

In the Matter of the Rehabilitation of:

Segregated Account of
Ambac Assurance Corporation

Case No. 10 CV

**CAPCO'S SUR-REPLY BRIEF IN SUPPORT OF ITS OBJECTION TO THE
PROPOSED PLAN OF REHABILITATION**

The Customer Asset Insurance Company (“CAPCO”) submits this Sur-Reply Brief in response to the Rehabilitator’s Reply Brief in Support of Motion for Confirmation of the Plan of Rehabilitation and in further support of its Objection to the Proposed Plan of Rehabilitation.¹

The Rehabilitator’s Reply Brief implicitly concedes that the Insurance Commissioner’s interpretation of Wis. Stat. § 645.68(3) is subject to *de novo* review by the circuit court. That Reply Brief offers no basis on which this Court could find that there has been any prior interpretation of the statute by the Office of the Insurance Commissioner, much less a “long-standing” one; nor does it offer any basis on which to find that the Rehabilitator is in a better position than this Court to interpret the very simple and straightforward language of the statute.

CAPCO’s objection to the Plan’s treatment of claims under a reinsurance contract as “general claims,” must be sustained because:

- the Rehabilitator offers no defense to CAPCO’s argument that the plain language of the statute requires that a reinsurance contract be treated as a “loss claim” under subsection (3) of the statute.

¹ See *Rehabilitator’s Reply Brief*, at 19-22. As explained in the cover letter to this brief, the Rehabilitator’s Reply Brief was the first full presentation of the Rehabilitator’s position on the interpretation of Wis. Stat. § 645.68(3), and this “Sur-Reply” brief really functions as CAPCO’s “Reply” to that position.

- *Peerless Ins. Co. v. Manson, infra*, when read in conjunction with its companion case, *Pella Farmers Mut. Ins. Co., infra*, supports CAPCO’s interpretation of the statute, not the Rehabilitator’s position.
- The foreign cases cited by the Rehabilitator are irrelevant to the interpretation of the Wisconsin statute.

ARGUMENT

I. The Rehabilitator Provides No Response to CAPCO’s Argument that the Plain Language of § 645.68(3) Includes Claims Under a Reinsurance Contract.

As discussed in CAPCO’s initial brief, the plain words of subsection (3) include “All claims under policies for losses incurred . . .” Here, CAPCO’s reinsurance contract falls within the statutory definition of a “policy” because it “proscribe[d] in writing the terms of an insurance contract” with Ambac. *See* Wis. Stat. § 600.03. Given the applicable *statutory* definition of “policy,” reinsurance contracts are indisputably included under Wis. Stat. § 645.68(3).²

The Rehabilitator’s Brief offers no defense to this argument because there is none. Thus, under the principles of statutory construction cited in CAPCO’s initial brief, there is no need to look further for evidence of legislative intent.

The Rehabilitator’s refusal to address the plain language of the statute is all the more troublesome to CAPCO in light of its willingness to accept claims under complex Credit Default Swap agreements as priority “policy claims.” The Rehabilitator acknowledges that the question of whether such claims are truly entitled to such priority is “unsettled,” yet it “sees no benefit” to costly litigation on this issue because the loss estimates for remaining CDS claims do not exceed \$20,000,000. *Rehabilitator’s Reply Brief*, at 20-21. The result is that CDS claims that do not appear to satisfy the plain language of § 645.68(3) are given that priority, whereas reinsurance

² *See* CAPCO’s Brief in Support of Its Objection, at 8-9.

claims that clearly do satisfy the plain language are not.³ The Plan must treat creditors fairly whether a claim involves \$20 or \$20 million or \$200 million.

