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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2004

ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 2914

(By Delegates H. White, Hrutkay and R. M. Thompson)

Passed March 11, 2004

In Effect Ninety Days from Passage

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FOR

H. B. 2914

(BY DELEGATES H. WHITE, HRUTKAY AND R. M. THOMPSON)

[Passed March 11, 2004; in effect ninety days from passage.]

AN ACT to repeal §33-10-27 of the code of West Virginia, 1931, as amended; to repeal §33-24-15, §33-24-16, §33-24-17, §33-24-18, §33-24-19, §33-24-21, §33-24-22, §33-24-23, §33-24-24, §33-24-25, §33-24-26, §33-24-27, §33-24-28, §33-24-29, §33-24-30, §33-24-31, §33-24-32, §33-24-33, §33-24-34, §33-24-35, §33-24-36, §33-24-37, §33-24-38, §33-24-39, §33-24-40, §33-24-41 and §33-24-42 of said code; to amend and reenact §33-10-1, §33-10-2, §33-10-3, §33-10-4, §33-10-10, §33-10-11, §33-10-13, §33-10-14, §33-10-18, §33-10-19a, §33-10-26, §33-10-28, §33-10-29, §33-10-30, §33-10-36, §33-10-38 and §33-10-39 of said code; to amend said code by adding thereto ten new sections, designated §33-10-4a, §33-10-4b, §33-10-4c, §33-10-4d, §33-10-4e, §33-10-26a, §33-10-26b, §33-10-26c, §33-10-26d and §33-10-40; and to amend and reenact §33-24-14 of said code, all relating to the rehabilitation and liquidation of insurers subject to the regulatory authority of the West Virginia insurance commissioner; revising delinquency proceedings; clarifying what parties will be affected

upon the effective date of the revisions; expanding the liquidators' powers; expediting hearings and appeals; modifying current state law relative to liquidation proceedings so as to create conformity with recent federal case law; and making numerous technical changes.

Be it enacted by the Legislature of West Virginia:

That §33-10-27 of the code of West Virginia, 1931, as amended, be repealed; that §33-24-15, §33-24-16, §33-24-17, §33-24-18, §33-24-19, §33-24-21, §33-24-22, §33-24-23, §33-24-24, §33-24-25, §33-24-26, §33-24-27, §33-24-28, §33-24-29, §33-24-30, §33-24-31, §33-24-32, §33-24-33, §33-24-34, §33-24-35, §33-24-36, §33-24-37, §33-24-38, §33-24-39, §33-24-40, §33-24-41, and §33-24-42 of said code be repealed; that §33-10-1, §33-10-2, §33-10-3, §33-10-4, §33-10-10, §33-10-11, §33-10-13, §33-10-14, §33-10-18, §33-10-19a, §33-10-26, §33-10-28, §33-10-29, §33-10-30, §33-10-36, §33-10-38 and §33-10-39 of said code be amended and reenacted; that said code be amended by adding thereto ten new sections, designated §33-10-4a, §33-10-4b, §33-10-4c, §33-10-4d, §33-10-4e, §33-10-26a, §33-10-26b, §33-10-26c, §33-10-26d and §33-10-40; and that §33-24-14 of said code be amended and reenacted, all to read as follows:

ARTICLE 10. REHABILITATION AND LIQUIDATION.

§33-10-1. Definitions.

1 For the purpose of this article, the following definitions
2 shall apply:

3 (a) "Impairment" means a financial situation in which,
4 based upon the financial information which would be required
5 by this chapter for the preparation of the insurer's annual
6 statement, the assets of an insurer are less than the sum of all of
7 its liabilities and required reserves including any minimum
8 capital or surplus or both required of that insurer by this chapter
9 so as to maintain its authority to transact the kinds of business
10 or insurance it is so authorized to transact.

11 (b) "Insolvency" or "insolvent" means a financial situation
12 in which, based upon the financial information which would be
13 required by this chapter for the preparation of the insurer's
14 annual statement, the assets of the insurer are less than the sum
15 of all of its liabilities and required reserves.

16 (c) "Insurer" means any person, firm, corporation, associa-
17 tion or aggregation of persons doing an insurance business and
18 which is or has been subject to the insurance supervisory
19 authority of, or to liquidation, rehabilitation, reorganization or
20 conservation by, the commissioner or the equivalent insurance
21 supervisory official of another state. For purposes of this article,
22 all persons, corporations, associations or entities to whom this
23 article applies and which are subject to delinquency proceed-
24 ings commenced in this state shall be considered "insurers".

