

SECOND REGULAR SESSION

HOUSE BILL NO. 2222

95TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE HOBBS.

5058L.03I

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 375.1152 and 375.1155, RSMo, and to enact in lieu thereof three new sections relating to the insurers supervision, rehabilitation and liquidation act.

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

Section A. Sections 375.1152 and 375.1155, RSMo, are repealed and three new sections enacted in lieu thereof, to be known as sections 375.1152, 375.1155, and 375.1191, to read as follows:

375.1152. For purposes of sections 375.570 to 375.750 and 375.1150 to 375.1246, the following words and phrases shall mean:

(1) "Allocated loss adjustment expenses", those fees, costs or expenses reasonably chargeable to the investigation, negotiation, settlement or defense of an individual claim or loss or to the protection and perfection of the subrogation rights of any insolvent insurer arising out of a policy of insurance issued by the insolvent insurer. "Allocated loss adjustment expenses" shall include all court costs, fees and expenses; fees for service of process; fees to attorneys; costs of undercover operative and detective services; fees of independent adjusters or attorneys for investigation or adjustment of claims beyond initial investigation; costs of employing experts for preparation of maps, photographs, diagrams, chemical or physical analysis or for advice, opinion or testimony concerning claims under investigation or in litigation; costs for legal transcripts or testimony taken at coroner's inquests, criminal or civil proceedings; costs for copies of any public records; costs of depositions and court-reported or -recorded statements. "Allocated loss adjustment expenses" shall not include the salaries of officials, administrators or other employees or normal overhead charges such as rent, postage, telephone, lighting, cleaning, heating or similar expenses;

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

- 17 (2) "Ancillary state", any state other than a domiciliary state;
- 18 (3) "Creditor", a person having any claim, whether matured or unmatured, liquidated or
19 unliquidated, secured or unsecured, absolute, fixed or contingent;
- 20 (4) "Delinquency proceeding", any proceeding instituted against an insurer for the
21 purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary
22 proceeding under sections 375.1160, 375.1162 and 375.1164;
- 23 (5) "Director", the director of the department of insurance, financial institutions and
24 professional registration;
- 25 (6) "Doing business" includes any of the following acts, whether effected by mail or
26 otherwise:
- 27 (a) The issuance or delivery of contracts of insurance to persons resident in this state;
- 28 (b) The solicitation of applications for such contracts, or other negotiations preliminary
29 to the execution of such contracts;
- 30 (c) The collection of premiums, membership fees, assessments, or other consideration
31 for such contracts;
- 32 (d) The transaction of matters subsequent to execution of such contracts and arising out
33 of them; or
- 34 (e) Operating under a license or certificate of authority, as an insurer, issued by the
35 department of insurance, financial institutions and professional registration;
- 36 (7) "Domiciliary state", the state in which an insurer is incorporated or organized or, in
37 the case of an alien insurer, its state of entry;
- 38 (8) "Fair consideration" is given for property or obligation:
- 39 (a) When in exchange for such property or obligation, as a fair equivalent thereof, and
40 in good faith, property is conveyed or services are rendered or an obligation is incurred or an
41 antecedent debt is satisfied; or
- 42 (b) When such property or obligation is received in good faith to secure a present
43 advance or antecedent debt in an amount not disproportionately small as compared to the value
44 of the property or obligation obtained;
- 45 (9) "Foreign country", any jurisdiction not in the United States;
- 46 (10) "Formal delinquency proceeding", any liquidation or rehabilitation proceeding;
- 47 (11) "General assets", all property, real, personal, or otherwise, not specifically
48 mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified
49 persons or classes of persons. As to specifically encumbered property, "general assets" includes
50 all such property or its proceeds in excess of the amount necessary to discharge the sum or sums
51 secured thereby. Assets held in trust and on deposit for the security or benefit of all

52 policyholders or all policyholders and creditors, in more than a single state, shall be treated as
53 general assets;

