insurers, see Section 38‑26‑10 et seq.

Applicability to captive insurance companies, see Section 38‑90‑180.

Authority of Commissioner to proceed as provided in this Chapter whenever there appears to be a violation of Chapter 21 which threatens the solvency of the insurer, see Section 38‑21‑350.

Authority of director to initiate proceedings under this chapter if conditions giving rise to administrative supervision of insurer still exist at the end of the supervision period, see Section 38‑26‑40.

**SECTION 38‑27‑20.** Construction.

 This chapter does not limit the powers granted the director or his designee by other provisions of law and must be liberally construed to effect the purpose stated in Section 38‑27‑30.

HISTORY: Former 1976 Code Section 38‑27‑20 derived from [1962 Code Section 37‑1301; 1967 (55) 273] recodified as Section 38‑39‑10 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1810 [En, 1982 Act No. 384, Section 1] recodified as Section 38‑27‑20 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609.

Library References

Insurance 1350.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 245 to 247, 256 to 258, 2356.

**SECTION 38‑27‑30.** Purpose.

 The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers, through:

 (1) Early detection of any potentially dangerous condition in an insurer and prompt application of appropriate corrective measures.

 (2) Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry.

 (3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation.

 (4) Equitable apportionment of any unavoidable loss.

 (5) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process and by extending the scope of personal jurisdiction over debtors of the insurer outside this State.

 (6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

HISTORY: Former 1976 Code Section 38‑27‑30 [1962 Code Section 37‑1303; 1967 (55) 273; 1971 (57) 709; 1985 Act No. 4, Section 1] recodified as Section 38‑39‑20 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1810 [1982 Act No. 384, Section 1] recodified as Section 38‑27‑30 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609.

Library References

Insurance 1350.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 245 to 247, 256 to 258, 2356.

**SECTION 38‑27‑40.** Persons covered.

 The proceedings authorized by this chapter may be applied to:

 (1) insurers who are doing, or have done, an insurance business in this State and against whom claims arising from that business may exist now or in the future;

 (2) insurers who purport to do an insurance business in this State;

 (3) insurers who have insureds resident in this State;

 (4) other persons organized or in the process of organizing with the intent to do an insurance business in this State;

 (5) nonprofit service plans, fraternal benefit societies, and beneficial societies; however, this chapter does not apply to associations as defined in Section 38‑38‑730(A)(8);

 (6) title insurance companies;

 (7) surety companies subject to Chapter 15, Title 38;

 (8) multiple employer self‑insured health plans defined in Chapter 41 of Title 38;

 (9) prepaid health care delivery plans.

HISTORY: Former 1976 Code Section 38‑27‑40 [1962 Code Section 37‑1304; 1967 (55) 273; 1971 (57) 709; 1985 Act No. 4, Section 2] recodified as Section 38‑39‑30 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1820; 1982 Act No. 384, Section 2] recodified as Section 38‑27‑40 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 17; 1993 Act No. 181, Section 609; 2008 Act No. 193, Section 1, eff April 2, 2008.

CROSS REFERENCES

Persons included under this section considered to be insurers, see Section 38‑26‑20.

Library References

Insurance 1350.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 245 to 247, 256 to 258, 2356.

NOTES OF DECISIONS

In general 1

1. In general

Deposited securities, being assets of an insolvent foreign corporation, may be retained by the Commissioner for administration, even though a statutory liquidator has been appointed in the state of incorporation; and such retention does not violate the full faith and credit clause of the Federal Constitution (decided under former law). Clark v. Preferred Acc. Ins. Co. of N. Y. (S.C. 1957) 231 S.C. 167, 97 S.E.2d 498.

**SECTION 38‑27‑50.** Definitions.

 For purposes of this chapter:

 (1) “Ancillary state” means any state other than a domiciliary state.

 (2) “Creditor” is a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed, or contingent.

 (3)(a) “Delinquency proceeding” means a proceeding instituted against an insurer to liquidate, rehabilitate, reorganize, or conserve the insurer and a summary proceeding under Section 38‑27‑220.

 (b) “Formal delinquency proceeding” means a liquidation or rehabilitation proceeding.

 (4) “Doing business” includes any of the following acts, whether effected by mail or otherwise:

 (a) the issuance or delivery of contracts of insurance to persons resident in this State;

 (b) the solicitation of applications for such contracts or other negotiations preliminary to the execution of such contracts;

 (c) the collection of premiums, membership fees, assessments, or other consideration for such contracts;

 (d) the transaction of matters subsequent to execution of such contracts and arising out of them; or

 (e) operating under a license or certificate of authority, as an insurer, issued by the director or his designee.

 (5) “Domiciliary state” means the state in which an insurer is incorporated or organized, or, in the case of an alien insurer, its state of entry.

 (6) “Fair consideration” is given for property or obligation:

 (a) when in exchange for the property or obligation, as a fair equivalent therefor and in good faith, property is conveyed or services are rendered or an obligation is incurred or an antecedent debt is satisfied; or

 (b) when the property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared to the value of the property or obligation obtained.

 (7) “Federal home loan bank” or “FHLB” means a federal home loan bank established pursuant to the Federal Home Loan Bank Act, 12 U.S.C. Section 1421, et seq.

 (8) “Foreign country” means any other jurisdiction not in any state.

 (9) “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 classes of persons. As to specifically encumbered property, “general assets” 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 on deposit for the security or benefit of all policyholders or all policyholders and creditors, in more than a single state, are treated as general assets.

 (10) “Guaranty association” means the South Carolina Property and Casualty Insurance Guaranty Association, the South Carolina Life and Accident and Health Insurance Guaranty Association, and any other similar entity created by the legislature of this State for the payment of claims of insolvent insurers. “Foreign guaranty association” means any similar entity created by the legislature of any other state.

 (11) “Insolvency” or “insolvent” means:

 (a) For an insurer issuing only assessable fire insurance policies:

 (i) the inability to pay any obligation within thirty days after it becomes payable; or

 (ii) if an assessment is made within thirty days after that date, the inability to pay the obligation thirty days following the date specified in the first assessment notice issued after the date of loss.

 (b) For any other insurer, that it is unable to pay its obligations when they are due, or when its admitted assets do not exceed its liabilities plus the greater of:

 (i) any capital and surplus required by law for its organization; or

 (ii) the total par or stated value of its authorized and issued capital stock.

 (c) For purposes of this item, “liabilities” includes, but is not limited to, reserves required by statute, regulations, or specific requirements imposed by the director or his designee upon a subject company at the time of admission or subsequent thereto.

 (12) “Insurer” means any person who has done, purports to do, is doing, or is licensed to do an insurance business and is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization, supervision, or conservation by, the commissioner of insurance, or similar entity, of any state. For purposes of this chapter, any other persons included under Section 38‑27‑40 are considered insurers.

 (13) “Insurer‑member” means an insurer who is a member of a federal home loan bank.

 (14) “Person” means natural persons, corporations, partnerships, trusts, associations, societies, orders, special purpose reinsurance vehicles, or any other organizations or entities.

 (15) “Preferred claim” means any claim with respect to which the terms of this chapter accord priority of payment from the general assets of the insurer.

 (16) “Receiver” means receiver, liquidator, rehabilitator, or conservator as the context requires.

 (17) “Reciprocal state” means any state other than this State in which in substance and effect subsection (a) of Section 38‑27‑370, Section 38‑27‑930, Section 38‑27‑940, and Sections 38‑27‑960 through 38‑27‑980 are in force, and in which provisions are in force requiring that the director, his designee, or equivalent official be the receiver of a delinquent insurer, and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

 (18) “Secured claim” means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which have become liens upon specific assets by reason of judicial process.

 (19) “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 claim secured by general assets.

 (20) “State” means any state, district, or territory of the United States and the Panama Canal Zone.

 (21) “Transfer” includes the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon 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.

HISTORY: Former 1976 Code Section 38‑27‑50 [1962 Code Section 37‑1305; 1967 (55) 273] recodified as Section 38‑39‑40 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1830 [En, 1982 Act No. 384, Section 3] recodified as Section 38‑27‑50 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 18; 1993 Act No. 181, Section 609; 2002 Act No. 228, Section 5, eff May 1, 2002; 2016 Act No. 190 (S.693), Section 2, eff May 26, 2016.

Effect of Amendment

2016 Act No. 190, Section 2, in (3), added designators (a) and (b); added (7) and (13), definitions for “federal home loan bank” and “insurer‑member”; and redesignated the paragraphs accordingly.

CROSS REFERENCES

Deficiency in capital or surplus as requiring initiation of delinquency proceeding, see Section 38‑9‑30.

Level of surplus required to subject licensed mutual insurer to delinquency proceedings, see Section 38‑9‑20.

Level of surplus required to subject stock insurer to delinquency proceedings, see Section 38‑9‑10.

Library References

Insurance 1350 to 1421.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 212, 226 to 258, 2356, 2360.

NOTES OF DECISIONS

In general 1

1. In general

South Carolina and Tennessee are reciprocal states under Uniform Insurer’s Liquidation Act since Tennessee has equivalent statutory provisions as provided in South Carolina statute (decided under former Section 38‑5‑1830). Smalls v. Weed (S.C.App. 1987) 293 S.C. 364, 360 S.E.2d 531.

**SECTION 38‑27‑60.** Jurisdiction and venue.

 (a) Except as provided in this subsection, no delinquency proceeding may be commenced under this chapter by anyone other than the director or his designee and no court has jurisdiction to entertain, hear, or determine any proceeding commenced by any other person. However, the court may consider the application for receivership of a person other than the director or his designee if the applicant for receivership has proceeded as follows:

 (1) The applicant for receivership, before presenting his complaint or petition to the court for action thereon, presents a copy thereof to the department for action thereon, as hereinafter set forth, and gives reasonable notice to the insurance company to be affected that a copy has been lodged with the department.

 (2) The insurance company affected thereby has ten days after the service of the notice within which to lodge with the department a copy of the answer which it proposes to file, and thereupon the director or his designee shall proceed to investigate and within a reasonable time determine the merits of the application for receivership and shall fix a time for the hearing of the investigation of the matters involved in the petition or complaint.

 (3) The director or his designee, after completing the investigation, shall recommend to the court that the receiver be or not be appointed. The court shall then consider the application for a receiver.

 (b) No court of this State has jurisdiction to entertain, hear, or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of an insurer or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to the proceedings other than in accordance with this chapter.

 (c) Whenever the director or his designee finds that any of the grounds for rehabilitation or liquidation of a domestic or alien insurance company as set forth in Sections 38‑27‑310 and 38‑27‑360 exists, he may apply to the circuit court for an order directing the company to show cause by a designated date why a receiver should not be appointed for the company or why an order should not be entered authorizing the department to proceed with the delinquency proceedings of the company or to take any other appropriate steps authorized in this chapter. The application and order may include any other relief the nature of the case and the interests of the policyholders, creditors, stockholders, and members of the company and of the public may require. A copy of the application and the order to show cause must be served upon the company by registered or certified mail and constitutes legal process in lieu of any summons or process otherwise provided by law.

 (d) In addition to other grounds for jurisdiction provided by the law of this State, a court of this State having jurisdiction of the subject matter in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this State has jurisdiction over a person served with process by registered or certified mail:

 (1) if the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation;

 (2) if the person served is a reinsurer who has at any time written a policy of reinsurance for an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced, or is an agent or broker of or for the reinsurer, in any action on or incident to the reinsurance contract; or

 (3) if the person served is or has been an officer, manager, trustee, organizer, promoter, or person in a position of comparable authority or influence in an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced, in any action resulting from such a relationship with the insurer.

 (e) If the court on motion of any party finds that any action should as a matter of substantial justice be tried in a forum outside this State, the court may enter an appropriate order to stay further proceedings on the action in this State.

 (f) All actions herein authorized shall be brought in the Court of Common Pleas for Richland County.