25 (d) "Delinquency proceeding" means any proceeding
26 commenced against an insurer pursuant to this article for the
27 purpose of liquidating, rehabilitating, reorganizing or conserv-
28 ing the insurer and any summary proceeding under section
29 thirty-six of this article. "Formal delinquency proceeding"
30 means any liquidation or rehabilitation proceeding.

31 (e) "State" means any state, district or territory of the
32 United States.

33 (f) "Foreign country" means any other jurisdiction not in
34 any state.

35 (g) "Domiciliary state" means the state in which an insurer
36 is incorporated or organized, or in the case of an alien insurer
37 as defined in section eight, article one of this chapter, the state
38 in which such insurer, having become authorized to do business
39 in such state, has at the commencement of delinquency pro-
40 ceedings, the largest amount of its assets held in trust and assets
41 held on deposit for the benefit of its policyholders or policy-
42 holders and creditors in the United States or its state of entry.

43 (h) "Ancillary state" means any state other than a domicili-
44 ary state.

45 (i) "Reciprocal state" means any state other than this state
46 in which in substance and effect the provisions of the uniform
47 insurers liquidation act, as defined in section twenty-one of this
48 article, are in force, and in which provisions are in force
49 requiring that the insurance commissioner or equivalent
50 insurance supervisory official be the receiver of a delinquent
51 insurer, and in which some provision exists for the avoidance
52 of fraudulent conveyances and preferential transfers.

53 (j) "General assets" means all property, real, personal or
54 otherwise, not specifically mortgaged, pledged, deposited or
55 otherwise encumbered for the security or benefit of specified
56 persons or a limited class or classes of persons and as to such
57 specifically encumbered property, the term includes all such
58 property or its proceeds in excess of the amount necessary to
59 discharge the sum or sums secured thereby. Assets held in trust
60 and assets held on deposit for the security or benefit of all
61 policyholders or all policyholders and creditors in more than a
62 single state shall be considered general assets.

63 (k) "Preferred claim" means any claim with respect to
64 which the terms of this article accord priority of payments from
65 the general assets of the insurer.

66 (l) "Special deposit claim" means any claim secured by a
67 deposit made pursuant to statute for the security or benefit of a
68 limited class or classes of persons, but not including any
69 general assets.

70 (m) "Secured claim" means any claim secured by mortgage,
71 trust deed, pledge, deposit as security, escrow, or otherwise, but
72 not including special deposit claim or claims against general
73 assets. The term also includes claims which more than four
74 months prior to the commencement of delinquency proceedings

75 in the state of the insurer's domicile have become liens upon
76 specific assets by reason of judicial process.

77 (n) "Receiver" means receiver, liquidator, rehabilitator or
78 conservator as the context may require.

79 (o) "Guaranty association" means the West Virginia
80 insurance guaranty association created by article twenty-six of
81 this chapter, the West Virginia life and health insurance
82 guaranty association act created by article twenty-six-a of this
83 chapter and any other similar entity now or hereafter created by
84 the Legislature of this state for the payment of claims of
85 insolvent insurers.

86 (p) "Foreign guaranty association" means any entities now
87 in existence in or hereafter created by the Legislature of any
88 other state that are similar to the entities described in subsection
89 (o) of this section.

90 (q) "Surplus" means the amount by which an insurer's
91 assets exceeds its liabilities and required reserves based upon
92 the financial information which would be required by this
93 chapter for the preparation of the insurer's annual statement.

94 (r) "Affiliate" or a person "affiliated with" a specific person
95 means a person that, directly or indirectly, through one or more
96 intermediaries, controls, or is controlled by, or is under com-
97 mon control with the person specified.

98 (s) "Control" means the possession, direct or indirect, of the
99 power to direct or cause the direction of the management and
100 policies of a person, whether through the ownership of voting
101 securities, by contract other than a commercial contract for
102 goods or nonmanagement services, or otherwise, unless the
103 power is the result of an official position with or corporate
104 office held by the person. Control shall be presumed to exist if
105 any person, directly or indirectly, owns, controls, holds with the

106 power to vote, or holds proxies representing ten percent or more
107 of the voting securities of any other person. This presumption
108 may be rebutted by a showing that control does not, in fact,
109 exist.

110 (t) "Transfer" means the sale and every other and different
111 mode, direct or indirect, of disposing of or of parting with
112 property or an interest therein, absolutely or conditionally,
113 voluntarily, by or without judicial proceedings. The retention of
114 a security title to property delivered to a debtor is considered a
115 transfer suffered by the debtor.