54 (12) "Guaranty association", the Missouri property and casualty insurance guaranty
55 association created by sections 375.771 to 375.779, as amended, the Missouri life and health
56 insurance guaranty association created by sections 376.715 to 376.758, RSMo, as amended, and
57 any other similar entity now or hereafter created by the laws of this state for the payment of
58 claims of insolvent insurers. "Foreign guaranty association" means any similar entities now in
59 existence or hereafter created by the laws of any other state;

60 (13) "Insolvency" or "insolvent" means:

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

62 a. The inability to pay an obligation within thirty days after it becomes payable; or

63 b. If an assessment be made within thirty days after such date, the inability to pay such
64 obligation thirty days following the date specified in the first assessment notice issued after the
65 date of loss;

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

68 a. Any capital and surplus required by law for its organization; or

69 b. The total par or stated value of its authorized and issued capital stock;

70 (c) As to any insurer licensed to do business in this state as of August 28, 1991, which
71 does not meet the standards established under paragraph (b) of this subdivision, the term
72 "insolvency" or "insolvent" shall mean, for a period not to exceed three years from August 28,
73 1991, that it is unable to pay its obligations when they are due or that its admitted assets do not
74 exceed its liabilities plus any required capital contribution ordered by the director under any other
75 provisions of law;

76 (d) For purposes of this subdivision "liabilities" shall include but not be limited to
77 reserves required by statute or by the department of insurance, financial institutions and
78 professional registration regulations or specific requirements imposed by the director upon a
79 subject company at the time of admission or subsequent thereto;

80 (e) For purposes of this subdivision, an obligation is payable within ninety days of the
81 resolution of any dispute regarding the obligation;

82 (14) "Insurer", any person who has done, purports to do, is doing or is licensed to do
83 insurance business as described in section 375.1150, and is or has been subject to the authority
84 of, or to liquidation, rehabilitation, reorganization, supervision, or conservation by, any insurance
85 department of any state. For purposes of sections 375.1150 to 375.1246, any other persons
86 included under section 375.1150 shall be deemed to be insurers;

87 (15) "**Netting agreement**":

88 (a) A contract or agreement (including terms and conditions incorporated by
89 reference therein), including a master settlement agreement (which master settlement
90 agreement, together with all schedules, confirmations, definitions and addenda thereto and
91 transactions under any thereof, shall be treated as one netting agreement), that documents
92 one or more transactions between the parties to the agreement for or involving one or more
93 qualified financial contracts and that provides for the netting, liquidation, setoff,
94 termination, acceleration, or close out under or in connection with one or more qualified
95 financial contracts or present or future payment or delivery obligations or payment or
96 delivery entitlements thereunder (including liquidation or close-out values relating to such
97 obligations or entitlements) among the parties to the netting agreement;

98 (b) Any master agreement or bridge agreement for one or more master agreements
99 described in paragraph (a) of this subdivision; or

100 (c) Any security agreement or arrangement or other credit enhancement or
101 guarantee or reimbursement obligation related to any contract or agreement described in
102 paragraph (a) or (b) of this subdivision; provided that any contract or agreement described
103 in paragraph (a) or (b) of this subdivision relating to agreements or transactions that are
104 not qualified financial contracts shall be deemed to be a netting agreement only with
105 respect to those agreements or transactions that are qualified financial contracts;

106 (16) "Preferred claim", any claim with respect to which the terms of sections 375.1150
107 to 375.1246 accord priority of payment from the general assets of the insurer;

108 [(16)] (17) "Qualified financial contract", any commodity contract, forward
109 contract, repurchase agreement, securities contract, swap agreement, and any similar
110 agreement that the director determines by rule to be a qualified financial contract for
111 purposes of sections 375.1150 to 375.1246. For purposes of this subdivision, the following
112 terms shall mean:

113 (a) "Commodity contract":

114 a. A contract for the purchase or sale of a commodity for future delivery on or
115 subject to the rules of the board of trade or contract market under the Commodity
116 Exchange Act, 7 U.S.C. Section 1, et seq., or a board of trade outside the United States;

117 b. An agreement that is subject to regulation under Section 19 of the Commodity
118 Exchange Act, 7 U.S.C. Section 1, et seq., and that is commonly known to the commodities
119 trade as a margin account, margin contract, leverage account, or leverage contract;