HISTORY: Former 1976 Code Section 38‑27‑60 [1962 Code Section 37‑1306; 1967 (55) 273] recodified as Section 38‑39‑50 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1840 [En, 1982 Act No. 384, Section 4] recodified as Section 38‑27‑60 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609.

Library References

Insurance 1384.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 245 to 248.

NOTES OF DECISIONS

In general 1

1. In general

Action by insured against insurance rehabilitator in South Carolina was not barred by Section 38‑27‑60, which was inapplicable because case was not action regarding or relating to institution of rehabilitation proceedings, but was instead action against insurance company which happened to be in rehabilitation (decided under former Section 38‑5‑1840). Smalls v. Weed (S.C.App. 1987) 293 S.C. 364, 360 S.E.2d 531. Insurance 1384

**SECTION 38‑27‑70.** Injunctions and orders.

 (A)(1) A receiver appointed in a proceeding under this chapter may at any time apply for, and a court of general jurisdiction may grant, restraining orders, preliminary and permanent injunctions, and other orders considered necessary and proper to prevent:

 (a) the transaction of further business;

 (b) the transfer of property;

 (c) interference with the receiver or with a proceeding under this chapter;

 (d) waste of the insurer’s assets;

 (e) dissipation and transfer of bank accounts;

 (f) the institution or further prosecution of any actions or proceedings;

 (g) the obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets, or its policyholders;

 (h) the levying of execution against the insurer, its assets, or its policyholders;

 (i) the making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of the insurer;

 (j) the withholding from the receiver of books, accounts, documents, or other records relating to the business of the insurer; or

 (k) any other threatened or contemplated action that might lessen the value of the insurer’s assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of any proceeding under this chapter.

 (2) The receiver may apply to any court outside of the State for the relief described in this subsection.

 (B) After the seventh day following the commencement of a delinquency proceeding involving an insurer‑member domiciled in this State, the insurer‑member’s FHLB must not be stayed or prohibited from exercising its rights regarding collateral pledged by that insurer‑member. The provisions of this subsection apply notwithstanding another provision of this chapter.

HISTORY: Former 1976 Code Section 38‑27‑70 [1962 Code Section 37‑1307; 1967 (55) 273] recodified as Section 38‑39‑60 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1850 [En, 1982 Act No. 384, Section 5] recodified as Section 38‑27‑70 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609; 2016 Act No. 190 (S.693), Section 3, eff May 26, 2016.

Effect of Amendment

2016 Act No. 190, Section 3, redesignated former (a) as (A)(1); redesignated former (a)(1) through (a)(11) as (a) through (k); redesignated former (b) as (a)(2); added (B); and made other nonsubstantive changes.

Library References

Insurance 1354, 1392.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 193 to 194, 198 to 205, 249 to 250, 252.

**SECTION 38‑27‑80.** Cooperation of officers, owners, and employees.

 (a) Any officer, manager, director, trustee, owner, employee, or agent of any insurer or any other person with authority over or in charge of any segment of the insurer’s affairs must cooperate with the director or his designee in any proceeding under this chapter or any investigation preliminary to the proceeding. The term “person” as used in this section includes any person who exercises control directly or indirectly over activities of the insurer through any holding company or other affiliate of the insurer. “To cooperate” includes, but is not limited to:

 (1) To reply promptly in writing to any inquiry from the director or his designee requesting a reply.

 (2) To make available to the director or his designee any books, accounts, documents, or other records or information or property of or pertaining to the insurer and in his possession, custody, or control.

 (b) No person may obstruct or interfere with the director or his designee in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto.

 (c) This section may not be construed to abridge otherwise existing legal rights, including the right to resist a petition for liquidation or other delinquency proceedings, or other orders.

 (d) Any person included within subsection (a) who fails to cooperate with the director or his designee, or any person who obstructs or interferes with the director or his designee in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto, or who violates any valid order the director or his designee issues under this chapter may:

 (1) upon conviction, be sentenced to pay a fine not exceeding ten thousand dollars or to undergo imprisonment for a term of not more than one year, or both, or

 (2) after a hearing, be subject to the imposition by the director or his designee of a civil penalty not to exceed ten thousand dollars and be subject further to the revocation or suspension of any insurance licenses issued by the director or his designee.

HISTORY: Former 1976 Code Section 38‑27‑80 [1962 Code Section 37‑1308; 1967 (55) 273] recodified as Section 38‑39‑70 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1860 [1982 Act No. 384, Section 6] recodified as Section 38‑27‑80 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609.

Library References

Insurance 1378.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 196, 249.

**SECTION 38‑27‑90.** Bonds.

 In any proceeding under this chapter, the director and his designee(s) are responsible on their official bonds for the faithful performance of their duties. If the court considers it desirable for the protection of the assets, it may at any time require an additional bond from the director or his designee(s). These bonds must be paid for out of the assets of the insurer as a cost of administration.

HISTORY: Former 1976 Code Section 38‑27‑90 [1962 Code Section 37‑1309; 1967 (55) 273; 1971 (57) 709, 937; 1980 Act No. 455; 1982 Act No. 378; 1983 Act No. 34; 1985 Act No. 37] recodified as Section 38‑39‑80 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑1870 [1982 Act No. 384, Section 7] recodified as Section 38‑27‑90 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 609.

Library References

Insurance 1400.

Westlaw Topic No. 217.

**SECTION 38‑27‑100.** Proceedings initiated prior to effective date of Insurers Supervision, Rehabilitation, and Liquidation Act.

 An insurance proceeding under this chapter begun before the effective date of the Insurers Rehabilitation and Liquidation Act is deemed to have begun after that date for the purpose of conducting the proceeding. However, in the discretion of the director or his designee, the proceeding may be continued, in whole or in part, as it would have been if this act was not in effect.

HISTORY: 1991 Act No. 13, Section 4; 1993 Act No. 181, Section 609.

**SECTION 38‑27‑110.** Disabilities of delinquent insurer pending repayment to guaranty association.

 Until payments of or on account of an insurer’s contractual obligations by a guaranty association, including expenses and interest, are repaid to the guaranty association or a plan of repayment by the insurer is approved by the guaranty association, no insurer that is subject to a delinquency proceeding, whether formal or informal, administrative or judicial, may:

 (1) be released from the proceeding unless it is converted into a judicial rehabilitation or liquidation proceeding;

 (2) be permitted to solicit or accept new business or request or accept the restoration of a suspended or revoked license or certificate of authority;

 (3) be returned to the control of its shareholders or private management; or

 (4) have its assets returned to the control of its shareholders or private management.

HISTORY: 1991 Act No. 13, Section 4; 1993 Act No. 181, Section 609.

Library References

Insurance 1378.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 196, 249.

ARTICLE 3

Summary Provisions

**SECTION 38‑27‑220.** Court’s seizure order.

 (a) The director or his designee may file in the circuit court a petition alleging, with respect to a domestic insurer:

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

 (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 director or his designee.

 (b) Upon a filing under subsection (a), the court may issue forthwith, ex parte and without a hearing, the requested order which shall direct the department to take possession and control of all or a part of the property, books, accounts, documents, and other records of an insurer and of the premises occupied by it for transaction of its business and, until further order of the court, shall enjoin the insurer and its officers, managers, agents, and employees from disposition of its property and from transaction of its business except with the written consent of the director or his designee.

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

 (d) Entry of a seizure order under this section does 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. A hearing under this subsection may be held privately in chambers and it must be so held if the insurer proceeded against so requests.

 (f) If, at any time after the issuance of a seizure 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 does not stay the effect of any order previously issued by the court.

HISTORY: Former 1976 Code Section 38‑5‑1920 [1982 Act No. 384, Section 10] recodified as Section 38‑27‑220 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 610.

CROSS REFERENCES

Provision granting Commissioner sole discretion to institute proceedings under this section, see Section 38‑27‑950.

Summary proceeding under this section as within definition of delinquency proceeding, see Section 38‑27‑50.

Library References

Insurance 1383.

Westlaw Topic No. 217.

**SECTION 38‑27‑230.** Confidentiality of hearings.

 In proceedings and judicial reviews under Section 38‑27‑220, records of the insurer, other documents, insurance department files, and court records and papers, so far as they pertain to or are a part of the record of the proceedings, are and must remain confidential except as is necessary to obtain compliance, unless the circuit court, after hearing arguments from the parties in chambers, orders otherwise, or unless the insurer requests that the matter be made public. Until a court order, papers filed with the clerk of the circuit court must be held by him in a confidential file.

HISTORY: Former 1976 Code Section 38‑5‑1930 [1982 Act No. 384, Section 11] recodified as Section 38‑27‑230 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 19; 1993 Act No. 181, Section 610.

CROSS REFERENCES

Provision granting Commissioner sole discretion to institute proceedings under this section, see Section 38‑27‑950.

Library References

Insurance 1389.

Westlaw Topic No. 217.

C.J.S. Insurance Section 2356.

ARTICLE 5

Formal Proceedings

**SECTION 38‑27‑310.** Grounds for rehabilitation.

 The director or his designee may apply by petition to the circuit court for an order authorizing him to rehabilitate a domestic insurer or an alien insurer domiciled in this State on any one or more of the following grounds:

 (1) The insurer is in a condition in which the further transaction of business would be hazardous, financially, to its policyholders, creditors, or the public.

 (2) There is reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer’s assets, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to the insurer that if established would endanger assets in an amount threatening the solvency of the insurer.

 (3) The insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person, if the person has been found after notice and hearing by the director or his designee to be dishonest or untrustworthy in a way affecting the insurer’s business.

 (4) Control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in a person or persons found after notice and hearing to be untrustworthy.

 (5) Any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, director or trustee, employee, or other person, has refused to be examined under oath by the director or his designee concerning its affairs, whether in this State or elsewhere, and, after reasonable notice of the fact, the insurer has failed promptly and effectively to terminate the employment and status of the person and all his influence on management.

 (6) After demand by the director or his designee under Section 38‑13‑20 or 38‑13‑120 or under this chapter, the insurer has failed to make available promptly for examination any of its own property, books, accounts, documents, or other records, or those of any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer.

 (7) Without first obtaining the written consent of the director or his designee, the insurer 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, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

 (8) The insurer or its property has been or is the subject of an application for the appointment of a receiver, trustee, custodian, conservator, or sequestrator or similar fiduciary of the insurer or its property otherwise than as authorized under the insurance laws of this State and the appointment has been made or is imminent and the appointment might oust the courts of this State of jurisdiction or might prejudice orderly delinquency proceedings under this chapter.

 (9) Within the previous three years the insurer wilfully has violated its charter, articles of incorporation, or bylaws, an insurance law of this State, or an order of the director or his designee.

 (10) The insurer has failed to pay within sixty days after due date any obligation to any state or any subdivision thereof or any judgment entered in any state, if the court in which the judgment was entered had jurisdiction over the subject matter, except that the nonpayment may not be a ground until sixty days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the director or his designee or in the courts, or the insurer has systematically attempted to compromise or renegotiate previously agreed settlements with its creditors on the ground that it is financially unable to pay its obligations in full.

 (11) The insurer has failed to file its annual report or other financial report required by statute within the time allowed by law and, after written demand by the director or his designee, has failed to give an adequate explanation immediately.

 (12) The board of directors or the holders of a majority of the shares entitled to vote request or consent to rehabilitation under this chapter.

HISTORY: Former 1976 Code Section 38‑5‑2010 [1982 Act No. 384, Section 12] recodified as Section 38‑27‑310 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 20; 1993 Act No. 181, Section 611.

CROSS REFERENCES

Applicability of this section to the grounds on which the Commissioner may apply to the court for an order appointing him conservator over an alien insurer, see Section 38‑27‑910.

Applicability of this section to the grounds on which the Commissioner may petition for an order directing him to liquidate the assets of a foreign or alien insurer, see Section 38‑27‑920.