§33-10-2. Jurisdiction, venue and appeal of delinquency proceedings; exclusive remedy.

1 (a) The circuit courts of this state or the judges thereof in
2 vacation are vested with exclusive original jurisdiction of
3 delinquency proceedings under this article, and are authorized
4 to make all necessary and proper orders to carry out the
5 purposes of this article.

6 (b) The venue of delinquency proceedings against a
7 domestic insurer shall be in the circuit court of the county of the
8 insurer's principal place of business. The venue of such
9 proceedings against foreign insurers, alien insurers or domestic
10 insurers in which their principal place of business is outside of
11 the state of West Virginia shall be in the circuit court of
12 Kanawha County.

13 (c) With the exception of administrative supervision
14 pursuant to article thirty-four of this chapter, delinquency
15 proceedings pursuant to this article shall constitute the sole and
16 exclusive method of liquidating, rehabilitating, reorganizing or
17 conserving an insurer and no court shall entertain a petition for
18 the commencement of such proceedings unless the same has
19 been filed in the name of the state on the relation of the
20 insurance commissioner.

21 (d) An appeal shall lie to the West Virginia supreme court
22 of appeals from an order granting or refusing rehabilitation,
23 liquidation or conservation and from every other order in
24 delinquency proceedings having the character of a final order
25 as to the particular portion of the proceedings embraced therein.
26 Appeals from orders granting or refusing rehabilitation,
27 liquidation or conservation shall be prosecuted pursuant to
28 section four-d of this article.

29 (e) At any time after an order is made under section ten or
30 eleven of this article, the commissioner may remove the
31 principal office of the insurer proceeded against to Kanawha
32 County. In the event of such removal, the court wherein the
33 proceeding was originally commenced shall, upon the applica-
34 tion of the commissioner, direct its clerk to transmit all the
35 pleadings, motions and other papers filed therein with such
36 clerk to the clerk of the circuit court of Kanawha County. The
37 proceeding shall thereafter be subject to the jurisdiction of the
38 Kanawha County circuit court and conducted in the same
39 manner as though it had been commenced in the Kanawha
40 County circuit court.

§33-10-3. Court's seizure order.

1 (a) The commissioner may file in the appropriate circuit
2 court of this state, as provided in section two of this article, a
3 petition alleging, with respect to a domestic insurer:

4 (1) That there exist any grounds that would justify a court
5 order for a formal delinquency proceeding against an insurer
6 under this act;

7 (2) That the interests of policyholders, creditors or the
8 public will be endangered by delay; and

9 (3) The contents of an order considered necessary by the
10 commissioner.

11 (b) Upon a filing under subsection (a) of this section, the
12 court may issue forthwith, ex parte and without a hearing, the
13 requested order which shall direct the commissioner to take
14 possession and control of all or a part of the assets, books,
15 accounts, documents and other records of an insurer and of the
16 premises occupied by it for transaction of its business; and until
17 further order of the court enjoin the insurer and its officers,
18 managers, agents and employees from disposition of its
19 property and from the transaction of its business except with the
20 written consent of the commissioner.

21 (c) The court shall specify in the order what its duration
22 shall be, which shall be the time as the court considers neces-
23 sary for the commissioner to ascertain the condition of the
24 insurer. On motion of either party or on its own motion, the
25 court may, from time to time, hold hearings as it considers
26 desirable after notice that it considers appropriate and may
27 extend, shorten or modify the terms of the seizure order. The
28 court shall vacate the seizure order if the commissioner fails to
29 commence a formal delinquency proceeding under this article
30 after having had a reasonable opportunity to do so. An order of
31 the court pursuant to a formal proceeding under this article shall
32 ipso facto vacate the seizure order.

33 (d) Entry of a seizure order under this section will not
34 constitute an anticipatory breach of any contract of the insurer.

35 (e) An insurer subject to an ex parte order under this section
36 may petition the court at any time after the issuance of the order
37 for a hearing and review of the order. The court shall hold the
38 hearing and review not more than fifteen days after the request.
39 Subject to the approval of the court, a hearing under this
40 subsection may be held privately in chambers if the insurer
41 proceeded against so requests.

42 (f) If, at any time after the issuance of such an order, it
43 appears to the court that any person whose interest is or will be
44 substantially affected by the order did not appear at the hearing
45 and has not been served, the court may order that notice be
46 given. An order that notice be given will not stay the effect of
47 any order previously issued by the court.

