

SENATE BILL No. 166

AN ACT concerning insurance; pertaining to the insurers supervision, rehabilitation and liquidation act; amending K.S.A. 40-3607 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. *Qualified financial contracts.* (a) (1) No person shall be stayed, enjoined or prohibited from exercising any of the following:

(A) A contractual right to terminate, liquidate, accelerate or close out, or cause the termination, liquidation, acceleration or close out of obligations, under or in connection with any netting agreement or qualified financial contract with an insurer because of any of the following:

(i) The insolvency, financial condition or default of the insurer at any time, provided that the right is enforceable under applicable law other than this act; or

(ii) the commencement of a formal delinquency proceeding under this act;

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

(C) subject to the provisions of subsection (b) of K.S.A. 40-3633, and amendments thereto, any right to set off or net out any termination value, payment amount or other transfer obligation arising under or in connection with one or more netting agreements or qualified financial contracts where the counterparty or its guarantor is organized under the laws of the United States or a state or a foreign jurisdiction approved by the securities valuation office (SVO) of the national association of insurance commissioners as eligible for netting.

(2) If a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a formal delinquency proceeding under this act terminates, liquidates, closes out or accelerates the agreement or contract, damages shall be measured as of the date or dates of termination, liquidation, close out or acceleration. The amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with subsection (f).

(b) Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a non-defaulting party to an insurer against which an application or petition has been filed under this act shall be transferred to or on the order of the receiver for the insurer even if the insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For the purposes of this subsection, the term “walkaway clause” means a provision in a netting agreement or a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from one of the parties in accordance with its terms upon termination, liquidation or acceleration of the netting agreement or qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party, in whole or in part, solely because of the party’s status as a non-defaulting party. Any limited two-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that has defaulted shall be deemed to be a full two-way payment or second method provision as against the defaulting insurer. Any such net or settlement amount shall, except to the extent it is subject to one or more secondary liens or encumbrances or rights of netting or setoff, be a general asset of the insurer.

(c) In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a formal delinquency proceeding under this article, the receiver shall either:

(1) Transfer to one party, other than an insurer subject to a proceeding under this act, all netting agreements and qualified financial contracts between a counterparty or any affiliate of such counterparty and the insurer that is the subject of the formal delinquency proceeding, including all of the following:

(A) All rights and obligations of each party under each such netting agreement and qualified financial contract; and

(B) all property, including any guarantees or other credit enhancement, securing any claims of each party under each such netting agreement and qualified financial contract; or

(2) transfer none of the netting agreements, qualified financial contracts, rights, obligations or property referred to in paragraph (1) of this

subsection with respect to the counterparty and any affiliate of such counterparty.

(d) (1) If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, then the receiver shall use its best efforts to notify any person who is a party to the netting agreements or qualified financial contracts of the transfer by 12 noon, the receiver's local time, on the business day following the transfer.

(2) For purposes of this subsection, "business day" means a day other than a Saturday, Sunday or any day on which either the New York stock exchange or the federal reserve bank of New York is closed.

(e) (1) Notwithstanding any other provision of this act to the contrary, except as provided in paragraph (2), a receiver shall not avoid a transfer of money or other property arising under or in connection with a netting agreement or qualified financial contract, or any pledge, security, collateral or guarantee agreement or any other similar security arrangement or credit support document relating to such netting agreement or qualified financial contract that is made before the commencement of a formal delinquency proceeding under this act.

(2) However, a transfer may be avoided under subsection (a) of K.S.A. 40-3629, and amendments thereto, if such transfer was made with actual intent to hinder, delay or defraud the insurer, a receiver appointed for the insurer or existing or future creditors.

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

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

(B) disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in subsection (f)(1)(A) with respect to the person or any affiliate of the person;

(2) notwithstanding any other provisions of this act, any claim of a counterparty against the estate arising from the receiver's disaffirmance or repudiation of a netting agreement or qualified financial contract that has not been previously affirmed in the liquidation or immediately preceding a conservation or rehabilitation case shall be determined and shall be allowed or disallowed:

(A) As if the claim had arisen before the date of the filing of the petition for liquidation; or

(B) if a conservation or rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the petition for conservation or rehabilitation.

(3) The amount of the claim shall be the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified financial contract.

(4) (A) The term "actual direct compensatory damages" does not include punitive or exemplary damages, damages for lost profit or lost opportunity or damages for pain and suffering.

(B) The term "actual direct compensatory damages" does include normal and reasonable costs of cover or other reasonable measures of damages utilized in the derivatives, securities or other market for the contract and agreement claims.

(g) As used in this section, the term "contractual right" shall include:

(1) Any right set forth in a rule or bylaw or resolution of the governing board of a:

(A) Derivatives clearing organization, as defined in the commodity exchange act;

(B) multilateral clearing organization, as defined in the federal deposit insurance corporation improvement act of 1991;

(C) national securities exchange;

(D) national securities association;

(E) securities clearing agency;

(F) contract market designated under the commodity exchange act;

(G) derivatives transaction execution facility registered under the commodity exchange act; or

(H) board of trade, as defined in the commodity exchange act;

(2) any right, whether or not evidenced in writing, arising under stat-

utory or common law, or under merchant law, or by reason of normal business practice.

(h) The provisions of this section shall not apply to any person who is an affiliate of the insurer that is the subject of the formal delinquency proceeding.

(i) All rights of any counterparties under this act shall apply to netting agreements and qualified financial contracts entered into on behalf of the general account or separate accounts if the assets of each separate account are available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of that separate account.