Authority of Commissioner to apply to court for appointment of a receiver for insurance company whenever any grounds for rehabilitation or liquidation as set forth in this section exist, see Section 38‑27‑60.

Commissioner’s authority to apply for an order to rehabilitate, liquidate, or conserve a health maintenance organization upon grounds stated in this section, see Section 38‑33‑190.

Library References

Insurance 1357.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 195, 249, 2356.

**SECTION 38‑27‑320.** Rehabilitation orders.

 (a) An order to rehabilitate the business of a domestic insurer or an alien insurer domiciled in this State shall appoint the director, and his successors in office, or his designee the rehabilitator and shall direct the rehabilitator to take possession immediately of the assets of the insurer and to administer them under the general supervision of the court. The filing or recording of the order with the clerk of court or register of deeds of the county in which the principal business of the company is conducted or the county in which its principal office or place of business is located imparts the same notice which a deed, bill of sale, or other evidence of title duly filed or recorded with that office would have imparted. The order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator.

 (b) Any order issued under this section shall require accounting to the court by the rehabilitator. Accountings must be at intervals as the court specifies in its order.

 (c) Entry of an order of rehabilitation does not constitute an anticipatory breach of any contracts of the insurer.

HISTORY: Former 1976 Code Section 38‑5‑2020 [1982 Act No. 384, Section 13] recodified as Section 38‑27‑320 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 612; 1997 Act No. 34, Section 1.

CROSS REFERENCES

Upon entry of order for rehabilitation of controlled insurer, receiver appointed under order may maintain civil action for benefit of controlled insurer if receiver believes law or regulation has not been complied causing loss or damage to controlled insure, see Section 38‑21‑95.

Library References

Insurance 1394.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 249, 252.

**SECTION 38‑27‑330.** Powers and duties of rehabilitator.

 (a) The director may appoint one or more special deputies who have all the powers and responsibilities of the rehabilitator granted under this section to assist the director or his designee as rehabilitator, and the director may employ any counsel, clerks, and assistants considered necessary. The compensation of the special deputy, counsel, clerks, and assistants and all expenses of taking possession of the insurer and of conducting the proceedings must be fixed by the director with the court’s approval and must be paid out of the funds or assets of the insurer. The persons appointed under this section shall serve at the director’s pleasure. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the director may advance the costs so incurred out of any appropriation for the maintenance of the insurance department. Any amounts so advanced for expenses of administration must be repaid to the director for the use of the insurance department out of the first available monies of the insurer.

 (b) The rehabilitator may take any action he considers necessary or appropriate to reform and revitalize the insurer. He has all the powers of the directors, officers, and managers, whose authority is suspended, except as they are redelegated by the rehabilitator. He has full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer.

 (c) If it appears to the rehabilitator that there has been criminal or tortious conduct or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agent, broker, employee, or other person, he may pursue all appropriate legal remedies on behalf of the insurer.

 (d) If the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, he shall prepare a plan to effect the changes. Upon application of the rehabilitator for approval of the plan, and after any notice and hearings the court may prescribe, the court may either approve or disapprove the proposed plan, or may modify it and approve it as modified. Any plan approved under this section must be, in the judgment of the court, fair and equitable to all parties concerned. If the plan is approved, the rehabilitator shall carry out the plan. In the case of a life insurer, the plan proposed may include the imposition of liens upon the policies of the company, if all rights of shareholders are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for the period and to the extent necessary.

 (e) The rehabilitator has the power under Sections 38‑27‑450 and 38‑27‑460 to avoid fraudulent transfers.

HISTORY: Former 1976 Code Section 38‑5‑2030 [1982 Act No. 384, Section 14] recodified as Section 38‑27‑330 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 613.

Library References

Insurance 1405.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 227 to 229, 2356.

**SECTION 38‑27‑340.** Actions by and against rehabilitator.

 (a) Any court in this State before which any action or proceeding in which the insurer is a party or is obligated to defend a party is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for ninety days and any additional time necessary for the rehabilitator to obtain proper representation and prepare for further proceedings. The rehabilitator shall take any action respecting the pending litigation he considers necessary in the interests of justice and for the protection of creditors, policyholders, and the public. The rehabilitator shall immediately consider all litigation pending outside this State and shall petition the courts having jurisdiction over that litigation for stays whenever necessary to protect the estate of the insurer.

 (b) No statute of limitations or defense of laches runs with respect to any action by or against an insurer between the filing of a petition for appointment of a rehabilitator for that insurer and the order granting or denying that petition. Any action by or against the insurer that might have been commenced when the petition was filed may be commenced for at least sixty days after the order of rehabilitation is entered or the petition is denied.

 (c) Any guaranty association or foreign guaranty association covering life or health insurance or annuities has standing to appear in any court proceeding concerning the rehabilitation of a life or health insurer if the association is or may become liable to act as a result of the rehabilitation.

HISTORY: Former 1976 Code Section 38‑5‑2040 [1982 Act No. 384, Section 15] recodified as Section 38‑27‑340 by 1987 Act No. 155, Section 1.

Library References

Insurance 1407.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 193, 236 to 237, 254.

NOTES OF DECISIONS

On general 1

1. On general

Action against insurance rehabilitator was not barred in South Carolina under provisions of former Section 38‑5‑2470, which concerns actions against liquidators, because insurance company was rehabilitator, and such actions were governed by former Section 38‑5‑2040. Smalls v. Weed (S.C.App. 1987) 293 S.C. 364, 360 S.E.2d 531.

**SECTION 38‑27‑350.** Termination of rehabilitation.

 (a) Whenever the director or his designee believes further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders, or the public or would be futile, the director or his designee may petition the circuit court for an order of liquidation. A petition under this subsection has the same effect as a petition under Section 38‑27‑360. The circuit court shall permit the directors of the insurer to take actions reasonably necessary to defend against the petition and may order payment from the estate of the insurer of costs and other expenses of defense as justice requires.

 (b) The rehabilitator may at any time petition the circuit court for an order terminating rehabilitation of an insurer. The court shall also permit the directors of the insurer to petition the court for an order terminating rehabilitation of the insurer and may order payment from the estate of the insurer of costs and other expenses of the petition as justice requires. If the circuit court finds that rehabilitation has been accomplished and that grounds for rehabilitation under Section 38‑27‑310 no longer exist, it shall order that the insurer be restored to possession of its property and the control of its business. The circuit court may also make that finding and issue that order at any time upon its own motion.

HISTORY: Former 1976 Code Section 38‑5‑2050 [1982 Act No. 384, Section 16] recodified as Section 38‑27‑350 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 614.

Library References

Insurance 1390.

Westlaw Topic No. 217.

C.J.S. Insurance Section 253.

**SECTION 38‑27‑360.** Grounds for liquidation.

 The director or his designee may petition the circuit court as provided by law for an order directing him to liquidate a domestic insurer or an alien insurer domiciled in this State on the basis:

 (1) of any ground for an order of rehabilitation as specified in Section 38‑27‑310, whether or not there has been a prior order directing the rehabilitation of the insurer;

 (2) that the insurer is insolvent; or

 (3) that the insurer is in such a condition that the further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors, or the public.

HISTORY: Former 1976 Code Section 38‑5‑2060 [1982 Act No. 384, Section 17] recodified as Section 38‑27‑360 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 615.

CROSS REFERENCES

Applicability of this section to the grounds on which the Commissioner may petition for an order directing him to liquidate the assets of a foreign or alien insurer, see Section 38‑27‑920.

Authority of Commissioner to apply to court for appointment of a receiver for insurance company whenever any grounds for rehabilitation or liquidation as set forth in this section exist, see Section 38‑27‑60.

Library References

Insurance 1357.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 195, 249, 2356.

**SECTION 38‑27‑370.** Liquidation orders.

 (A) An order to liquidate the business of a domestic insurer must appoint the director and his successors in office, or his designee, as liquidator and direct the liquidator immediately to take possession of the assets of the insurer and to administer them under the general supervision of the court. The liquidator is vested by operation of law with the title to the property, contracts, and rights of action and the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation. The filing or recording of the order with the clerk of court or the register of deeds of the county in which its principal office or place of business is located or, for real estate, with the clerk of court and the register of deeds of the county where the property is located imparts the same notice which a deed, bill of sale, or other evidence of title filed or recorded with that office would have imparted.

 (B) Upon issuance of the order, the rights and liabilities of the insurer and its creditors, policyholders, shareholders, members, and other persons interested in its estate become fixed as of the date of entry of the order of liquidation, except as provided in Sections 38‑27‑380 and 38‑27‑560.

 (C) An order to liquidate the business of an alien insurer domiciled in this State must be in the same terms and has the same legal effect as an order to liquidate a domestic insurer, except that the assets and the business in the United States are the only assets and business included.

 (D) At the time of petitioning for an order of liquidation, or after that time, the director or his designee, after making appropriate findings of an insurer’s insolvency, may petition the court for a judicial declaration of insolvency. After providing notice and hearing it considers proper the court may make the declaration.

 (E) An order issued under this section must require accounting to the court by the liquidator. Accountings must be at intervals the court specifies in its order.

 (F)(1) Within five days of the effective date of this subsection or within five days after the initiation of an appeal of an order of liquidation, which order has not been stayed, the director or his designee shall present for the court’s approval a plan for the continued performance of the defendant company’s policy claims obligations, including the duty to defend insureds under liability insurance policies during the pendency of an appeal. The plan must provide for the continued performance and payment of policy claims obligations in the normal course of events notwithstanding the grounds alleged in support of the order of liquidation including the ground of insolvency. If the defendant company’s financial condition, in the judgment of the director or his designee, does not support the full performance of policy claims obligations during the appeal pendency period, the plan may prefer the claims of certain policyholders and claimants over creditors and interested parties as well as other policyholders and claimants as the director or his designee finds to be fair and equitable considering the relative circumstances of the policyholders and claimants. The court shall examine the plan submitted by the director or his designee and if it finds the plan to be in the best interests of the parties, the court shall approve the plan. No action may lie against the director, or his deputies, designees, agents, clerks, assistants, or attorneys based on preference in an appeal pendency plan approved by the court.

 (2) The appeal pendency plan may not supersede or affect the obligations of an insurance guaranty association. An appeal pendency plan must provide for equitable adjustments to be made by the liquidator to distributions of assets to guaranty associations, if the liquidator pays claims from assets of the estate, which otherwise would be the obligations of a guaranty association but for the appeal of the order of liquidation, so that guaranty associations equally benefit on a pro rata basis from the assets of the estate. If an order of liquidation is set aside upon appeal, the company must not be released from delinquency proceedings unless funds advanced by a guaranty association, including reasonable administrative expenses relating to obligations of the company, are repaid in full, together with interest at the judgment rate of interest or unless an arrangement for repayment has been made with the consent of applicable guaranty associations.

HISTORY: Former 1976 Code Section 38‑5‑2070 [1982 Act No. 384, Section 18] recodified as Section 38‑27‑370 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 21; 1993 Act No. 181, Section 616; 1997 Act No. 34, Section 1.

CROSS REFERENCES

Commissioner’s authority to apply for an order to rehabilitate, liquidate, or conserve a health maintenance organization upon grounds stated in this section, see Section 38‑33‑190.

Definition of “reciprocal state”, see Section 38‑27‑50.

Upon entry of order for liquidation of controlled insurer, receiver appointed under order may maintain civil action for benefit of controlled insurer if receiver believes law or regulation has not been complied causing loss or damage to controlled insure, see Section 38‑21‑95.

Library References

Insurance 1396.

Westlaw Topic No. 217.

**SECTION 38‑27‑380.** Continuance of coverage.

 (a) All policies, other than life or health insurance or annuities, in effect at the time of issuance of an order of liquidation continue in force only for the lesser of:

 (1) a period of thirty days from the date of entry of the liquidation order;

 (2) the expiration of the policy coverage;

 (3) the date when the insured has replaced the insurance coverage with equivalent insurance in another insurer or otherwise terminated the policy; or

 (4) the liquidator has effected a transfer of the policy obligation pursuant to Section 38‑27‑400(a)(8).