§33-10-4. Injunctions and other orders.

1 (a) Upon application by the commissioner for an order
2 under this article:

3 (1) The court may without notice issue an injunction
4 restraining the insurer, its officers, directors, stockholders,
5 members, subscribers, agents and all other persons from the
6 transaction of its business or the waste or disposition of its
7 property until further order of the court.

8 (2) The court may at any time during a proceeding under
9 this article issue other injunctions or orders as may be consid-
10 ered necessary to prevent interference with the commissioner
11 or the proceeding, or waste of the assets of the insurer, or the
12 commencement or prosecution of any actions, or the obtaining
13 of preferences, judgments, attachments or other liens, or the
14 making of any levy against the insurer or against its assets or
15 any part thereof.

16 (3) The court may order any managing general agent or
17 attorney in fact to release to the commissioner any books,
18 records, accounts, documents or other writings relating to the
19 business of such person: *Provided*, That any of the same or the
20 property of an agent or attorney shall be returned when no
21 longer necessary to the commissioner or at any time the court
22 after notice and hearing shall so direct.

23 (b) Any person having possession of and refusing to deliver
24 any of the books, records or assets of an insurer against whom

25 a seizure order has been issued by the court shall be guilty of a
26 misdemeanor and punishable by fine not exceeding one
27 thousand dollars or imprisoned not more than one year, or both
28 fine and imprisonment.

29 (c) Whenever the commissioner makes any seizure as
30 provided in section three of this article, it shall be the duty of
31 the sheriff of any county of this state, and of the police depart-
32 ment of any municipality therein, to furnish the commissioner,
33 upon demand, with such deputies, patrolmen or officers as may
34 be necessary to assist the commissioner in making and enforc-
35 ing any seizure.

36 (d) Notwithstanding any other provision of law, no bond
37 shall be required of the commissioner as a prerequisite for the
38 issuance of any injunction or restraining order pursuant to this
39 section.

§33-10-4a. Commencement of formal delinquency proceeding.

1 (a) Any formal delinquency proceeding against a person
2 shall be commenced by filing a petition in the name of the
3 commissioner.

4 (b) The petition shall state the grounds upon which the
5 proceeding is based and the relief requested, and may include
6 a prayer for restraining orders and injunctive relief as described
7 in section four of this article.

8 (c) Any petition that prays for a temporary restraining order
9 must be verified by the commissioner or the commissioner's
10 designee, but need not plead or prove irreparable harm or
11 inadequate remedy by law. The commissioner shall provide
12 only such notice as the court may require.

13 (d) If any temporary restraining order is prayed for:

14 (1) The court may issue an initial order containing the relief
15 requested;

16 (2) The order shall state the time and date of its issuance;

17 (3) The court shall set a time and date for the return of
18 summons, not more than ten days from the time and date of the
19 issuance of the initial order, at which time the person proceeded
20 against may appear before the court for a summary hearing;

21 (4) The order shall not continue in effect beyond the time
22 and date set for the return of summons, unless the court shall
23 expressly enter one or more orders extending the restraining
24 order; and

25 (5) The verified petition shall be filed with the clerk of the
26 circuit court and maintained as confidential, except for good
27 cause shown, until service of the petition and summons is
28 effected.

29 (e) If no temporary restraining order is requested, the court
30 shall cause a summons to be issued. The summons shall specify
31 a return date not more than thirty days after issuance and that an
32 answer to the petition must be filed at or before the return date.

33 (f) Service of process required pursuant to this article shall
34 be upon the person named in the petition in accordance with the
35 West Virginia rules of civil procedure.

§33-10-4b. Return of summons and summary hearing.

1 (a) The court shall hold a summary hearing at the time and
2 date for the return of summons.

3 (b) If a person is not served with the petition and summons
4 and fails to appear for the summary hearing, the court shall:

5 (1) Continue the summary hearing not more than ten days;

6 (2) Require the commissioner to make additional or
7 alternative attempts at service of the petition and summons
8 upon the person; and

9 (3) Extend any restraining order.

10 (c) Upon a showing of good faith efforts to effect service
11 upon a person who has failed to appear for a continued sum-
12 mary hearing, the court shall order notice of the petition to be
13 published. The order and notice shall specify a return date not
14 less than ten nor more than twenty days after the publication
15 and that the restraining order has been extended to the contin-
16 ued hearing date.

17 (d) If a person fails to appear for a summary hearing after
18 service of the summons, the court shall enter judgment in favor
19 of the commissioner against that person.