II. Peerless Ins. Co. v. Manson Does Not Support the Rehabilitator's Interpretation of the Statute.

The Rehabilitator relies on *Peerless Ins. Co. v. Manson*, 27 Wis. 2d 601, 135 N.W.2d 258 (1965), which held only that Chapter 201 of the 1957 Wisconsin statutes intended to treat reinsurance differently than insurance. The Rehabilitator ignores *Pella Farmers Mut. Ins. Co. v. Hartland Richmond Town Ins. Co.*, 26 Wis. 2d 29, 35, 132 N.W.2d 225 (1965), decided just a few months earlier, which reached the opposite conclusion in the context of Chapter 202. Read together, these cases support the conclusion that, *where an insurance statute is ambiguous, insurance includes reinsurance unless the immediate context clearly demonstrates otherwise.*

In *Pella* the court addressed an issue that arose between two insurance companies under Chapter 202 of the 1957 statutes, a chapter that governed town mutual insurance companies. The defendant insurance company contended that because its contract with Pella Farmers Mutual was a reinsurance contract it was not a “member” subject to an assessment by Pella under the Chapter. Under the applicable statutes, one must be a “policyholder” to be a member, and so the court considered whether the “policy” referred to by the term policyholder included a company that had provided a reinsurance contract. The court concluded that in this setting a reinsurance contract was an insurance policy:

It seems to us most logical and most in accord with the framework of ch. 202, Stats., that *each reinsurance contract should be treated as an additional policy of insurance* issued by the reinsurer Town Mutual, and the reinsured company as a member of the reinsurer, subject to assessment.

³ See LVM Movants’ Objection to Proposed Plan of Rehabilitation at 32-34; *see also* RMBS Movants’ Objections to Motion for Confirmation of Plan of Rehabilitation at 32-33; *see also* Freddie Mac’s Objections to the Proposed Plan of Rehabilitation at 11-12.

Id., at 35, *emphasis added*.

In *Peerless*, the court faced a similar question under Chapter 201, and reached a different result. After discussing and explaining its decision in *Pella*, the court limited its conclusions to Chapter 201:

It is unnecessary for the decision in this case for us to rule on these opposing contentions as to the similarity or differences of ‘reinsurance’ and ‘insurance.’ We need only conclude that as far as ch. 201 is concerned, the legislature treated reinsurance differently from insurance.

Id. at 607-08. The court distinguished the statutes at issue in *Pella*, and found that under the statutory scheme in Chapter 201, a foreign stock insurance company such as *Peerless*, which had reinsured its risks with a Wisconsin mutual insurance company, did not become a policyholder-member for purposes of an assessment under section 201.02(3)(d). The court found numerous reasons within the design of that particular chapter to conclude that the legislature did not intend a reinsured stock company to be a policyholder-member:

Peerless was not regarded as a policyholder-member, received no statements, reports or notices of any kind from Federal; *Peerless* was unrepresented on any meetings, never received proxy authorizations, never cast a vote, and never received any distribution or dividend from Federal.

Id. at 608, *footnotes omitted*.

In contrast, the current Chapter 645 provides no such evidence that the priority scheme of Wis. Stat. § 645.68 intended to differentiate between reinsurance contracts and general insurance policies. In an effort to create the illusion of such a distinction, the Rehabilitator claims that “Chapter 645 is strewn with references to ‘reinsurance’ or ‘reinsurance contracts’.” *Rehabilitator’s Reply Brief*, at 19. However, the Rehabilitator cites only three subsections of this lengthy chapter, and all three of these sections concern circumstances where the “insurer” subject to liquidation has

been reinsured by another company and where that reinsurance contract is an asset in which the insured creditors of the insurer have an interest. See §§ 645.04(5)(b), 645.52(3), and 645.58, set forth in Appendix A. These statutory provisions would relate to contracts under which the Segregated Account might have reinsurance claims of its own; they say nothing about claims *against* the Segregated Account under a reinsurance policy. They also do not logically reflect any intent to broadly distinguish reinsurance from insurance.

***III. The Foreign Cases Cited by the Rehabilitator Are
Entitled to No Weight in the
Interpretation of Wis. Stat. § 645.68.***

The Rehabilitator has demonstrated no need to consult appellate decisions from other states. Even were there to be some ambiguity that justified resort to extrinsic evidence of intent, the foreign cases cited by the Rehabilitator are irrelevant to this Court's decision because they address dissimilar statutes and consider dissimilar histories. The language, case law, definitions and legislative history germane to these other state statutes are unique to each statute, just as these factors are unique as they apply to Wis. Stat. § 645.68.