 (b) An order of liquidation under Section 38‑27‑370 terminates coverages at the time specified in subsection (a) of this section for purposes of any other statute.

 (c) Policies of life or health insurance or annuities continue in force for the period and under the terms as provided for by any applicable guaranty association or foreign guaranty association.

 (d) Policies of life or health insurance or annuities or any period or coverage of the policies not covered by a guaranty association or foreign guaranty association terminates under subsections (a) and (b) of this section.

HISTORY: Former 1976 Code Section 38‑5‑2080 [1982 Act No. 384, Section 19] recodified as Section 38‑27‑380 by 1987 Act No. 155, Section 1.

Library References

Insurance 1377.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 197, 200 to 203.

**SECTION 38‑27‑390.** Dissolution of insurer.

 The director or his designee may petition for an order dissolving the corporate existence of a domestic insurer or the United States branch of an alien insurer domiciled in this State at the time he applies for a liquidation order. The court as provided by law shall order dissolution of the corporation upon petition by the director or his designee upon or after the granting of a liquidation order. If the dissolution has not previously been ordered, it must be effected by operation of law upon the discharge of the liquidator if the insurer is insolvent but may be ordered by the court upon the discharge of the liquidator if the insurer is under a liquidation order for some other reason.

HISTORY: Former 1976 Code Section 38‑5‑2090 [1982 Act No. 384, Section 20] recodified as Section 38‑27‑390 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 617.

Library References

Insurance 1162.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 194 to 195, 197 to 204.

**SECTION 38‑27‑400.** Powers of liquidator.

 (a) The liquidator has the power:

 (1) To appoint a special deputy to act for him under this chapter and to determine the special deputy’s reasonable compensation. The special deputy has all powers of the liquidator granted by this section. The special deputy serves at the pleasure of the liquidator.

 (2) To employ employees and agents, legal counsel, actuaries, accountants, appraisers, consultants, and other personnel he considers necessary to assist in the liquidation.

 (3) To fix the reasonable compensation of employees and agents, legal counsel, actuaries, accountants, appraisers, and consultants with the court’s approval.

 (4) To pay reasonable compensation to persons appointed and to defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the director may advance the costs so incurred out of any appropriation for the maintenance of the insurance department. Any amounts so advanced for expenses of administration must be repaid to the director for the use of the insurance department out of the first available monies of the insurer.

 (5) To hold hearings, to subpoena witnesses to compel their attendance, to administer oaths, to examine any person under oath, and to compel any person to subscribe to his testimony after it has been correctly reduced to writing and, in connection therewith, to require the production of any books, papers, records, or other documents which he considers relevant to the inquiry.

 (6) To collect all debts and monies due and claims belonging to the insurer, wherever located, and, for this purpose:

 (i) To institute timely action in other jurisdictions in order to forestall garnishment and attachment proceedings against the debts.

 (ii) To do other acts necessary or expedient to collect, conserve, or protect its assets or property, including the power to sell, compound, compromise, or assign debts for purposes of collection upon terms and conditions he considers best.

 (iii) To pursue any creditor’s remedies available to enforce his claims.

 (7) To conduct public and private sales of the property of the insurer.

 (8) To use assets of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under Section 38‑27‑610.

 (9) To acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with any property of the insurer at its market value or upon terms and conditions that are fair and reasonable. He also has power to execute, acknowledge, and deliver any and all deeds, assignments, releases, and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation.

 (10) To borrow money on the security of the insurer’s assets or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

 (11) To enter into contracts necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party.

 (12) To continue to prosecute and to institute in the name of the insurer or in his own name any and all suits and other legal proceedings, in this State or elsewhere, and to abandon the prosecution of claims he considers unprofitable to pursue further. If the insurer is dissolved under Section 38‑27‑390, he has the power to apply to any court in this State or elsewhere for leave to substitute himself for the insurer as plaintiff.

 (13) To prosecute any action which may exist in behalf of the creditors, members, policyholders, or shareholders of the insurer against any officer of the insurer or any other person.

 (14) To remove any or all records and property of the insurer to the offices of the department or to any other place convenient for the purposes of efficient and orderly execution of the liquidation. Guaranty associations and foreign guaranty associations shall have such reasonable access to the records of the insurer as is necessary for them to carry out their statutory obligations.

 (15) To deposit in one or more banks in this State sums required for meeting current administration expenses and dividend distributions.

 (16) To invest all sums not currently needed, unless the court orders otherwise.

 (17) To file any necessary documents for recording in the office of any recorder of deeds or record office in this State or elsewhere where property of the insurer is located.

 (18) To assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of fraud, and the defense of usury. A waiver of any defense by the insurer after a petition in liquidation has been filed does not bind the liquidator. Whenever a guaranty association or foreign guaranty association has an obligation to defend any suit, the liquidator shall give precedence to that obligation and may defend only in the absence of a defense by the guaranty associations.

 (19) To exercise and enforce all the rights, remedies, and powers of any creditor, shareholder, policyholder, or member, including any power to avoid any transfer or lien that may be given by the general law and that is not included with Sections 38‑27‑450 through 38‑27‑470.

 (20) To intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee and to act as the receiver or trustee whenever the appointment is offered.

 (21) To enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation, or dissolution of an insurer doing business in both states.

 (22) To exercise all powers now held or hereafter conferred upon receivers by the laws of this State not inconsistent with this chapter.

 (23) To audit the books and records of agents of the insurer insofar as those records relate to the business activities of the insurer.

 (24) Notwithstanding the powers of the liquidator in subsections (a) and (b), the liquidator is not obligated to defend claims or to continue to defend claims after the entry of a liquidation order.

 (b) The enumeration, in this section, of the powers and authority of the liquidator may not be construed as a limitation upon him; nor shall it exclude in any manner his right to do other acts not herein specifically enumerated, or otherwise provided for, that may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

HISTORY: Former 1976 Code Section 38‑5‑2100 [1982 Act No. 384, Section 21] recodified as Section 38‑27‑400 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Sections 22, 23; 1993 Act No. 181, Section 618.

Library References

Insurance 1405.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 227 to 229, 2356.

**SECTION 38‑27‑410.** Notice to creditors and others.

 (a) Unless the court otherwise directs, the liquidator shall give or cause to be given notice of the liquidation order as soon as possible:

 (1) By first class mail and either by telegram or telephone to the insurance commissioner of each jurisdiction in which the insurer is doing business.

 (2) By first class mail to any guaranty association or foreign guaranty association which is or may become obligated as a result of the liquidation.

 (3) By first class mail to all insurance agents of the insurer.

 (4) By first class mail to all persons known or reasonably expected to have claims against the insurer, including all policyholders, at their last known addresses as indicated by the records of the insurer.

 (5) By publication in a newspaper of general circulation in the county in which the insurer has its principal place of business and in any other locations the liquidator considers appropriate.

 (b) Notice to potential claimants under subsection (a) requires claimants to file with the liquidator their claims together with proper proofs thereof under Section 38‑27‑550 by a date the liquidator specifies in the notice. The liquidator need not require persons claiming cash surrender values or other investment values in life insurance and annuities to file a claim. All claimants have a duty to keep the liquidator informed of any changes of address.

 (c) If notice is given in accordance with this section, the distribution of assets of the insurer under this chapter is conclusive with respect to all claimants, whether or not they received notice.

HISTORY: Former 1976 Code Section 38‑5‑2110 [1982 Act No. 384, Section 22] recodified as Section 38‑27‑410 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 619.

Library References

Insurance 1379.

Westlaw Topic No. 217.

**SECTION 38‑27‑420.** Duties of agents.

 (a) Every person who receives notice in the form prescribed in Section 38‑27‑410 that an insurer which he represents as an agent is the subject of a liquidation order shall within fifteen days of the notice give notice of the liquidation order. The notice must be sent by first class mail to the last address contained in the agent’s records to each policyholder or other person named in any policy issued through the agent by the insurer, if he has a record of the address of the policyholder or other person. A policy is considered issued through an agent if the agent has a property interest in the expiration of the policy, or if the agent has had in his possession a copy of the declarations of the policy at any time during the life of the policy, except where the ownership of the expiration of the policy has been transferred to another. The written notice shall include the name and address of the insurer, the name and address of the agent, identification of the policy impaired, and the nature of the impairment including termination of coverage, as described in Section 38‑27‑380. Notice by a general agent satisfies the notice requirement for any agents under contract to him. Each agent obligated to give notice under this section shall file a report of compliance with the liquidator.

 (b) Any agent failing to give notice or file a report of compliance as required in subsection (a) of this section is subject to the penalty provisions of Section 38‑2‑10.

 (c) The liquidator may waive the duties imposed by this section if he determines that other notice to the policyholders of the insurer under liquidation is adequate.

HISTORY: Former 1976 Code Section 38‑5‑2120 [1982 Act No. 384, Section 23] recodified as Section 38‑27‑420 by 1987 Act No. 155, Section 1; 1988 Act No. 374, Section 10.

Library References

Insurance 1361.

Westlaw Topic No. 217.

**SECTION 38‑27‑430.** Actions by and against liquidator.

 (a) Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this State, no action at law or equity may be brought against the insurer or liquidator, whether in this State or elsewhere; nor may any existing actions be maintained or further presented after issuance of the order. The courts of this State shall give full faith and credit to injunctions against the liquidator or the company or the continuation of existing actions against the liquidator or the company, when the injunctions are included in an order to liquidate an insurer issued pursuant to corresponding provisions in other states. Whenever, in the liquidator’s judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this State, he may intervene in the action. The liquidator may defend any action in which he intervenes under this section at the expense of the estate of the insurer.

 (b) The liquidator may, upon or after an order for liquidation, within two years or such time in addition to two years as applicable law may permit, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which the order is entered. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by applicable law, for taking any action, filing any claim or pleading, or doing any act, and where in the case the period had not expired at the date of the filing of the petition, the liquidator may, for the benefit of the estate, take any action or do any act, required of or permitted to the insurer, within a period of one hundred eighty days after the entry of an order for liquidation, or within a further period that is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

 (c) No statute of limitations or defense of laches runs with respect to any action against an insurer between the filing of a petition for liquidation against an insurer and the denial of the petition. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least sixty days after the petition is denied.

 (d) Any guaranty association or foreign guaranty association has standing to appear in any court proceeding concerning the liquidation of an insurer if the association is or may become liable to act as a result of the liquidation.

HISTORY: Former 1976 Code Section 38‑5‑2130 [1982 Act No. 384, Section 24] recodified as Section 38‑27‑430 by 1987 Act No. 155, Section 1.

Library References

Insurance 1407.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 193, 236 to 237, 254.

NOTES OF DECISIONS

In general 1

1. In general

So long as a plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, the trial court should move forward to determination of both matters, although, if the corporation is an insurer, no action at law or equity may be brought against the insurer or liquidator once an order of liquidation has been issued. Drury Development Corp. v. Foundation Ins. Co. (S.C. 2008) 380 S.C. 97, 668 S.E.2d 798. Insurance 1385; Pretrial Procedure 644

The trial court did not err by applying Section 38‑27‑430 to a North Carolina insurer subject to a North Carolina liquidation order where, even though the insurer was a “foreign insurer” rather than a domestic or alien insurer pursuant to Section 38‑1‑20, North Carolina has a similar statute and in its state would be a domestic insurer; thus, South Carolina must give full faith and credit to the North Carolina injunction. Williams v. Northwestern Sec. Life Ins. Co. (S.C. 1992) 307 S.C. 462, 415 S.E.2d 809.

Action against insurance rehabilitator was not barred in South Carolina under provisions of former Section 38‑5‑2470, which concerns actions against liquidators, because insurance company was rehabilitator, and such actions were governed by former Section 38‑5‑2040. Smalls v. Weed (S.C.App. 1987) 293 S.C. 364, 360 S.E.2d 531.