20 (e) A person who appears for the summary hearing shall
21 file its answer at the hearing and the court shall:

22 (1) Determine whether to extend any temporary restraining
23 orders pending final judgment; and

24 (2) Set the case for trial on a date not more than ten days
25 from the summary hearing.

26 (f) The court shall grant no continuance for filing an
27 answer.

**§33-10-4c. Proceedings for expedited trial, continuances, discov-
ery, evidence.**

1 (a) The court shall hear the case at the time and date set
2 forth for trial without a jury and without unnecessary delays. To
3 the extent not inconsistent with other laws or applicable rules,

4 the court shall give priority to the matter over all other matters.
5 To the extent otherwise authorized by law or applicable rules,
6 the court may assign the matter to other judges if necessary to
7 comply with the need for expedited proceedings under this
8 article.

9 (b) Continuances for trial shall be granted only in extreme
10 circumstances.

11 (c) The court shall receive as self-authenticated any of the
12 following when offered by the commissioner:

13 (1) Certified copies of the financial statements made by the
14 person; and

15 (2) Certified copies of examination reports of the person
16 made by or on behalf of the commissioner.

17 (d) The facts contained in any such examination report shall
18 be presumed to be true as of the date of the hearing if the
19 examination was made as of a date not more than two hundred
20 seventy days before the petition was filed. This presumption
21 shall be rebuttable and shall shift the burden of production and
22 persuasion.

23 (e) Discovery shall be limited to grounds alleged in the
24 petition, and shall be concluded on an expedited basis.

§33-10-4d. Decision and appeals.

1 (a) The court shall enter judgment within fifteen days or as
2 soon as practicable after the conclusion of the evidence.

3 (b) The judgment shall be final when entered. Any appeal
4 shall be prosecuted on an expedited basis and must be filed
5 within five days of entry. No request for reconsideration,

6 review or appeal and no posting of a bond shall dissolve or stay
7 the judgment.

§33-10-4e. Confidentiality.

1 (a) In all proceedings and judicial reviews under section
2 four of this article, all records of the insurer, other documents
3 and all insurance department files and court records and papers,
4 so far as they pertain to or are a part of the record of the
5 proceedings, shall be and remain confidential and all papers
6 filed with the clerk of the circuit court shall be held by the clerk
7 in a confidential file, except as is necessary to obtain compli-
8 ance with any order entered in connection with the proceedings,
9 unless and until:

10 (1) The circuit court, after hearing argument in chambers,
11 shall order otherwise;

12 (2) The insurer requests that the matter be made public; or

13 (3) The commissioner applies for an order under section ten
14 or eleven of this article.

15 (b) The commissioner may share documents, materials or
16 other information in his or her possession or control pertaining
17 to an insurer that is the subject of a proceeding under this article
18 with other state insurance departments, the national association
19 of insurance commissioners, and federal banking agencies in
20 accordance with section nineteen, article two of this chapter. No
21 waiver of any applicable privilege or claim of confidentiality
22 shall occur as a result of disclosure by the commissioner under
23 this section or as a result of sharing documents, materials or
24 other information pursuant to this subsection.

§33-10-10. Order of rehabilitation.

1 (a) An order to rehabilitate a domestic insurer or the United
2 States branch of an alien insurer having trustee assets in this
3 state shall direct the commissioner forthwith to take possession
4 of the assets of the insurer and to conduct the business thereof,
5 and to take such steps toward removal of the causes and
6 conditions which have made rehabilitation necessary as the
7 court may direct.

8 (b) If at any time the commissioner deems that further
9 efforts to rehabilitate the insurer would be useless, he or she
10 may apply to the court for an order of liquidation.

11 (c) The commissioner, or any interested person upon due
12 notice to the commissioner, at any time may apply to the court
13 for an order terminating the rehabilitation proceedings and
14 permitting the insurer to resume possession of its property and
15 the conduct of its business, but no such order shall be granted
16 except when, after a full hearing, the court has determined that
17 the purposes of the proceeding have been fully accomplished.

§33-10-11. Order of liquidation of domestic insurer.

1 (a) An order to liquidate the business of a domestic insurer
2 shall direct the commissioner forthwith to take possession of
3 the assets of the insurer, to liquidate its business, to deal with
4 the insurer's property and business in his or her own name as
5 insurance commissioner or in the name of the insurer, as the
6 court may direct, and to give notice to all creditors who may
7 have claims against the insurer to present their claims.