120 c. An agreement or transaction that is subject to regulation under Section 4c(b) of
121 the Commodity Exchange Act, 7 U.S.C. Section 1, et seq., and that is commonly known to
122 the commodities trade as a commodity option;

123 **d. Any combination of the agreements or transactions referred to in this**
124 **paragraph; or**

125 **e. Any option to enter into an agreement or transaction referred to in this**
126 **paragraph;**

127 **(b) "Forward contract", "repurchase agreement", "securities contract", and**
128 **"swap agreement", the same meaning as set forth in the Federal Deposit Insurance Act,**
129 **12 U.S.C. Section 1821(e)(8)(D), as amended;**

130 **(18) "Receiver", a receiver, liquidator, administrative supervisor, rehabilitator or**
131 **conservator, as the context requires;**

132 **[(17)] (19) "Reciprocal state", any state other than this state in which in substance and**
133 **effect, provisions substantially similar to subsection 1 of section 375.1176 and sections**
134 **375.1235, 375.1236, 375.1240, 375.1242 and 375.1244 have been enacted and are in force, and**
135 **in which laws are in force requiring that the director of the state department of insurance,**
136 **financial institutions and professional registration or equivalent official be the receiver of a**
137 **delinquent insurer, and in which some provision exists for the avoidance of fraudulent**
138 **conveyances and preferential transfers;**

139 **[(18)] (20) "Secured claim", any claim secured by mortgage, trust deed, pledge, deposit**
140 **as security, escrow, or otherwise, including a pledge of assets allocated to a separate account**
141 **established pursuant to section 376.309, RSMo; but not including special deposit claims or**
142 **claims against general assets. The term also includes claims which have become liens upon**
143 **specific deposit claims or claims against general assets. The term also includes claims which**
144 **have become liens upon specific assets by reason of judicial process;**

145 **[(19)] (21) "Special deposit claim", any claim secured by a deposit made pursuant to**
146 **statute for the security or benefit of a limited class or classes of persons, but not including any**
147 **claim secured by general assets;**

148 **[(20)] (22) "State", any state, district, or territory of the United States and the Panama**
149 **Canal Zone;**

150 **[(21)] (23) "Transfer" shall include the sale and every other and different mode, direct**
151 **or indirect, of disposing of or of parting with property or with an interest therein, or with the**
152 **possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or**
153 **conditionally, voluntarily, by or without judicial proceedings. The retention of a security title**
154 **to property delivered to a debtor shall be deemed a transfer suffered by the debtor.**

 375.1155. 1. Any receiver appointed in a proceeding under sections 375.1150 to
2 375.1246 may at any time apply for, and any court of general jurisdiction may grant, such
3 restraining orders, preliminary and permanent injunctions, and other orders as may be deemed
4 necessary and proper to prevent:

- 5 (1) The transaction of further business;
- 6 (2) The transfer of property;
- 7 (3) Interference with the receiver or with a proceeding under sections 375.1150 to
- 8 375.1246;
- 9 (4) Waste of the insurer's assets;
- 10 (5) Dissipation and transfer of bank accounts;
- 11 (6) The institution or further prosecution of any actions or proceedings;
- 12 (7) The obtaining of preferences, judgments, attachments, garnishments or liens against
- 13 the insurer, its assets or its policyholders;
- 14 (8) The levying of execution against the insurer, its assets or its policyholders;
- 15 (9) The making of any sale or deed for nonpayment of taxes or assessments that would
- 16 lessen the value of the assets of the insurer;
- 17 (10) The withholding from the receiver of books, accounts, documents, or other records
- 18 relating to the business of the insurer; or
- 19 (11) Any other threatened or contemplated action that might lessen the value of the
- 20 insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the
- 21 administration of any proceeding under this act.

22 2. The receiver may apply to any court outside of the state for the relief described in
23 subsection 1 of this section.