**SECTION 38‑27‑440.** Collection and list of assets.

 (a) As soon as practicable after the liquidation order but not later than one hundred twenty days thereafter, the liquidator shall prepare in duplicate a list of the insurer’s assets. The list must be amended or supplemented from time to time as the liquidator may determine. One copy must be filed in the office of the clerk of the circuit court and one copy must be retained for the liquidator’s files. All amendments and supplements must be similarly filed.

 (b) The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation.

 (c) A submission to the court for disbursement of assets in accordance with Section 38‑27‑530 fulfills the requirements of subsection (a) of this Section.

HISTORY: Former 1976 Code Section 38‑5‑2140 [1982 Act No. 384, Section 25] recodified as Section 38‑27‑440 by 1987 Act No. 155, Section 1.

Library References

Insurance 1365.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑450.** 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 chapter 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 chapter, 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 the transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. The court may, on due notice, order the transfer or obligation to be preserved for the benefit of the estate, and, in that event, the receiver succeeds to and may enforce the rights of the purchaser, lienor, or obligee.

 (b)(1) A transfer of property other than real property is considered made or suffered when it becomes so far perfected that no later lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee under Section 38‑27‑470.

 (2) A transfer of real property is considered 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 considered 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 is considered made immediately before the filing of the successful petition.

 (5) This subsection (b) applies 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 is considered fraudulent and may be avoided by the receiver under subsection (a) 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 transaction, unless the reinsurer gives a present fair equivalent value for the release.

 (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.

HISTORY: Former 1976 Code Section 38‑5‑2150 [1982 Act No. 384, Section 26] recodified as Section 38‑27‑450 by 1987 Act No. 155, Section 1.

Library References

Insurance 1367.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑460.** Transfers after petition.

 (a) After 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 is 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 therefor, for which amount the transferee shall have a lien on the property so transferred. The commencement of a proceeding in rehabilitation or liquidation is constructive notice upon the recording of a copy of the petition for or order of rehabilitation or liquidation with the register of deeds in 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 is not impaired by the pendency of the 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 is 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 therefor, 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 order, with the same effect as if the petition were not pending.

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

 (4) A person asserting the validity of a transfer under this section has 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 is valid against the liquidator.

 (c) Nothing in this chapter impairs the negotiability of currency or negotiable instruments.

HISTORY: Former 1976 Code Section 38‑5‑2160 [1982 Act . 384, Section 27] recodified as Section 38‑27‑460 by 1987 Act No. 155, Section 1; 1997 Act No. 34, Section 1.

Library References

Insurance 1367.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑470.** Voidable preferences and liens.

 (a)(1) 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 chapter, 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 receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, then the transfers are considered 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.

 (2) Any preference may be avoided by the liquidator if:

 (i) the insurer was insolvent at the time of the transfer;

 (ii) the transfer was made within four months before the filing of the petition;

 (iii) the creditor receiving it or to be benefited thereby or his 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

 (iv) the creditor receiving it was an officer, employee, attorney, or other person who was in fact in a position of comparable influence in the insurer to an officer, whether or not he held such position, or any shareholder holding directly or indirectly more than five percent of any class of any equity security, as defined in Section 38‑23‑20, 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.

 (3) 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, he shall have a lien upon the property to the extent of the consideration actually given by him. 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 passes to the liquidator.

 (b)(1) A transfer of property other than real property is considered 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 considered 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 considered to be perfected if there are available means by which a legal lien could be created.

 (4) A transfer not perfected prior to the filing of a petition for liquidation is considered made immediately before the filing of the successful petition.

 (5) This subsection (b) applies whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.

 (c)(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, execution, or like process, 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 could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of subsection (b) of this section, if such consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. The lien could not, however, become superior and the purchase could not create superior rights for the purpose of subsection (b) 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.

 (d) A transfer of property for or on account of a new and contemporaneous consideration which is considered under subsection (b) of this section 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 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 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.

 (e) If any lien considered voidable under paragraph (2) of subsection (a) 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 chapter which results in a liquidation order, the indemnifying transfer or lien is also considered voidable.

 (f) The property affected by any lien considered voidable under subsections (a) and (e) of this section is discharged from the lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety 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.

 (g) 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 must 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 indemnified 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 a reasonable time the court shall fix.

 (h) The liability of a 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 voided by the liquidator, or, where the property is retained under subsection (g), to the extent of the amount paid to the liquidator.

 (i) 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.

 (j) If an insurer, directly or indirectly, within four months before the filing of a successful petition for liquidation under this chapter 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 transaction may be examined by the court on its own motion or must 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. The excess may be recovered by the liquidator for the benefit of the estate; however, 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 is governed by item (iv) of paragraph (2) of subsection (a) of this section.

 (k)(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 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 reasonable cause to so believe if the transfer was made within four months before the date of filing of the successful petition for liquidation.

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

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

HISTORY: Former 1976 Code Section 38‑5‑2170 [1982 Act No. 384, Section 28] recodified as Section 38‑27‑470 by 1987 Act No. 155, Section 1.

Library References

Insurance 1367.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑475.** Federal home loan banks and insurer‑members, pledge collateral, delinquency proceedings.

 (A) Notwithstanding any other provision of this chapter to the contrary, the receiver for an insurer‑member shall not void any transfer of, or any obligation to transfer, money or any other property arising under or in connection with any federal home loan bank security agreement, or any pledge, security, collateral, or guarantee agreement, or any other similar arrangement or credit enhancement relating to a federal home loan bank security agreement made in the ordinary course of business and in compliance with the applicable federal home loan bank agreement. The receiver also may not void a redemption or repurchase of any stock or equity securities made by the federal home loan bank within four months of the commencement of the delinquency proceedings or which received prior approval of the receiver. However, a transfer is voidable if the transfer is made with the actual intent to hinder, delay, or defraud the insurer‑member, existing creditors, or future creditors.

 (B) If a federal home loan bank exercises its rights regarding collateral pledged by an insurer‑member who is subject to a delinquency proceeding, the federal home loan bank shall repurchase any outstanding capital stock that is in excess of that amount of federal home loan bank stock that the insurer‑member is required to hold as a minimum investment, to the extent the federal home loan bank in good faith determines the repurchase to be permissible under applicable laws, regulations, regulatory obligations, and the federal home loan bank’s capital plan, and consistent with the federal home loan bank’s current capital stock practices applicable to its entire membership.

 (C) Following the appointment of a receiver for an insurer‑member, the federal home loan bank shall, within ten business days after a request from the receiver is made, provide a process and establish timelines for the:

 (1) release of collateral that exceeds the lendable collateral value, as determined pursuant to the advance agreement with the federal home loan bank, required to support secured obligations remaining after any repayment of advances;

 (2) release of any of the insurer‑member’s collateral remaining in the federal home loan bank’s possession following full repayment of all outstanding secured obligations of the insurer‑member in full;

 (3) payment of fees owed by the insurer‑member and the operation of deposits and other accounts of the insurer‑member with the federal home loan bank; and

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

 (D) Upon request from the receiver for an insurer‑member, the federal home loan bank shall provide any available options that an insurer‑member may exercise to renew or restructure an advance to defer associated prepayment fees, subject to:

 (1) market conditions;

 (2) the terms of the advances outstanding to the insurer‑member;

 (3) the applicable policies of the federal home loan bank; and

 (4) the compliance of the federal home loan bank with the Federal Home Loan Bank Act, 12 U.S.C. Section 1421, et seq., and corresponding regulations.

 (E) Nothing in this section affects the rights of a receiver regarding advances to an insurer‑member in delinquency proceedings pursuant to 12 C.F.R. Section 1266.4.

 (F) The provisions of this section apply notwithstanding another provision of this chapter.

HISTORY: 2016 Act No. 190 (S.693), Section 1, eff May 26, 2016.

**SECTION 38‑27‑480.** Claims of holders of voidable rights.

 (a) No claim of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment, or encumbrance voidable under this chapter is allowed unless he 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 may not be allowed unless the money is paid or the property is delivered to the liquidator within thirty days from the date of the entering 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) by reason of the avoidance, whether voluntary or involuntary, or a preference, a lien, conveyance, transfer, assignment, or encumbrance, may be filed as an excused late filing under Section 38‑27‑540 if filed within thirty days from the date of the avoidance or within the further time allowed by the court under subsection (a).

HISTORY: Former 1976 Code Section 38‑5‑2180 [1982 Act No. 384, Section 29] recodified as Section 38‑27‑480 by 1987 Act No. 155, Section 1.

Library References

Insurance 1367, 1412.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 200 to 203, 238 to 240.

**SECTION 38‑27‑490.** Setoffs.

 (a) Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter must be set off and the balance only may be allowed or paid, except as provided in subsection (b) of this section and Section 38‑27‑520.

 (b) No setoff is allowed in favor of any person where:

 (1) the obligation of the insurer to the person would not at the date of the filing of a petition for liquidation entitle the person 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 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.

HISTORY: Former 1976 Code Section 38‑5‑2190 [1982 Act . 384, Section 30] recodified as Section 38‑27‑490 by 1987 Act No. 155, Section 1; 1997 Act No. 68, Section 10.

Library References

Insurance 1373.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 211, 244.

**SECTION 38‑27‑500.** Assessments.

 (a) As soon as practicable but not more than two years from the date of an order of liquidation under Section 38‑27‑370 of an insurer issuing assessable policies, the liquidator shall make a report to the court setting forth:

 (1) The reasonable value of the assets of the insurer.

 (2) The insurer’s probable total liabilities.

 (3) The probable aggregate amount of the assessment necessary to pay all claims of creditors and expenses in full, including expenses of administration and costs of collecting the assessment.

 (4) A recommendation as to whether or not an assessment should be made and in what amount.

 (b)(1) Upon the basis of the report provided in subsection (a), including any supplements and amendments thereto, the circuit court may levy one or more assessments against all members of the insurer who are subject to assessment.

 (2) Subject to any applicable legal limits on assessability, the aggregate assessment must be for the amount that the sum of the probable liabilities, the expenses of administration, and the estimated cost of collection of the assessment exceeds the value of existing assets, with due regard being given to assessments that cannot be collected economically.

 (c) After levy of assessment under subsection (b) the liquidator shall issue an order directing each member who has not paid the assessment pursuant to the order to show cause why the liquidator should not pursue a judgment therefor.

 (d) The liquidator shall give notice of the order to show cause by publication and by first class mail to each member liable thereunder mailed to his last known address as it appears on the insurer’s records, at least twenty days before the return day of the order to show cause.

 (e)(1) If a member does not appear and serve duly verified objections upon the liquidator by the return day of the order to show cause under subsection (c), the court shall make an order adjudging the member liable for the amount of the assessment against him, pursuant to subsection (c), together with costs, and the liquidator shall have a judgment against the member therefor.

 (2) If by the return day the member appears and serves duly verified objections upon the liquidator, the director or his designee may hear and determine the matter or may appoint a referee to hear it and make an order as the facts warrant. In the event that the director or his designee determines that the objections do not warrant relief from assessment, the member may request the court to review the matter and vacate the order to show cause.

 (f) The liquidator may enforce any order or collect any judgment under subsection (e) by any lawful means.

HISTORY: Former 1976 Code Section 38‑5‑2200 [1982 Act No. 384, Section 31] recodified as Section 38‑27‑500 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 620.

Library References

Insurance 1372.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 206 to 210, 212, 2360.

**SECTION 38‑27‑510.** Reinsurer’s liability.

 The amount recoverable by the liquidator from reinsurers may not be reduced as a result of delinquency proceedings. Payment made directly to an insured or other creditor does not diminish the reinsurer’s obligation to the insurer’s estate 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.