8 (b) The commissioner may apply for and secure an order
9 dissolving the corporate existence of a domestic insurer upon
10 his or her application for an order of liquidation of the insurer
11 or at any time after such order has been granted.

**§33-10-13. Order of conservation or ancillary liquidation of
foreign or alien insurers.**

1 (a) An order to conserve the assets of a foreign or alien
2 insurer shall require the commissioner forthwith to take
3 possession of the assets of the insurer within this state and to
4 conserve it, subject to the further direction of the court.

5 (b) An order to liquidate the assets in this state of a foreign
6 insurer shall require the commissioner forthwith to take
7 possession of the assets of the insurer within this state and to
8 liquidate it subject to the orders of the court and with due regard
9 to the rights and powers of the domiciliary receiver, as provided
10 in this article.

**§33-10-14. Conduct of delinquency proceedings against domestic
or alien insurers.**

1 (a) Whenever under this article a receiver is to be appointed
2 in delinquency proceedings for a domestic or alien insurer, the
3 court shall appoint the insurance commissioner as the receiver.
4 The court shall order the commissioner forthwith to take
5 possession of the assets of the insurer and to administer the
6 same under the orders of the court.

7 (b) As domiciliary receiver, the commissioner shall be
8 vested by operation of law with the title to all the property,
9 contracts and rights of action and all of the books and records
10 of the insurer, wherever located, as of the date of entry of the
11 order directing him or her to rehabilitate or liquidate a domestic
12 insurer or to liquidate the United States branch of an alien
13 insurer domiciled in this state and he or she shall have the right
14 to recover the same and reduce the same to possession; except
15 that ancillary receivers in reciprocal states shall have, as to
16 assets located in their respective states, the rights and powers
17 which are prescribed in this section for ancillary receivers
18 appointed in this state as to assets located in this state.

19 (c) The recording of a certified copy of the order directing
20 possession to be taken in the office of the clerk of the county

21 commission of the county where the proceedings are pending
22 and in the office of the clerk of the county commission of any
23 county wherein the insurer has property or other assets,
24 recorded in the same manner as deeds to real property are
25 recorded, shall impart the same notice as would be imparted by
26 a deed, bill of sale or other evidence of title duly recorded or
27 filed.

28 (d) The commissioner as domiciliary receiver shall be
29 responsible for the proper administration of all assets coming
30 into his or her possession or control. The court may at any time
31 require a bond from the commissioner or his or her deputies if
32 considered desirable for the protection of the assets. The cost of
33 the bond shall be paid out of the assets of the insurer as a cost
34 of administration.

35 (e) Upon taking possession of the assets of an insurer, the
36 domiciliary receiver shall, subject to the direction of the court,
37 immediately proceed to conduct the business of the insurer or
38 to take such steps as are authorized by this article for the
39 purpose of rehabilitating, liquidating or conserving the affairs
40 or assets of the insurer.

41 (f) In connection with delinquency proceedings, the
42 commissioner may appoint one or more special deputy commis-
43 sioners of insurance to act for him or her and may employ such
44 counsel, clerks and assistants as he or she considers necessary.
45 The compensation of the special deputies, counsel, clerks or
46 assistants and all expenses of taking possession of the insurer
47 and of conducting the proceedings shall be fixed by the
48 receiver, subject to the approval of the court and shall be paid
49 out of the funds or assets of the insurer. In the event the
50 property of such person does not contain cash or liquid assets
51 sufficient to defray the cost of the service required to be
52 performed under the terms of this article, the commissioner
53 may pay the cost of the services first out of the commissioner's

54 closed estate fund account. If the moneys in the closed estate
55 fund account are insufficient to fully defray the cost of the
56 services required under the terms of this article, the commis-
57 sioner may pay the costs out of the commissioner's "operating
58 – additional fees" account. Any amount so paid from either
59 account shall be considered to be expenses of administration
60 and shall be repaid to the appropriate account out of the first
61 available moneys in the estate.

62 (g) Within the limits of duties imposed upon them, special
63 deputies shall possess all the powers given to and, in the
64 exercise of those powers, shall be subject to all of the duties
65 imposed upon the receiver with respect to such proceedings. All
66 transactions involving estate accounts shall be reconciled
67 quarterly by a special deputy commissioner appointed pursuant
68 to subsection (f) of this section and reported to the commis-
69 sioner. An annual audit of any special deputy commissioner
70 appointed under this section may be conducted, at the discretion
71 of the commissioner, by an independent, outside certified public
72 accountant. The cost of this audit shall be allocated among the
73 estates of the companies in conservation, rehabilitation or
74 liquidation on a basis of allocation established by the commis-
75 sioner.