For example, none of the cited cases address the same language and or the same statutory definition of "policy" that apply to the Wisconsin statute. Additionally, in *State ex rel. Long v. Beacon Ins. Co.*, 359 S.E.2d 508, 509-10 (N.C. App. 1987), the text of the statute at issue specifically excludes reinsurer contracts from the higher status.⁴ If anything, this suggests the need for a legislature to specify such a distinction if it intends to make such a distinction.

⁴ See Uniform Insurers Liquidation Act, G.S. § 58-155.15. Priority of certain claims:

(3) Claims or portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, up to an amount of three hundred thousand dollars (\$300,000) per claim; *but excluding certain claims of insurance pools, underwriting associations, or reinsurers*, claims of other insurers for subrogation, and claims of insurers for payments and settlements under uninsured and underinsured motorist coverages. (*emphasis added*)

In *In re Liquidation of Res. Ins. Co.*, 524 N.E. 2d 538, 563 (Ill. 1988), the court concluded that the legislature’s choice to use both “insurance” and “reinsurance” in the same statutes meant that the terms should have separate and distinct meanings. In contrast, Wis. Stat. § 645.68 does not differentiate between types of insurance. Equally unhelpful is the Rehabilitator’s citation to *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 4-5 (Tenn. 1986), in which the court discussed specific Tennessee case law and specific Tennessee legislative history in finding that the Tennessee legislature intended to treat reinsurers differently than general insurance.

IV. The Plan Must Give Claims under § 645.68(6) through (11) a Lower Priority than Claims under Subsection (5).

CAPCO joined in Part II of One State Street’s Objection to the approval of the Plan of Rehabilitation, which argued that the Rehabilitation Plan fails to recognize the distinct priority classification established by subsections (5) through (11) and violates the requirement that each of these subsections be given separate priority in the order of distribution.

The Rehabilitator’s Reply Brief appears to agree, but contends that there is no need to address this classification issue now because there may not be any claims that fall below subsection (5) in priority. *See Rehabilitator’s Reply Br.* at 19, fn 29. In light of the Rehabilitator’s agreement on this issue, CAPCO requests that this Court require that the Plan specifically state that any claims under subsections (6) to (11) of Wis Stat. § 645.68 will be subject to the statutory priority contemplated by the statute.

CONCLUSION

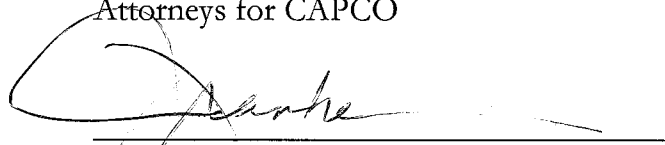
CAPCO respectfully requests that this Court sustain CAPCO’s objection and require that the Plan of Rehabilitation treat any potential CAPCO claims under its reinsurance contract with Ambac as “policy claims” as that term is defined in the Plan. Alternatively, CAPCO requests that the Court require that the Plan specifically

state that any claims under subsections (6) to (11) of the statute will be subject to the explicit statutory priority.

Dated this 22nd day of November, 2010.

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APPENDIX A

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CHAPTER 645

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Cross-reference: See definitions in ss. 600.03 and 628.02.

SUBCHAPTER I
GENERAL PROVISIONS**645.01 Short title, construction and purpose.**

(1) **SHORT TITLE.** This chapter may be cited as the "Insurers Rehabilitation and Liquidation Act".

(2) **CONSTRUCTION: NO LIMITATION OF POWERS.** This chapter shall not be interpreted to limit the powers granted the commissioner by other provisions of the law.

(3) **LIBERAL CONSTRUCTION.** This chapter shall be liberally construed to effect the purpose stated in sub. (4).

(4) **PURPOSE.** The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation

process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

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

History: 1979 c. 89, 102, 177.