 The reinsurance is payable under contracts reinsured by the assuming insurer on the basis of reported claims allowed in the liquidation proceedings, subject to court approval, without diminution because of the insolvency of the ceding insurer.

 The domiciliary liquidator of an insolvent ceding insurer shall give written notice to the assuming insurer of the pendency of a claim against the ceding insurer on the contract reinsured within a reasonable time after the claim is filed in the liquidation proceeding. During the pendency of the claim, an assuming insurer may investigate the claim and interpose, at its own expense in the proceeding where the claim is to be adjudicated, any defenses which it considers available to the ceding insurer or its liquidator. This expense is chargeable, subject to court approval, against the insolvent ceding insurer as part of the expense of liquidation 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 the claim, the expense must be apportioned in accordance with the terms of the reinsurance agreement as though the expense had been incurred by the ceding insurer.

HISTORY: Former 1976 Code Section 38‑5‑2210 [1982 Act No. 384, Section 32] recodified as Section 38‑27‑510 by 1987 Act No. 155, Section 1; 1998 Act No. 416, Section 1.

Library References

Insurance 1376.

Westlaw Topic No. 217.

C.J.S. Insurance Section 251.

**SECTION 38‑27‑520.** Recovery of premiums owed.

 (a)(1) An agent, broker, premium finance company, or any other person, other than the insured, responsible for the payment of a premium is obligated to pay any unpaid collected premium held by such person at the time of the declaration of insolvency, whether earned or unearned, and any unpaid earned premium, all as shown on the records of the insurer. An agent, broker, premium finance company, or any other person shall have no obligation to pay an uncollected unpaid unearned premium to the liquidator. The liquidator has the right to recover from that person any part of an unearned premium that represents that person’s commission. Credits or setoffs or both are not allowed to an agent, broker, or premium finance company for any amounts advanced to the insurer by the agent, broker, or premium finance company on behalf of, but in the absence of a payment by, the insured.

 (2) An insured is obligated to pay any unpaid earned premium due the insurer at the time of the declaration of insolvency, as shown on the records of the insurer.

 (b) Upon satisfactory evidence of a violation of this section, the director or his designee may pursue either one or both of the following courses of action:

 (1) Suspend or revoke or refuse to renew the licenses of the offending party or parties.

 (2) Impose a penalty of not more than one thousand dollars for each and every act in violation of this section by the party or parties.

 (c) Before the director or his designee takes any action as set forth in subsection (b), he shall give written notice to the person, company, association, or exchange accused of violating the law, stating specifically the nature of the alleged violation and advising of an opportunity of hearing to be held at least ten days thereafter. After the hearing, upon failure of the accused to appear at the hearing, or upon failure to request the hearing, the director or his designee, if he finds a violation, shall impose the penalties under subsection (b) he considers advisable.

 (d) When the director or his designee takes action in any or all of the ways set out in subsection (b), the party aggrieved may appeal from the action to the Administrative Law Court as provided by law.

HISTORY: Former 1976 Code Section 38‑5‑2220 [1982 Act No. 384, Section 33] recodified as Section 38‑27‑520 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 621; 1994 Act No. 368, Section 1.

Library References

Insurance 1366.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑530.** Domiciliary liquidator’s proposal to distribute assets.

 (a) Within one hundred twenty days of a final determination of insolvency of an insurer by a court of competent jurisdiction of this State, the liquidator shall make application to the court for approval of a proposal to disburse assets out of marshaled assets, as the assets become available, to a guaranty association or foreign guaranty association having obligations because of the insolvency. If the liquidator determines that there are insufficient assets to disburse, the application required by this section is considered satisfied by a filing by the liquidator 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 the payment of claims of secured creditors, to the extent of the value of the security held, and claims falling within the priorities established in Section 38‑27‑610, Classes 1 and 2.

 (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 guaranty associations and foreign guaranty associations entitled thereto.

 (4) The securing by the liquidator from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the liquidator the 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 38‑27‑610 in accordance with such priorities. No bond is required of the associations.

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

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

 (d) The liquidator’s proposal shall, with respect to an insolvent insurer writing life or health insurance or annuities, provide for disbursements of assets to any guaranty association or any foreign guaranty association covering life or health insurance or annuities or to any other entity or organization reinsuring, assuming, or guaranteeing policies or contracts of insurance under the acts creating the associations.

 (e) Notice of the application must be given to the association and to the commissioners of insurance of each of the states. The notice is considered to have been given when deposited in the United States certified mails, 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 if the above required notice has been given and if the liquidator’s proposal complies with subsection (b)(1) and (2).

HISTORY: Former 1976 Code Section 38‑5‑2230 [1982 Act No. 384, Section 34] recodified as Section 38‑27‑530 by 1987 Act No. 155, Section 1.

Library References

Insurance 1368.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑540.** Filing of claims.

 (a) Proof of all claims must be filed with the liquidator in the form required by Section 38‑27‑550 by the last day for filing specified in the notice required under Section 38‑27‑410, except that proof of claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

 (b) The liquidator may permit a claimant making a late filing to share in distributions, whether past or future, as if he were not late, to the extent that the payment will not prejudice the orderly administration of the liquidation, under the following circumstances:

 (1) The existence of the claim was not known to the claimant and he filed his claim as promptly thereafter as reasonably possible after learning of it.

 (2) A transfer to a creditor was avoided under Sections 38‑27‑450 through 38‑27‑470, or was voluntarily surrendered under Section 38‑27‑480 and the filing satisfies the conditions of Section 38‑27‑480.

 (3) The valuation under Section 38‑27‑600, of security held by a secured creditor, shows a deficiency, which is filed within thirty days after the valuation.

 (c) The liquidator shall permit late filing claims to share in distributions, whether past or future, as if they were not late, if the claims are claims of a guaranty association or foreign guaranty association for reimbursement of covered claims paid or expenses incurred, or both, after the last day for filing where the payments were made and expenses incurred as provided by law.

 (d) The liquidator may consider any claim filed late which is not covered by subsection (b) of this section and permit it to receive distributions which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late‑filing claimant shall receive, at each distribution, the same percentage of the amount allowed on his claim as is then being paid to claimants of any lower priority. This must continue until his claim has been paid in full.

HISTORY: Former 1976 Code Section 38‑5‑2240 [1982 Act No. 384, Section 35] recodified as Section 38‑27‑540 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Applicability of this section to a claim brought in this state by a claimant residing in this state against an insurer domiciled in a reciprocal state, see Section 38‑27‑970.

Library References

Insurance 1413.

Westlaw Topic No. 217.

C.J.S. Insurance Section 241.

**SECTION 38‑27‑550.** Proof of claim.

 (a) Proof of claim consists of a statement signed by the claimant that includes all of the following that are applicable:

 (1) the particulars of the claim, including the consideration given for it;

 (2) the identity and amount of the security on the claim;

 (3) the payments made on the debt, if any;

 (4) that the sum claimed is justly owing and that there is no setoff, counterclaim, or defense to the claim;

 (5) any right of priority of payment or other specific right asserted by the claimants;

 (6) a copy of the written instrument which is the foundation of the claim;

 (7) the name and address of the claimant and the attorney who represents him, if any.

 (b) No claim need be considered or allowed if it does not contain all the information in subsection (a) which may be applicable. The liquidator may require that a prescribed form be used and may require that other information and documents be included.

 (c) At any time the liquidator may request the claimant to present information or evidence supplementary to that required under subsection (a) and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.

 (d) No judgment or order against an insured or the insurer entered after the date of filing of a successful petition for liquidation and no judgment or order against an insured or the insurer entered at any time by default or by collusion need be considered as evidence of liability or of quantum of damages. No judgment or order against an insured or the insurer entered within four months before the filing of the petition need be considered as evidence of liability or of the quantum of damages.

 (e) All claims of a guaranty association or foreign guaranty association must be in the form and shall contain the substantiation as agreed to by the association and the liquidator.

HISTORY: Former 1976 Code Section 38‑5‑2250 [1982 Act No. 384, Section 36] recodified as Section 38‑27‑550 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Applicability of this section to a claim brought in this state by a claimant residing in this state against an insurer domiciled in a reciprocal state, see Section 38‑27‑970.

Library References

Insurance 1412.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 200 to 203, 240.

**SECTION 38‑27‑560.** Special claims.

 (a) The claim of a third party which is contingent only on his first obtaining a judgment against the insured must be considered and allowed as if there were no contingency.

 (b) A claim may be allowed even if contingent, if it is filed in accordance with Section 38‑27‑540. It may be allowed and may participate in all distributions declared after it is filed to the extent that it does not prejudice the orderly administration of the liquidation.

 (c) Claims that are due except for the passage of time must be treated as absolute claims are treated, except that the claims may be discounted at the legal rate of interest.

 (d) Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to the issuance of any order of rehabilitation or liquidation under Section 38‑27‑320 or 38‑27‑370.

HISTORY: Former 1976 Code Section 38‑5‑2260 [1982 Act No. 384, Section 37] recodified as Section 38‑27‑560 by 1987 Act No. 155, Section 1.

Library References

Insurance 1415.

Westlaw Topic No. 217.

**SECTION 38‑27‑570.** Special provisions for third party and insureds’ claims.

 (a) Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator.

 (b) Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within sixty days after mailing of the notice required by Section 38‑27‑410, whichever is later, he is an unexcused late‑filer.

 (c) The liquidator shall make his recommendations to the court under Section 38‑27‑610 for the allowance of an insured’s claim under subsection (b) of this section after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action, and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured must be afforded the same notice and opportunity to be heard on all changes in the recommendations as in their initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured must be paid from the amount withheld the same percentage dividend as was paid on other claims of like property, based on the lesser of (1) the amount actually recovered from the insured by action or paid by agreement, plus the reasonable costs and expenses of defense, or (2) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld reverts to the undistributed assets of the insurer. Delay in final payment under this subsection (c) is not a reason for unreasonable delay of final distribution and discharge of the liquidator.

 (d) If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed must be reduced in the same proportion so that the total equals the policy limit. Claims by the insured must be evaluated as in subsection (c). If any insured’s claim is subsequently reduced under subsection (c), the amount thus freed must be apportioned ratably among the claims which have been reduced under this subsection (d).

 (e) No claim may be presented under this section if it is or may be covered by any guaranty association or foreign guaranty association.

HISTORY: Former 1976 Code Section 38‑5‑2270 [1982 Act No. 384, Section 38] recodified as Section 38‑27‑570 by 1987 Act No. 155, Section 1.

Library References

Insurance 1415.

Westlaw Topic No. 217.

**SECTION 38‑27‑580.** Disputed claims.

 (a) When a claim is denied in whole or in part by the liquidator, written notice of the determination must be given to the claimant or his 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 objections with the liquidator. If no filing is made, the claimant may not further object to the determination.

 (b) Whenever objections are filed with the liquidator and the liquidator does not alter his 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 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 recommendation.

HISTORY: Former 1976 Code Section 38‑5‑2280 [1982 Act No. 384, Section 39] recodified as Section 38‑27‑580 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Applicability of this section to a claim brought in this state by a claimant residing in this state against an insurer domiciled in a reciprocal state, see Section 38‑27‑970.

Library References

Insurance 1416.

Westlaw Topic No. 217.

C.J.S. Insurance Section 241.

**SECTION 38‑27‑590.** Claims of surety.

 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 is 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 discharges the undertaking. In the absence of an agreement with the creditor to the contrary, however, the other person is not entitled to any distribution 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 must be held by him in trust for the other person. The term “other person” as used in this section is not intended to apply to a guaranty association or foreign guaranty association.

HISTORY: Former 1976 Code Section 38‑5‑2290 [1982 Act No. 384, Section 40] recodified as Section 38‑27‑590 by 1987 Act No. 155, Section 1.

Library References

Insurance 1417.

Westlaw Topic No. 217.