§33-10-18. Proof of claims.

1 (a) All claims against an insurer against which delinquency
2 proceedings have begun shall set forth all of the following that
3 are applicable:

4 (1) In reasonable detail, the amount of the claim, or the
5 basis upon which the amount can be ascertained;

6 (2) The facts upon which the claim is based, including any
7 consideration given for it;

8 (3) The priorities asserted, if any;

9 (4) The identity and amount of any security on the claim;

10 (5) The payments made on the debt, if any; and

11 (6) A statement that the sum claimed is justly owing and
12 whether there is a right of setoff, counterclaim or defense to the
13 claim.

14 (b) All claims shall be verified by the affidavit of the
15 claimant, or someone authorized to act on his or her behalf and
16 having knowledge of the facts and shall be supported by any
17 documents as may be material thereto.

18 (c) All claims filed in this state shall be filed with the
19 receiver, whether domiciliary or ancillary, in this state on or
20 before the last date for filing as specified in this article.

21 (d) When a claim is denied, in whole or in part, by the
22 liquidator, written notice of the determination shall be given to
23 the claimant or his or her attorney by first class mail at the
24 address shown in the proof of claim. Within sixty days from the
25 mailing of the notice, the claimant may file his or her objections
26 with the liquidator. If no such filing is made, the claimant may
27 not further object to the determination.

28 (e) Whenever objections are filed with the liquidator and
29 the liquidator does not alter his or her denial of the claim as a
30 result of the objections, the liquidator shall ask the court for a
31 hearing as soon as practicable and give notice of the hearing by
32 first class mail to the claimant or his or her attorney and to any
33 other persons directly affected, not less than ten nor more than
34 thirty days before the date of the hearing. The matter may be
35 heard by the court or by a court-appointed referee who shall
36 submit findings of fact along with his or her recommendation.
37 Upon receipt of the report, the court shall fix a time for hearing
38 the claim and shall direct that the claimant or the receiver, as
39 the court shall specify, shall give such notice as the court shall

40 determine to any persons as shall appear to the court to be
41 interested therein. All such notices shall specify the time and
42 place of the hearing and shall concisely state the amount and
43 nature of the claim, the priorities asserted, if any, and the
44 recommendation of the receiver with reference thereto.

45 (f) At the hearing, all persons interested shall be entitled to
46 appear and the court shall enter an order allowing, allowing in
47 part, or disallowing the claim. Any such order shall be consid-
48 ered an appealable order.

§33-10-19a. Priority of distribution.

1 The priority of distribution of claims from the insurer's
2 estate shall be in accordance with the order in which each class
3 of claims is herein set forth. Every claim in each class shall be
4 paid in full or adequate funds retained for such payment before
5 the members of the next class receive any payment. No
6 subclasses may be established within any class. No claim by a
7 shareholder, policyholder or other creditor may be permitted to
8 circumvent the priority classes through the use of equitable
9 remedies. The order of distribution shall be:

10 (a) Class I. The costs and expenses of administration,
11 including, but not limited to, the following:

12 (1) The actual and necessary costs of preserving or recover-
13 ing the assets of the insurer;

14 (2) Compensation for all authorized services rendered in the
15 liquidation;

16 (3) Any necessary filing fees;

17 (4) The fees and mileage payable to witnesses;

18 (5) Reasonable attorney's fees and fees for other profes-
19 sional services rendered in the proceeding; and

20 (6) All expenses incurred by the department of insurance
21 arising out of the enforcement of chapter thirty-three and its
22 rules.

23 (b) Class II. All claims for refund of unearned premiums
24 under nonassessable policies and all claims of policyholders
25 including claims of the federal or any state or local government
26 as policyholders for losses incurred; third party claims of an
27 insolvent insurer; and all reasonable claims of the West
28 Virginia insurance guaranty associations and associations or
29 entities performing a similar function in other states.

30 (c) Class III. Claims of the federal government other than
31 as an insured policyholder.

32 (d) Class IV. Debts due to employees for compensation,
33 which may not exceed two months of monetary compensation
34 and must represent payment for services performed within six
35 months before the filing of the petition for liquidation, or, if
36 rehabilitation preceded liquidation, within one year before the
37 filing of the petition for rehabilitation. Principal officers and
38 directors shall not be entitled to the benefit of this priority
39 except as otherwise approved by the liquidator and the court.
40 This priority shall be in lieu of any other similar priority which
41 may be authorized by law as to wages or compensation of
42 employees.