24 **3. Notwithstanding any other provision of this section to the contrary, the**
25 **commencement of a delinquency proceeding under sections 375.1150 to 375.1246 does not**
26 **operate as a stay or prohibition of any right to cause of netting, liquidation, setoff,**
27 **termination, acceleration or close out of obligations, or enforcement of any security**
28 **agreement or arrangement or other credit enhancement or guarantee or reimbursement**
29 **obligation under or in connection with any netting agreement or qualified financial**
30 **contract as provided for in section 375.1191.**

375.1191. 1. Notwithstanding any other provision of sections 375.1150 to 375.1246,
2 **including any provision permitting the modification of contracts, or other law of a state,**
3 **no person shall be stayed or prohibited from exercising:**

4 (1) **A contractual right to cause the termination, liquidation, or acceleration or close**
5 **out of obligations under or in connection with any netting agreement or qualified financial**
6 **contract with an insurer because of:**

7 (a) **The insolvency, financial condition, or default of the insurer at any time;**
8 **provided that the right is enforceable under applicable law other than sections 375.1150**
9 **to 375.1246; or**

10 (b) The commencement of a formal delinquency proceeding under sections
11 375.1150 to 375.1246;

12 (2) Any right under a pledge, security, collateral, reimbursement, or guarantee
13 agreement or arrangement or any similar security agreement or arrangement or other
14 credit enhancement relating to one or more netting agreements or qualified financial
15 contracts;

16 (3) Subject to any provision of section 375.1198, any right to set off or net out any
17 termination value, payment amount, or other transfer obligation arising under or in
18 connection with one or more qualified financial contracts where the counterparty or its
19 guarantor is organized under the laws of the United States or a foreign jurisdiction
20 approved by the Securities Valuation Office (SVO) of the NAIC as eligible for netting; or

21 (4) If a counterparty to a master netting agreement or qualified financial contract
22 with an insurer subject to a proceeding under sections 375.1150 to 375.1246 terminates,
23 liquidates, closes out, or accelerates the agreement or contract, damages shall be measured
24 as of the date or dates of termination, liquidation, close out, or acceleration. The amount
25 of a claim for damages shall be actual direct compensatory damages calculated in
26 accordance with subsection 6 of this section.

27 2. (1) Upon termination of a netting agreement or qualified financial contract, the
28 net or settlement amount, if any, owed by a nondefaulting party to an insurer against
29 which an application or petition has been filed under sections 375.1150 to 375.1246 shall
30 be transferred to or on the order of the receiver for the insurer, even if the insurer is the
31 defaulting party, notwithstanding any walkaway clause in the netting agreement or
32 qualified financial contract.

33 (2) For purposes of this subsection, "walkaway clause" means a provision in a
34 netting agreement or qualified financial contract that, after calculation of a value of a
35 party's position or an amount due to or from one of the parties in accordance with its terms
36 upon termination, liquidation, or obligation of a party or extinguishes a payment
37 obligation of a party in whole or in part solely because of the party's status as a
38 nondefaulting party.

39 (3) Any limited two-way payment or first method provision in a netting agreement
40 or qualified financial contract with an insurer that has defaulted shall be deemed to be a
41 full two-way payment or second method provision as against the defaulting insurer. Any
42 such property or amount shall, except to the extent it is subject to one or more secondary
43 liens or encumbrances or rights of netting or setoff, be a general asset of the insurer.

44 **3. In making any transfer of a netting agreement or qualified financial contract of**
45 **an insurer subject to a proceeding under sections 375.1150 to 375.1246, the receiver shall**
46 **either:**

47 **(1) Transfer to one party, other than an insurer subject to a proceeding under**
48 **sections 375.1150 to 375.1246, all netting agreements and qualified financial contracts**
49 **between a counterparty or any affiliate of the counterparty and the insurer that is the**
50 **subject of the proceeding, including:**

51 **(a) All rights and obligations of each party under each netting agreement and**
52 **qualified financial contract; and**

53 **(b) All property, including any guarantees or other credit enhancement, securing**
54 **any claims of each party under each netting agreement and qualified financial contract;**
55 **or**

56 **(2) Transfer none of the netting agreements, qualified financial contracts, rights,**
57 **obligations, or property referred to in subdivision (1) of this subsection with respect to the**
58 **counterparty and any affiliate of the counterparty.**