Although the circuit court had subject matter jurisdiction, because New Jersey has adopted insurance rehabilitation legislation similar to ch. 645 that seeks to satisfy the same policy objectives as ch. 645, the principal of comity required the court to yield to the rehabilitation court in New Jersey and dismiss the claim of a Wisconsin resident against the insurer. *Isermann v. MBL Life Assurance Corp.* 231 Wis. 2d 136, 605 N.W.2d 210 (Ct. App. 1999), 98-2846.

645.02 Persons covered. The proceedings authorized by this chapter may be applied to all of the following:

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

(2) All insurers who purport to do an insurance business in this state.

(3) All insurers who have insureds resident in this state.

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

(5) All service insurance corporations under ch. 613 and all fraternal as defined in s. 614.01.

(6) All licensees under ch. 615 or 616.

(7) All health maintenance organizations, limited service health organizations and preferred provider plans organized under ss. 185.981 to 185.985.

History: 1975 c. 223, 373, 374; 1979 c. 93, 261, 355; 1985 a. 29.

645.03 INSURERS REHABILITATION AND LIQUIDATION

645.03 Definitions. (1) GENERAL DEFINITIONS. For the purposes of this chapter:

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

(b) “Delinquency proceeding” means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary proceeding under ss. 645.21 to 645.24.

(c) “Domiciliary state” means the state in which an insurer is incorporated or organized or, in the case of an alien insurer, the state in which the insurer has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and on deposit for the benefit of policyholders and creditors in the United States.

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

1. When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or services are rendered or obligation is incurred or an antecedent debt is satisfied; or

2. When such 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.

(e) “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 limited classes of persons, and as to specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the 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, shall be treated as general assets.

(f) “Insurer” means any person who is doing, has done, purports to do or is licensed to do an insurance business and is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization or conservation by, a commissioner. For purposes of this chapter, all other persons included under s. 645.02 shall be deemed to be insurers.

(g) “Preferred claim” means any claim with respect to which the law accords priority of payment from the general assets of the insurer.

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

(i) “Reciprocal state” means any state other than this state in which in substance and effect ss. 645.42 (1), 645.83 (1) and (3), 645.84 and 645.86 to 645.89 are in force, and in which provisions are in force requiring that the commissioner be the receiver of a delinquent insurer, and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

(j) “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, except where they have been invalidated.

(k) “Special deposit claim” means any claim secured by a deposit made pursuant to law for the security or benefit of one or more limited classes of persons, but not including any claim secured by general assets.

(L) “Transfer” includes the sale and every other method, 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 or involuntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by the debtor.

(2) DEFINITIONS APPLICABLE TO PROCEEDINGS INVOLVING SURETY INSURANCE. If the subject of a rehabilitation or liquidation

proceeding under this chapter is an insurer engaged in a surety business:

(a) “Beneficiary” as used in this chapter includes an obligee of a bond.

(b) “Insured” as used in this chapter includes both the principal and obligee of a bond.

(c) “Policy” as used in this chapter includes a bond issued by a surety.

(d) “Policyholder” as used in this chapter includes a principal on a bond.

History: 1971 c. 260; 1979 c. 93; 1983 a. 189.

645.035 Bankruptcy petition is prohibited. (1) In this section, “bankruptcy proceeding” means any proceeding under 11 USC 101 to 1330.

(2) No insurer may commence a bankruptcy proceeding in which the insurer is a debtor.

(3) No person, including an insurer, may commence a bankruptcy proceeding against an insurer.

(4) No board of directors, director or officer of an insurer may authorize the commencement of a bankruptcy proceeding in which the insurer is a debtor or the commencement of a bankruptcy proceeding against an insurer. Any act, resolution, filing or other matter that purports to authorize the commencement of a bankruptcy proceeding in which the insurer is a debtor or against an insurer is void and without effect.

(5) This section applies to all insurers, including but not limited to an insurer doing business as a health maintenance organization, as defined in s. 609.01 (2).

History: 1989 a. 23.

645.04 Jurisdiction and venue. (1) ACTIONS BY COMMISSIONER. Except as provided in sub. (2) and s. 645.45 (1), no delinquency proceeding may be commenced under this chapter by anyone other than the commissioner of this state and no court has jurisdiction to entertain, hear or determine any proceeding commenced by any other person.