**SECTION 38‑27‑600.** Secured creditor’s claims.

 (a) The value of any security held by a secured creditor must be determined in one of the following ways, as the court may direct:

 (1) by converting the same into money according to the terms of the agreement pursuant to which the security was delivered to the creditor; or

 (2) by agreement, arbitration, compromise, or litigation between the creditor and the liquidator.

 (b) The determination must be under the supervision and control of the court with due regard for the recommendation of the liquidator. The amount so determined must be credited upon the secured claim, and any deficiency is treated as an unsecured claim. If the claimant surrenders his security to the liquidator, the entire claim is allowed as if unsecured.

HISTORY: Former 1976 Code Section 38‑5‑2300 [1982 Act No. 384, Section 41] recodified as Section 38‑27‑600 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Right of the owner of a secured claim against an insurer to resort to the security in accordance with this section or to surrender the security and file as a general creditor, see Section 38‑27‑990.

Library References

Insurance 1418.

Westlaw Topic No. 217.

**SECTION 38‑27‑610.** Priority of distribution.

 The priority of distribution of claims from the insurer’s estate must be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class must be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses may be established within any class. The order of distribution of claims is:

 (1) Class 1. The costs and expenses of administration including, but not limited to:

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

 (b) compensation for services rendered by the receiver in the amount of five percent of the total assets of the insurer coming into the possession of the receiver;

 (c) any necessary filing fees;

 (d) the fees and mileage payable to witnesses;

 (e) compensation of the special deputies, attorneys, and other persons as appointed by the receiver for the efficient conduct of the receivership, rehabilitation, or liquidation;

 (f) the reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

 (2) Class 2. Claims under policies, including claims of federal, state, and local governments, for losses incurred, loss claims, including third party claims, and claims of a guaranty association or foreign guaranty association. Claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, must be treated as loss claims. That portion of a loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, must not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death, or as proceeds of life insurance or as gratuities. No payment by an employer to his employee may be treated as a gratuity.

 (3) Class 3. Claims under nonassessable policies for unearned premium or other premium refunds.

 (4) Class 4. Claims of the federal government not included in items (2) or (3).

 (5) Class 5. Debts due to employees for services performed to the extent that they do not exceed one thousand dollars and represent payment for services performed within one year before the filing of the petition for liquidation. Officers and directors are not entitled to the benefit of this priority. This priority is in lieu of any other similar priority authorized by law as to wages or compensation of employees.

 (6) Class 6. Claims of general creditors and claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies.

 (7) Class 7. Claims of state and local governments, except those under item (2). Claims, including those of a state or local governmental body for a penalty or forfeiture, are 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. The remainder of the claims are postponed to the class of claims under item (11).

 (8) Class 8. Claims filed late or any other claims other than claims under items (9), (10), and (11) of this section.

 (9) Class 9. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies except premium refund claims of the federal government which must be included in the class of claims under item (4).

 (10) Class 10. Payments to members of domestic mutual insurance companies are limited in accordance with law.

 (11) Class 11. The claims of shareholders or other owners.

HISTORY: Former 1976 Code Section 38‑5‑2310 [1982 Act No. 384, Section 42] recodified as Section 38‑27‑610 by 1987 Act No. 155, Section 1; 1988 Act No. 334, Section 7; 1991 Act No. 13, Section 24; 2000 Act No. 312, Section 6.

CROSS REFERENCES

Applicability of this section to a liquidator’s proposal to distribute assets of insurer, see Section 38‑27‑530.

Applicability of this section to the claims of nonresidents against insurers domiciled within the state, see Section 38‑27‑960.

Disposition of funds withheld under Section 38‑27‑560 in accordance with this section unless the Commissioner petitions the court to reopen the liquidation under Section 38‑27‑660, see Section 38‑27‑640.

Power of liquidator to transfer policy obligations of insurer under liquidation order if transfer can be arranged without prejudice to applicable priorities under this section, see Section 38‑27‑400.

Provision that no interest be paid on unclaimed funds deposited by the liquidator with the State Treasurer except in accordance with this section, see Section 38‑27‑640.

Requirement that claims filed in an ancillary receivership be placed in a class of claims under this section if the ancillary receiver fails to transfer to the domiciliary liquidator in this state certain assets, see Section 38‑27‑1000.

Requirement that liquidator make recommendations to court under this section for the allowance of an insured’s claim, see Section 38‑27‑570.

Library References

Insurance 1414.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 242 to 243.

**SECTION 38‑27‑620.** Liquidator’s recommendations to court.

 (a) The liquidator shall review all claims duly filed in the liquidation and shall make any further investigation he considers necessary. He may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court except where the liquidator is required by law to accept claims as settled by any person or organization, including any guaranty association or foreign guaranty association. Unresolved disputes are determined under Section 38‑27‑580. As soon as practicable, he shall present to the court a report of the claims against the insurer with his recommendations. The report shall include the name and address of each claimant and the amount of the claim finally recommended, if any. If the insurer has issued annuities or life insurance policies, the liquidator shall report the persons to whom, according to the records of the insurer, amounts are owed as cash surrender values or other investment value and the amounts owed.

 (b) The court may approve, disapprove, or modify the report on claims by the liquidator. The reports not modified by the court within a period of sixty days following submission by the liquidator must be treated by the liquidator as allowed claims, subject thereafter to later modification or to rulings made by the court pursuant to Section 38‑27‑580. No claim under a policy of insurance may be allowed for an amount in excess of the applicable policy limits.

HISTORY: Former 1976 Code Section 38‑5‑2320 [1982 Act No. 384, Section 43] recodified as Section 38‑27‑620 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Applicability of this section to a claim brought in this state by a claimant residing in this state against an insurer domiciled in a reciprocal state, see Section 38‑27‑970.

Library References

Insurance 1410.

Westlaw Topic No. 217.

**SECTION 38‑27‑630.** Distribution of assets.

 Under the direction of the 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.

HISTORY: Former 1976 Code Section 38‑5‑2330 [1982 Act No. 384, Section 44] recodified as Section 38‑27‑630 by 1987 Act No. 155, Section 1.

Library References

Insurance 1368.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑640.** Unclaimed and withheld funds.

 (a) All unclaimed funds subject to distribution remaining in the liquidator’s hands when he 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, must be deposited with the State Treasurer and must be paid without interest except in accordance with Section 38‑27‑610 to the person entitled thereto or his legal representative upon proof satisfactory to the State Treasurer of his right thereto. Unclaimed funds deposited with the State Treasurer in accordance with this section must be advertised and disposed of in accordance with the provisions of Section 27‑19‑220.

 (b) All funds withheld under Section 38‑27‑560 and not distributed must, upon discharge of the liquidator, be deposited with the State Treasurer and paid by him in accordance with Section 38‑27‑610. Any sums remaining which under Section 38‑27‑610 would revert to the undistributed assets of the insurer must be transferred to the State Treasurer and become the property of the state under subsection (a) of this section unless the director or his designee in his discretion petitions the court to reopen the liquidation under Section 38‑27‑660.

HISTORY: Former 1976 Code Section 38‑5‑2340 [1982 Act No. 384, Section 45] recodified as Section 38‑27‑640 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 622.

Library References

Insurance 1421.

Westlaw Topic No. 217.

**SECTION 38‑27‑650.** Termination of proceedings.

 (a) When all assets justifying the expense of collection and distribution have been collected and distributed under this chapter the liquidator shall apply to the court for discharge. The court may grant the discharge and make any other orders, including an order to transfer any remaining funds that are uneconomic to distribute, as may be considered appropriate.

 (b) Any other person may apply to the court at any time for an order under subsection (a). If the application is denied, the applicant shall pay the costs and expenses of the liquidator in resisting the application, including a reasonable attorney’s fee.

HISTORY: Former 1976 Code Section 38‑5‑2350 [1982 Act No. 384, Section 46] recodified as Section 38‑27‑650 by 1987 Act No. 155, Section 1.

Library References

Insurance 1390.

Westlaw Topic No. 217.

C.J.S. Insurance Section 253.

**SECTION 38‑27‑660.** Reopening liquidation.

 After the liquidation proceeding has been terminated and the liquidator discharged, the director or his designee or other interested party may at any time petition the circuit court to reopen the proceedings for good cause, including the discovery of additional assets. If the court is satisfied that there is justification for reopening, it must so order.

HISTORY: Former 1976 Code Section 38‑5‑2360 [1982 Act No. 384, Section 47] recodified as Section 38‑27‑660 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 623.

Library References

Insurance 1391.

Westlaw Topic No. 217.

**SECTION 38‑27‑670.** Disposition of records during and after termination of liquidation.

 Whenever it appears to the director or his designee that the records of any insurer in process of liquidation or completely liquidated are no longer useful, he may recommend to the court, and the court shall direct, what records should be retained for future reference and what should be destroyed.

HISTORY: Former 1976 Code Section 38‑5‑2370 [1982 Act No. 384, Section 48] recodified as Section 38‑27‑670 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 624.

Library References

Insurance 1374.

Westlaw Topic No. 217.

**SECTION 38‑27‑680.** External audit of receiver’s books.

 The circuit court may, as it considers desirable, cause audits to be made of the books of the director or his designee relating to any receivership established under this chapter, and a report of each audit must be filed with the department and with the court. The books, records, and other documents of the receivership must be made available to the auditor at any time without notice. The expense of each audit is considered a cost of administration of the receivership.

HISTORY: Former 1976 Code Section 38‑5‑2380 [1982 Act No. 384, Section 49] recodified as Section 38‑27‑680 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 625.

Library References

Insurance 1350, 1374.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 245 to 247, 256 to 258, 2356.

ARTICLE 7

Interstate Relations

**SECTION 38‑27‑910.** Conservation of property of alien or foreign insurers.

 (a) If a domiciliary liquidator has not been appointed, the director or his designee may apply to the circuit court by verified petition for an order directing him to act as conservator to conserve the property of an alien insurer not domiciled in this State or a foreign insurer on any one or more of the following grounds:

 (1) Any of the grounds in Section 38‑27‑310.

 (2) That any of its property has been sequestered by official action in its domiciliary state or in any other state.

 (3) That enough of its property has been sequestered in a foreign country to give reasonable cause to fear that the insurer is or may become insolvent.

 (4)(i) That its certificate of authority to do business in this State has been revoked or that none was ever issued; and

 (ii) That there are residents of this State with outstanding claims or outstanding policies.

 (b) When an order is sought under subsection (a) of this section, the court shall cause the insurer to be given reasonable notice and time to respond.

 (c) The court may issue the order in whatever terms it considers appropriate. The filing or recording of the order with the clerk of court or the register of deeds of the county in which the principal business of the company is located or the county in which its principal office or place of business is located imparts the same notice which a deed, bill of sale, or other evidence of title duly filed or recorded with that office would have imparted.

 (d) The conservator may at any time petition for, and the court may grant, an order under Section 38‑27‑920 to liquidate assets of a foreign or alien insurer under conservation or, if appropriate, for an order under Section 38‑27‑940, to be appointed ancillary receiver.

 (e) The conservator may at any time petition the court for an order terminating conservation of an insurer. If the court finds that the conservation is no longer necessary, it shall order that the insurer be restored to possession of its property and the control of its business. The court may also make that finding and issue the order at any time upon motion of any interested party, but, if the motion is denied, all costs must be assessed against the interested party.

HISTORY: Former 1976 Code Section 38‑5‑2410 [1982 Act No. 384, Section 50] recodified as Section 38‑27‑910 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 626; 1997 Act No. 34, Section 1.

Library References

Insurance 1357, 1405.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 195, 227 to 229, 249, 2356.

NOTES OF DECISIONS

In general 1

1. In general

It was not abuse of discretion for trial court to appoint conservator of assets of foreign insurance company within state, notwithstanding insurer’s contention that such appointment was unnecessary because (1) all South Carolina claims are protected by statutory deposit, (2) insurer desires to handle its own affairs, (3) insurer could perform tasks of notification of claimants and distribution of assets as easily as conservator, and (4) appointment of conservator will cause delay to claimants and insurer and will be expensive to insurer (decided under former Section 38‑5‑2410). Lindsay v. Main Ins. Co. (S.C.App. 1984) 281 S.C. 331, 315 S.E.2d 166.