59 **4. If a receiver for an insurer makes a transfer of one or more netting agreements**
60 **or qualified financial contracts, the receiver shall use its best efforts to notify any person**
61 **who is party to the netting agreements or qualified financial contracts of the transfer by**
62 **noon, the receiver's local time, on the business day following the transfer. For purposes**
63 **of this subsection, "business day" means a day other than a Saturday, Sunday, or any day**
64 **on which either the New York Stock Exchange or the Federal Reserve Bank of New York**
65 **is closed.**

66 **5. Notwithstanding any other provision of sections 375.1150 to 375.1246, a receiver**
67 **shall not avoid a transfer of money or other property arising under or in connection with**
68 **a netting agreement or qualified financial contract, or any pledge, security, collateral, or**
69 **guarantee agreement or any other similar security arrangement or credit support**
70 **document relating to a netting agreement or qualified financial contract, that is made**
71 **before the commencement of a formal delinquency proceeding under sections 375.1150 to**
72 **375.1246. However, a transfer may be avoided under section 375.1182 if the transfer was**
73 **made with actual intent to hinder, delay, or defraud the insurer, a receiver appointed for**
74 **the insurer, or existing or future creditors.**

75 **6. (1) In exercising the rights of disaffirmance or repudiation of a receiver with**
76 **respect to any netting agreement or qualified financial contract to which an insurer is a**
77 **party, the receiver for the insurer shall either:**

78 **(a) Disaffirm or repudiate all netting agreements and qualified financial contracts**
79 **between a counterparty or any affiliate of the counterparty and the insurer that is the**
80 **subject of the proceeding; or**

81 **(b) Disaffirm or repudiate none of the netting agreements and qualified financial**
82 **contracts referred to in paragraph (a) of this subdivision with respect to the person or any**
83 **affiliate of the person.**

84 **(2) Notwithstanding any other provision of sections 375.1150 to 375.1246, any claim**
85 **of a counterparty against the estate arising from the receiver's disaffirmance or**
86 **repudiation of a netting agreement or qualified financial contract that has not been**
87 **previously affirmed in the liquidation or immediately preceding conservation or**
88 **rehabilitation case shall be determined and shall be allowed or disallowed as if the claim**
89 **had arisen before the date of the filing of the petition for liquidation or, if a conservation**
90 **or rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had**
91 **arisen before the date of the filing of the petition for conservation or rehabilitation. The**
92 **amount of the claim shall be the actual direct compensatory damages determined as of the**
93 **date of the disaffirmance or repudiation of the netting agreement or qualified financial**
94 **contract. Actual direct compensatory damages does not include punitive or exemplary**
95 **damages, damages for lost profit or lost opportunity or damages for pain and suffering,**
96 **but does include normal and reasonable costs of cover or other reasonable measures of**
97 **damages utilized in the derivatives, securities, or other market for the contract and**
98 **agreement claims.**

99 **7. Contractual right, as used in this section, includes any right set forth in a rule**
100 **or bylaw of a derivatives clearing organization as defined in the Commodity Exchange Act,**
101 **a multilateral clearing organization as defined in the Federal Deposit Insurance**
102 **Corporation Improvement Act of 1991, a national securities exchange, a national securities**
103 **association, a securities clearing agency, a contract market designated under the**
104 **Commodity Exchange Act, a derivatives transaction execution facility registered under the**
105 **Commodity Exchange Act, or a board of trade as defined in the Commodity Exchange Act,**
106 **or in a resolution of the governing board thereof and any right, whether or not evidenced**
107 **in writing, arising under statutory or common law, or under law merchant, or by reason**
108 **of normal business practice.**

109 **8. The provisions of this section shall not apply to persons who are affiliates of the**
110 **insurer that is the subject of the proceeding.**

111 **9. All rights of counterparties under sections 375.1150 to 375.1246 shall apply to**
112 **netting agreements and qualified financial contracts entered into on behalf of the general**
113 **account or separate accounts if the assets of each separate account are available only to**

114 **counterparties to netting agreements and qualified financial contracts entered into on**
115 **behalf of such separate account.**

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