(2) ACTIONS BY JUDGMENT CREDITORS. (a) The judgment creditors of 3 or more unrelated judgments may commence proceedings under the conditions and in the manner prescribed in this subsection, by serving notice upon the commissioner and the insurer of intention to file a petition for liquidation under s. 645.41 or 645.82. Each of the judgments must:

1. Have been rendered against the insurer by a court in this state having jurisdiction over the subject matter and the insurer;

2. Have been entered more than 60 days before the service of notice;

3. Not have been paid in full;

4. Not be the subject of a valid contract between the insurer and any judgment creditor for payment of the judgment, unless the contract has been breached by the insurer; and

5. Not be a judgment on which an appeal or review is pending.

(b) If any one of the judgments in favor of a petitioning creditor remains unpaid for 30 days after service of the notice, and the commissioner has not then filed a petition for liquidation, the creditor may file in the name of the commissioner a verified petition for liquidation of the insurer under s. 645.41 or 645.82 alleging the conditions stated in this subsection. The commissioner shall be served and joined in the action.

(3) EXCLUSIVENESS OF PROCEEDINGS; ARBITRATION CLAUSES. 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 any insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than in accordance with this chapter. An arbitration provision of any contract with an insurer that is subject to a delinquency proceeding under subch. III is not enforceable unless the receiver elects to accept arbitration. Only the court that has jurisdiction of

the delinquency proceeding may entertain, hear or determine any matter that otherwise would be subject to an arbitration provision.

(4) CHANGE OF VENUE. Venue for proceedings arising under this chapter shall be laid initially as specified in this chapter. All other actions and proceedings initiated by the receiver may be commenced and tried where the delinquency proceedings are then pending, or where venue would be laid by ss. 801.50 to 801.62 or other applicable law. All other actions and proceedings against the receiver shall be commenced and tried in the county where the delinquency proceedings are pending. At any time upon motion of any party, venue may be changed by order of the court or the presiding judge thereof to any other circuit court in this state, as the convenience of the parties and witnesses and the ends of justice may require. This subsection relates only to venue and is not jurisdictional.

(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 801.11 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

(a) 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;

(b) 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

(c) 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 the relationship with the insurer.

(6) CHANGE OF FORUM. If the court on motion of any party finds that any action commenced under sub. (5) should as a matter of substantial justice be tried in a forum outside this state, the court may enter an order under s. 801.63 to stay further proceedings on the action in this state.

History: Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975); 1979 c. 93; 1979 c. 110; 1981 c. 390; 1989 a. 23.

The exercise of jurisdiction under sub. (5) over a foreign person obligated to a domestic receiver does not violate due process. *Liquidation of All-Star Insurance Corporation*, 110 Wis. 2d 72, 327 N.W.2d 648 (1983).

645.05 Injunctions and orders. (1) INJUNCTIONS IN THIS STATE. Any receiver appointed in a proceeding under this chapter may at any time apply for and any court of general jurisdiction in this state may grant, under the relevant sections of ch. 813, such restraining orders, temporary and permanent injunctions, and other orders as are deemed necessary and proper to prevent:

- (a) The transaction of further business;
- (b) The transfer of property;
- (c) Interference with the receiver or with the proceedings;
- (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 or its assets;

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

(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 the proceeding.

(2) INJUNCTIONS ELSEWHERE. The receiver may apply to any court outside of this state for the relief described in sub. (1).

History: Sup. Ct. Order, 67 Wis. 2d 585, 776 (1975).

645.06 Costs and expenses of litigation. In any proceeding or action brought by the commissioner or a receiver under this chapter, the court may award such costs and other expenses of litigation to the commissioner or receiver as justice requires, without regard to the limitations otherwise prescribed by law.

History: 1989 a. 23.