**SECTION 38‑27‑920.** Liquidation of property of alien or foreign insurers.

 (a) If no domiciliary receiver has been appointed, the director or his designee may apply to the circuit court by verified petition for an order directing him to liquidate the assets found in this State of a foreign insurer or an alien insurer not domiciled in this State, on any of the following grounds:

 (1) any of the grounds in Section 38‑27‑310 or 38‑27‑360; or

 (2) any of the grounds specified in items (2) through (4) of subsection (a) of Section 38‑27‑910.

 (b) When an order is sought under subsection (a) of this section, the court shall cause the insurer to be given reasonable notice and time to respond.

 (c) If it appears to the court that the best interests of creditors, policyholders, and the public require, the court may issue an order to liquidate in whatever terms it considers appropriate. The filing or recording of the order with the clerk of court or the register of deeds of the county in which the principal business of the company is located or the county in which its principal office or place of business is located imparts the same notice which a deed, bill of sale, or other evidence of title duly filed or recorded with that office would have imparted.

 (d) If a domiciliary liquidator is appointed in a reciprocal state while a liquidation is proceeding under this section, the liquidator under this section must thereafter act as ancillary receiver under Section 38‑27‑940. If a domiciliary liquidator is appointed in a nonreciprocal state while a liquidation is proceeding under this section, the liquidator under this section may petition the court for permission to act as ancillary receiver under Section 38‑27‑940.

 (e) On the same grounds as are specified in subsection (a) of this section, the director or his designee may petition any appropriate federal district court to be appointed receiver to liquidate that portion of the insurer’s assets and business over which the court will exercise jurisdiction or any lesser part thereof that the director or his designee considers desirable for the protection of the policyholders and creditors in this State.

 (f) may order the director or his designee, when he has liquidated the assets of a foreign or alien insurer under this section, to pay claims of residents of this State against the insurer under such rules as to the liquidation of insurers under this chapter as are otherwise compatible with the provisions of this section.

HISTORY: Former 1976 Code Section 38‑5‑2420 [1982 Act No. 384, Section 51] recodified as Section 38‑27‑920 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 627; 1997 Act No. 34, Section 1.

Library References

Insurance 1357, 1362, 1405.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 189 to 192, 195, 227 to 229, 238 to 239, 245 to 247, 249, 2356.

**SECTION 38‑27‑930.** Domiciliary liquidators in other states.

 (a) The domiciliary liquidator of an insurer domiciled in a reciprocal state is, except as to special deposits and security on secured claims under Section 38‑27‑940(c), vested by operation of law with the title to all of the assets, property, contracts and rights of action, agents’ balances, and all of the books, accounts, and other records of the insurer located in this State. The date of vesting is the date of the filing of the petition, if that date is specified by the domiciliary law for the vesting of property in the domiciliary state. Otherwise, the date of vesting is the date of entry of the order directing possession to be taken. The domiciliary liquidator has the immediate right to recover balances due from agents and to obtain possession of the books, accounts, and other records of the insurer located in this State. He also has the right to recover all other assets of the insurer located in this State, subject to Section 38‑27‑940.

 (b) If a domiciliary liquidator is appointed for an insurer not domiciled in a reciprocal state, the director of this State or his designee is vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books, accounts, and other records of the insurer located in this State, at the same time that the domiciliary liquidator is vested with title in the domicile. The director of this State or his designee may petition for a conservation or liquidation order under Section 38‑27‑910 or 38‑27‑920, or for an ancillary receivership under Section 38‑27‑940 or, after approval by the circuit court, may transfer title to the domiciliary liquidator, as the interests of justice and the equitable distribution of the assets require.

 (c) Claimants residing in this State may file claims with the liquidator or ancillary receiver, if any, in this State or with the domiciliary liquidator, if the domiciliary law permits. The claims must be filed by the last date fixed for the filing of claims in the domiciliary liquidation proceedings.

HISTORY: Former 1976 Code Section 38‑5‑2430 [1982 Act No. 384, Section 52] recodified as Section 38‑27‑930 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 628.

CROSS REFERENCES

Definition of “reciprocal state”, see Section 38‑27‑50.

Library References

Insurance 1405.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 227 to 229, 2356.

**SECTION 38‑27‑940.** Ancillary formal proceedings.

 (a) If a domiciliary liquidator has been appointed for an insurer not domiciled in this State, the director or his designee may file a petition with the circuit court requesting appointment as ancillary receiver in this State:

 (1) If he finds that there are sufficient assets of the insurer located in this State to justify the appointment of an ancillary receiver.

 (2) If the protection of creditors or policyholders in this State so requires.

 (b) The court may issue an order appointing an ancillary receiver in whatever terms it considers appropriate. The filing or recording of the order with a register of deeds in this State imparts the same notice which a deed, bill of sale, or other evidence of title duly filed or recorded with that office would impart.

 (c) When a domiciliary liquidator has been appointed in a reciprocal state, then the ancillary receiver appointed in this State may, whenever necessary, aid and assist the domiciliary liquidator in recovering assets of the insurer located in this State. 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. He shall promptly transfer all remaining assets, books, accounts, and records to the domiciliary liquidator. Subject to this section, the ancillary receiver and his deputies have the same powers and are subject to the same duties with respect to the administration of assets as a liquidator of an insurer domiciled in this State.

 (d) When a domiciliary liquidator has been appointed in this State, ancillary receivers appointed in reciprocal states have, as to assets and books, accounts, and other records in their respective states, corresponding rights, duties, and powers to those provided in subsection (c) for ancillary receivers appointed in this State.

HISTORY: Former 1976 Code Section 38‑5‑2440 [1982 Act No. 384, Section 53] recodified as Section 38‑27‑940 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 629; 1997 Act No. 34, Section 1.

CROSS REFERENCES

Definition of “reciprocal state”, see Section 38‑27‑50.

Library References

Insurance 1378.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 196, 249.

**SECTION 38‑27‑950.** Ancillary summary proceedings.

 The director or his designee in his sole discretion may institute proceedings under Sections 38‑27‑220 and 38‑27‑230 at the request of the commissioner or other appropriate insurance official of the domiciliary state of a foreign or an alien insurer having property located in this State.

HISTORY: Former 1976 Code Section 38‑5‑2450 [1982 Act No. 384, Section 54] recodified as Section 38‑27‑950 by 1987 Act No. 155, Section 1; 1991 Act No. 13, Section 25; 1993 Act No. 181, Section 630.

Library References

Insurance 1382.

Westlaw Topic No. 217.

**SECTION 38‑27‑960.** Claims of nonresidents against insurers domiciled in South Carolina.

 (a) In a liquidation proceeding begun in this State against an insurer domiciled in this State, claimants residing in foreign countries or in states not reciprocal states shall file claims in this State and claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states or with the domiciliary liquidator. Claims must be filed by the last date fixed for the filing of claims in the domiciliary liquidation proceeding.

 (b) Claims belonging to claimants residing in reciprocal states may be proved either in the liquidation proceeding in this State as provided in this chapter or in ancillary proceedings, if any, in the reciprocal states. If notice of the claims and opportunity to appear and be heard are afforded the domiciliary liquidator of this State as provided in Section 38‑27‑970(b) with respect to ancillary proceedings, the final allowance of claims by the courts in ancillary proceedings in reciprocal states is conclusive as to amount and as to priority against special deposits or other security located in the ancillary states but is not conclusive with respect to priorities against general assets under Section 38‑27‑610.

HISTORY: Former 1976 Code Section 38‑5‑2460 [1982 Act No. 384, Section 55] recodified as Section 38‑27‑960 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Definition of “reciprocal state”, see Section 38‑27‑50.

Library References

Insurance 1419.

Westlaw Topic No. 217.

**SECTION 38‑27‑970.** Claims of residents against insurers domiciled in reciprocal states.

 (a) In a liquidation proceeding in a reciprocal state against an insurer domiciled in that state, claimants against the insurer who reside within this State may file claims either with the ancillary receiver, if any, in this State or with the domiciliary liquidator. Claims must be filed by the last dates fixed for the filing of claims in the domiciliary liquidation proceeding.

 (b) Claims belonging to claimants residing in this State may be proved either in the domiciliary state under the law of that state or in ancillary proceedings, if any, in this State. If a claimant elects to prove his claim in this State, he shall file his claim with the liquidator in the manner provided in Sections 38‑27‑540 and 38‑27‑550. The ancillary receiver shall make his recommendation to the court as under Section 38‑27‑620. He shall also arrange a date for hearing if necessary under Section 38‑27‑580 and shall give notice to the liquidator in the domiciliary state, either by certified mail or by personal service, at least forty days prior to the date set for hearing. If the domiciliary liquidator, within thirty days after the giving of the notice, gives notice in writing to the ancillary receiver and to the claimant, either by certified mail or by personal service, of his intention to contest the claim, he is entitled to appear or to be represented in any proceeding in this State involving the adjudication of the claim.

 (c) The final allowance of the claim by the courts of this State is conclusive as to the amount and as to priority against special deposits or other security located in this State.

HISTORY: Former 1976 Code Section 38‑5‑2470 [1982 Act No. 384, Section 56] recodified as Section 38‑27‑970 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Definition of “reciprocal state”, see Section 38‑27‑50.

Library References

Insurance 1420.

Westlaw Topic No. 217.

C.J.S. Insurance Section 248.

NOTES OF DECISIONS

In general 1

1. In general

Action against insurance rehabilitator was not barred in South Carolina under provisions of former Section 38‑5‑2470, which concerns actions against liquidators, because insurance company was rehabilitator, and such actions were governed by former Section 38‑5‑2040. Smalls v. Weed (S.C.App. 1987) 293 S.C. 364, 360 S.E.2d 531.

**SECTION 38‑27‑980.** Attachment, garnishment, and levy of execution.

 During the pendency in this State or any other state of a liquidation proceeding, whether called by that name or not, no action or proceeding in the nature of an attachment, garnishment, or levy of execution may be commenced or maintained in this State against the delinquent insurer or its assets.

HISTORY: Former 1976 Code Section 38‑5‑2480 [1982 Act No. 384, Section 57] recodified as Section 38‑27‑980 by 1987 Act No. 155, Section 1.

CROSS REFERENCES

Definition of “reciprocal state”, see Section 38‑27‑50.

Library References

Insurance 1364, 1386.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 238 to 239.

**SECTION 38‑27‑990.** Interstate priorities.

 (a) In a liquidation proceeding in this State involving one or more reciprocal states, the order of distribution of the domiciliary state controls as to all claims of residents of this State and reciprocal states. All claims of residents of reciprocal states are given equal priority of payment from general assets regardless of where the assets are located.

 (b) The owner of a secured claim against an insurer for which a liquidator has been appointed in this State 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 accordance with Section 38‑27‑600, in which case the deficiency, if any, is treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors.

HISTORY: Former 1976 Code Section 38‑5‑2490 [1982 Act No. 384, Section 58] recodified as Section 38‑27‑990 by 1987 Act No. 155, Section 1.

Library References

Insurance 1414.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 242 to 243.

**SECTION 38‑27‑1000.** Subordination of claims for noncooperation.

 If an ancillary receiver in another state or foreign country, whether called by that name or not, fails to transfer to the domiciliary liquidator in this State any assets within his control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, the claims filed in the ancillary receivership, other than special deposit claims or secured claims, must be placed in the class of claims under Section 38‑27‑610(7).

HISTORY: Former 1976 Code Section 38‑5‑2500 [1982 Act No. 384, Section 59] recodified as Section 38‑27‑1000 by 1987 Act No. 155, Section 1.

Library References

Insurance 1412.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 200 to 203, 240.