(j) The provisions of this section shall apply only to a liquidation, rehabilitation or conservation proceeding that commences on or after the effective date of this act.

(k) This section shall be a part of and supplemental to the insurers supervision, rehabilitation and liquidation act.

Sec. 2. K.S.A. 40-3607 is hereby amended to read as follows: 40-3607. For the purposes of this act:

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

(b) “Commissioner” means the commissioner of insurance.

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

(d) “Delinquency proceeding” means any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary proceeding under K.S.A. 40-3613 or 40-3614, *and amendments thereto*.

(e) “Doing business” includes, but is not necessarily limited to, any of the following acts, whether effected by mail or otherwise:

(1) The issuance or delivery of contracts of insurance to persons resident in this state;

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

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

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

(5) operating under a license or certificate of authority, as an insurer, issued by the insurance department.

(f) “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.

(g) “Fair consideration” is given for property or 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 an 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.

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

(i) “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 hereby. 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.

(j) “Guaranty association” means the Kansas insurance guaranty association created by K.S.A. 40-2901, and amendments thereto, the Kansas life and health insurance guaranty association created by K.S.A. 40-3001, and amendments thereto, and any other similar entity now or hereafter created by the legislature of this state for the payment of claims of insolvent insurers. “Foreign guaranty association” means any similar entities now in existence in or hereafter created by the legislature of any other state.

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

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

(A) The inability to pay any obligation within 30 days after it becomes payable; or

(B) if an assessment is made, within 30 days after such date. The inability to pay such obligation 30 days following the date specified in the first assessment notice issued after the date of loss.

(2) 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:

(A) Any capital and surplus required by law for its organization; or

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

~~(C)~~(3) For purposes of this subsection, “liabilities” shall include, but not be limited to, reserves required by statute or by insurance department general regulations or specific requirements imposed by the commissioner upon a subject company at the time of admission or subsequent thereto.

(l) “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, any insurance commissioner. For purposes of this act, any other persons included under K.S.A. 40-3606, *and amendments thereto*, shall be deemed to be insurers.

(m) “Person” means any individual, aggregation of individuals, trust, association, partnership, corporation or any affiliate thereof.

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

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

(p) “Reciprocal state” means any state other than this state in which in substance and effect subsection (a) of K.S.A. 40-3622 and K.S.A. 40-3650, 40-3651 and 40-3653 through 40-3655, *and amendments thereto*, are in force, and in which provisions are in force requiring that the commissioner 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.

(q) “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.

(r) “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.

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

(t) “Transfer” shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or within 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 shall be deemed a transfer suffered by the debtor.

(u) “Commodity contract” means any of the following:

(1) A contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a:

(A) Board of trade or contract market under the commodity exchange act, 7 U.S.C. § 1 *et seq.*; or

(B) board of trade outside the United States.

(2) An agreement that is subject to regulation under section 23 of the commodity exchange act, 7 U.S.C. § 1 *et seq.*, and that is commonly known to the commodities trade as a margin account, margin contract, leverage account or leverage contract.

(3) An agreement or transaction that is subject to regulation under section 6c(b) of the commodity exchange act, 7 U.S.C. § 1 *et seq.*, and that is commonly known to the commodities trade as a commodity option.

(4) Any combination of the agreements or transactions referred to in this paragraph.

(5) Any option to enter into an agreement or transaction referred to in this paragraph.

(v) “Formal delinquency proceeding” means a delinquency proceeding, except that such term shall not include a supervision under K.S.A. 40-3613, and amendments thereto.

(w) “Forward contract” shall have the meaning ascribed to such term in the federal deposit insurance act, 12 U.S.C. § 1821(e)(8)(D).

(x) “Netting agreement” means:

(1) A contract or agreement, including the terms and conditions incorporated by reference therein, including a master agreement, (which master agreement, together with all schedules, confirmations, definitions and addenda thereto and transactions under any thereof, shall be treated as one netting agreement) that documents one or more transactions between the parties to the agreement:

(A) For or involving one or more qualified financial contracts; and

(B) that provides for the netting, liquidation, setoff, termination, acceleration or close out under or in connection with one or more qualified financial contracts or present or future payment or delivery obligations or payment or delivery entitlements thereunder (including liquidation or close out values relating to such obligations or entitlements) among the parties to the netting agreement;

(2) any master agreement or bridge agreement for one or more master agreements described in paragraph (1) of this subsection; or

(3) any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in either paragraph (1) or (2) of this subsection.

Provided that any contract or agreement described in either paragraph (1) or (2) of this subsection relating to agreements or transactions that are not qualified financial contracts shall be deemed to be a netting agreement only with respect to those agreements or transactions that are qualified financial contracts.

(y) “Qualified financial contract” means any commodity contract, forward contract, repurchase agreement, securities contract, swap agreement and any similar agreement that the commissioner determines by regulation, rule or order to be a qualified financial contract for the purposes of this act.

(z) “Repurchase agreement” shall have the meaning ascribed to such term in the federal deposit insurance act, 12 U.S.C. § 1821(e)(8)(D). The term repurchase agreement also applies to a reverse repurchase agreement.

(aa) “Securities contract” shall have the meaning set forth in the federal deposit insurance act, 12 U.S.C. § 1821(e)(8)(D).

(bb) “Swap agreement” shall have the meaning set forth in the federal deposit insurance act, 12 U.S.C. § 1821(e)(8)(D).

Sec. 3. K.S.A. 40-3607 is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the SENATE, and passed that body

President of the Senate.

Secretary of the Senate.

Passed the HOUSE _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.