645.07 Cooperation of officers and employees.

(1) DUTY TO COOPERATE. Any officer, manager, trustee or general agent of any insurer, any attorney representing an insurer on any matter, and any other person with executive authority over or in charge of any segment of the insurer's affairs shall cooperate with the commissioner in any proceeding under this chapter or any investigation preliminary or incidental to the proceeding. "To cooperate" includes:

(a) To reply promptly in writing to any inquiry from the commissioner requesting a reply; and

(b) To make available and deliver to the commissioner any books, accounts, documents or other records, or information or property of or pertaining to the insurer and in the person's possession, custody or control.

(2) DUTY NOT TO OBSTRUCT. No person may obstruct or interfere with the commissioner in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto.

(3) RIGHT TO DEFEND. This section does not make it illegal to resist by legal proceedings the petition for liquidation or other delinquency proceedings, or other orders.

(4) SANCTION. Any person included within sub. (1) who fails to cooperate with the commissioner, or any person who obstructs or interferes with the commissioner in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto, is subject to s. 601.64.

History: 1979 c. 93; 1979 c. 102 ss. 196, 236 (15); 1979 c. 177.

645.08 Bonds; immunity. (1) BONDS. In any proceeding under this chapter the commissioner and the commissioner's deputies are responsible on their official bonds for the faithful performance of their duties. If the court deems it desirable for the protection of the assets, it may at any time require an additional bond from the commissioner or the commissioner's deputies.

(2) IMMUNITY. No civil cause of action may arise against and no civil liability may be imposed upon the state, commissioner, special deputy commissioner, rehabilitator or liquidator, or their employees or agents, or the insurance security fund under ch. 646 or its agents, employees, directors or contributor insurers, for an act or omission by any of them in the performance of their powers and duties under this chapter or in the performance of their powers and duties relating to regulation of the capital or solvency of an insurer under chs. 600 to 646, including the compulsory or security surplus requirements under ch. 623. This subsection does not apply to a civil cause of action arising from an act or omission that is criminal under ch. 943. Such a cause of action, however, may be barred or limited by common law, sovereign immunity, governmental immunity or otherwise by law.

History: 1979 c. 93; 1979 c. 102 s. 236 (14); 1989 a. 23; 1996 a. 396.

645.09 Commissioner's reports. (1) GENERAL REPORT OF PROCEEDINGS. The commissioner may include in his or her annual report:

(a) *Formal proceedings.* The names of the insurers proceeded against under ss. 645.31, 645.41, 645.45, 645.81, 645.82 and

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 company, if the agent has a record of the address of the policyholder or other person. A policy shall be deemed issued through an agent if the agent has a property interest in the expiration of the policy; or if the agent has had in his or her possession a copy of the declarations of the policy at any time during the life of the policy, except where the ownership of the expiration of the policy has been transferred to another. 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 under s. 645.43. Notice by a general agent satisfies the notice requirement for any agents under contract to the general agent.

(2) **ORAL NOTICE.** So far as practicable, every insurance agent subject to sub. (1) shall give immediate oral notice, by telephone or otherwise, of the liquidation order to the same persons to whom the agent is obligated to give written notice. The oral notice shall include substantially the same information as the written notice.

History: 1975 c. 371, 421; 1979 c. 102.

645.49 Actions by and against liquidator. (1) TERMINATION OF ACTIONS AGAINST INSURER BY ORDER APPOINTING LIQUIDATOR. Upon issuance of any order appointing the commissioner liquidator of a domestic insurer or of an alien insurer domiciled in this state, all actions and all proceedings against the insurer whether in this state or elsewhere shall be abated and the liquidator shall not intervene in them, except as provided in this subsection. Whenever in the liquidator's judgment an action in this state has proceeded to a point where fairness or convenience would be served by its continuation to judgment, the liquidator may apply to the court for leave to defend or to be substituted for the insurer, and if the court grants the application, the action shall not be abated. 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, with approval of the court the liquidator may intervene in the action. The liquidator may defend at the expense of the estate of the insurer any action in which he or she intervenes under this section at the expense of the estate of the insurer.

(2) **STATUTES OF LIMITATIONS ON CLAIMS BY INSURER.** The liquidator may, within 2 years subsequent to the entry of an order for liquidation or within such further time as applicable law permits, 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 such 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 any such 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 such action or do any such act, required of or permitted to the insurer, within a period of 60 days subsequent to the entry of an order for liquidation, or within such further period as is permitted by the agreement, or in the proceeding or by applicable law, or within such further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

(3) **STATUTES OF LIMITATIONS ON CLAIMS AGAINST INSURER.** The time between the filing of a petition for liquidation against an insurer and the denial of the petition shall not be considered to be a part of the time within which any action may be commenced against the insurer. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the petition is denied.

History: 1979 c. 102.

645.51 Collection and list of assets. (1) LIST OF ASSETS REQUIRED. As soon as practicable after the liquidation order, the liquidator shall prepare in duplicate a list of the insurer's assets. The list shall be amended or supplemented as the court requires. One copy shall be filed in the office of the clerk of the court having jurisdiction over the liquidation proceedings and one copy shall be retained for the liquidator's files. All amendments and supplements shall be similarly filed.

(2) **LIQUIDATION OF ASSETS.** The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation as rapidly and economically as he or she can.

History: 1979 c. 102 s. 236 (5).

645.52 Fraudulent transfers prior to petition. (1) DEFINITION AND EFFECT. 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 such transfer, lien or obligation, may retain the property, lien or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate, and in that event the receiver shall succeed to and may enforce the rights of the purchaser, lienor or obligee.

(2) **PERFECTION OF TRANSFERS. (a) Personal property.** A transfer of property other than real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee under s. 645.54 (3).

(b) **Real property.** A transfer of real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(c) **Equitable liens.** A transfer which creates an equitable lien shall not be deemed to be perfected if there are available means by which a legal lien could be created.

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

(e) **Actual creditors unnecessary.** This subsection applies whether or not there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers.

(3) **FRAUDULENT REINSURANCE TRANSACTIONS.** Any transaction of the insurer with a reinsurer shall be deemed fraudulent and may be avoided by the receiver under sub. (1) if:

(a) 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; and

(b) 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.

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(3) **ORDER TO SHOW CAUSE.** After levy of assessment under sub. (2), the court shall issue an order directing each member who has not paid the assessment pursuant to the order to show cause why the liquidator shall not have a judgment therefor. If a member of the insurer also appears to be indebted to the insurer apart from the assessment, the court, upon application of the liquidator, may also direct the member to show cause why the member should not pay the other indebtedness. Liability for such indebtedness shall be determined in the same manner and at the same time as the liability to pay the assessment.

(4) **NOTICE.** The liquidator shall give notice of the order to show cause by publication if so directed by the court and by first class mail to each member liable thereunder mailed at least 20 days before the return day of the order to show cause to the member's last-known address as it appears on the records of the insurer.

(5) **ORDERS AND HEARINGS.** (a) If a member does not appear and serve duly verified objections upon the liquidator upon the return day of the order to show cause under sub. (3), the court shall make an order adjudging the member liable to the liquidator for the amount of the assessment against the member and other indebtedness, under sub. (3), together with costs.

(b) If on such return day, the member appears and serves duly verified objections upon the liquidator, the court may hear and determine the matter or may appoint a referee to hear it and make such order as the facts warrant. Any order made by a referee under this paragraph shall have the same force and effect as if it were a judgment of the court, subject to review by the court upon application within 30 days.

(6) **COLLECTION.** The liquidator may enforce any order or collect any judgment under sub. (5) by any lawful means.

History: 1973 c. 22 s. 12; 1979 c. 102; 1991 a. 316.

645.58 Reinsurer's liability; arbitration clauses.

(1) **LIABILITY.** Except as provided in this subsection and in s. 646.35 (8) (e), the amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate except when any of the following applies:

(a) The reinsurance contract or other agreement specifically provides for another payee of the reinsurance in the event of delinquency proceedings, payment is made to the other payee, and the payment operates to extinguish the liability of the ceding insurer to the extent of the payment made by the reinsurer.

(b) The reinsurer has assumed policy obligations of the ceding insurer as direct obligations of the reinsurer, payment is made to the payees under the policies, and the assumption operates to extinguish the liability of the ceding insurer to the extent assumed.

(2) **ARBITRATION.** After December 31, 1989, a domestic insurer may not enter into a reinsurance contract that contains an arbitration provision permitting its reinsurer to require arbitration of an action on or related to the contract when the domestic insurer is subject to a delinquency proceeding under this subchapter.

History: 1989 a. 23; 2003 a. 44, 261.

645.59 Uncollected, unearned premiums. An agent or broker who is a resident of this state is not liable to the liquidator of a domestic or foreign insurer for the amount of any uncollected, unearned premium.

History: 1987 a. 325.

645.60 Applicability of claims settlement provisions to loss claims. Sections 645.46 (18), 645.61 (2) and (3), 645.63 (1), (3), (4) and (6), 645.64 (3), 645.65, 645.71, 645.86 and 645.87 (2) do not apply to those loss claims that are subject to ch. 646 or to corresponding laws of other states that conform to s. 646.60 (1). In addition, ss. 645.61 (1), 645.62 (1), 645.63 (2), 645.64 (1), (2) and (4), 645.83 (3) and 645.87 (1) do not apply to those loss claims

under contracts subject to s. 646.35 or to corresponding laws of other states that conform to ss. 646.35 and 646.60 (1).

History: 1979 c. 109; 1985 a. 216.

645.61 Filing of claims. (1) DEADLINE FOR FILING. Proof of all claims must be filed with the liquidator in the form required by s. 645.62 on or before the last day for filing specified in the notice required under s. 645.47, except that proof of claims under s. 645.68 (9) to (11) need not be filed at all, and proof of claims for unearned premiums and claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

(2) **EXCUSED LATE FILINGS.** For a good cause shown, the liquidator shall recommend and the court shall permit a claimant making a late filing to share in dividends, whether past or future, as if the claim were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation. Good cause includes but is not limited to the following:

(a) That existence of a claim was not known to the claimant and which the claimant filed within 30 days after learning of it;

(b) That a claim for unearned premiums or for cash surrender values or other investment values in life insurance or annuities which was not required to be filed was omitted from the liquidator's recommendations to the court under s. 645.71, and that it was filed within 30 days after the claimant learned of the omission;

(c) That a transfer to a creditor was avoided under ss. 645.52 to 645.54 or was voluntarily surrendered under s. 645.55, and that the filing satisfies the conditions of s. 645.55;

(d) That valuation under s. 645.67 of security held by a secured creditor shows a deficiency, which is filed within 30 days after the valuation; and

(e) That a claim was contingent and became absolute, and was filed within 30 days after it became absolute.

(3) **UNEXCUSED LATE FILINGS.** The liquidator may consider any claim filed late which is not covered by sub. (2), and permit it to receive dividends, other than the first dividend, 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 the late claim as is then being paid to other claimants of the same priority plus the same percentage of the amount allowed on the late claim as is then being paid to claimants of any lower priority. This shall continue until the late claim has been paid in full.

(4) **FILING OF CLAIMS BY FUNDS.** Claims by funds under s. 646.33 and corresponding provisions of funds of other jurisdictions that satisfy s. 646.60 (1) (b) shall be filed periodically by the funds pursuant to rules promulgated by the commissioner.

History: 1971 c. 260; 1979 c. 93, 102, 109.

645.62 Proof of claim. (1) CONTENTS OF PROOF OF CLAIM.

(a) Unless otherwise prescribed by the liquidator, a proof of claim shall consist of a verified statement that includes all of the following that are applicable:

1. The particulars of the claim, including the consideration given for it.
2. The identity and amount of the security on the claim.
3. The payments made on the debt, if any.
4. That the sum claimed is justly owing and that there is no setoff, counterclaim or defense to the claim.
5. Any right of priority of payment or other specific right asserted by the claimant.
6. A copy of any written instrument which is the foundation of the claim.
7. In the case of any 3rd-party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to s. 645.64 (1).
8. The name and address of the claimant and the attorney, if any, who represents the claimant.