43 (e) Class V. Claims of general creditors including claims of
44 ceding and assuming companies in their capacity as such.

45 (f) Class VI. Claims of any state or local government.
46 Claims, including those of any governmental body for a penalty
47 or forfeiture, shall be allowed in this class only to the extent of
48 the pecuniary loss sustained from the act, transaction or

49 proceeding out of which the penalty or forfeiture arose, with
50 reasonable and actual costs occasioned thereby. The remainder
51 of such claims shall be postponed to the class of claims under
52 subsection (h) of this section.

53 (g) Class VII. Claims filed late or any other claims other
54 than claims under subsection (h) of this section.

55 (h) Class VIII. Surplus or contribution notes, or similar
56 obligations and premium refunds on assessable policies.
57 Payments to members of domestic mutual corporations shall be
58 limited in accordance with law.

59 (i) Class IX. The claims of shareholders or other owners.

§33-10-26. Voidable preferences and liens.

1 (a) A preference is a transfer of any of the property of an
2 insurer to or for the benefit of a creditor, for or on account of an
3 antecedent debt, made or suffered by the insurer within one
4 year before the filing of a successful petition for liquidation
5 under this article, the effect of which transfer may be to enable
6 the creditor to obtain a greater percentage of this debt than
7 another creditor of the same class would have otherwise
8 received. If a liquidation order is entered while the insurer is
9 already subject to a rehabilitation order, then the transfers shall
10 be deemed preferences if made or suffered within one year
11 before the filing of the successful petition for rehabilitation, or
12 within two years before the filing of the successful petition for
13 liquidation, whichever time is shorter.

14 (b) Any preference may be avoided by the liquidator if the
15 insurer was insolvent at the time of the transfer; and

16 (1) The transfer was made within four months before the
17 filing of the petition; or

18 (2) The creditor receiving it or to be benefited thereby or
19 his or her agent acting with reference thereto had, at the time
20 when the transfer was made, reasonable cause to believe that
21 the insurer was insolvent or was about to become insolvent; or

22 (3) The creditor receiving it was an officer, or any em-
23 ployee or attorney or other person who was in fact in a position
24 of comparable influence in the insurer to an officer whether or
25 not he or she held such position, or any shareholder holding
26 directly or indirectly more than five percent of any class of any
27 equity security issued by the insurer, or any other person, firm,
28 corporation, association or aggregation of persons with whom
29 the insurer did not deal at arm's length.

30 (c) Where the preference is voidable, the liquidator may
31 recover the property or, if it has been converted, its value from
32 any person who has received or converted the property; except
33 where a bona fide purchaser or lienor has given less than fair
34 equivalent value, the purchaser or lienor shall have a lien upon
35 the property to the extent of the consideration actually given.
36 Where a preference by way of lien or security title is voidable,
37 the court may on due notice order the lien or title to be pre-
38 served for the benefit of the estate, in which event the lien or
39 title shall pass to the liquidator.

40 (d) A transfer under this section will be considered to have
41 been made as follows:

42 (1) A transfer of property other than real property shall be
43 deemed to be made or suffered when it becomes so far per-
44 fected that no subsequent lien obtainable by legal or equitable
45 proceedings on a simple contract could become superior to the
46 rights of the transferee.

47 (2) A transfer of real property shall be deemed to be made
48 or suffered when it becomes so far perfected that no subsequent

49 bona fide purchaser from the insurer could obtain rights
50 superior to the rights of the transferee.

51 (3) A transfer which creates an equitable lien will not be
52 deemed to be perfected if there are available means by which a
53 legal lien could be created.

54 (4) A transfer not perfected prior to the filing of a petition
55 for liquidation shall be deemed to be made immediately before
56 the filing of the successful petition.

57 (5) The provisions of this subsection apply whether or not
58 there are or were creditors who might have obtained liens or
59 persons who might have become bona fide purchasers.

60 (e)(1) A lien obtainable by legal or equitable proceedings
61 upon a simple contract is one arising in the ordinary course of
62 the proceedings upon the entry or docketing of a judgment or
63 decree, or upon attachment, garnishment, execution or like
64 process, whether before, upon or after judgment or decree and
65 whether before or upon levy. It does not include liens which
66 under applicable law are given a special priority over other liens
67 which are prior in time.

68 (2) A lien obtainable by legal or equitable proceedings
69 could become superior to the rights of a transferee, or a
70 purchaser could obtain rights superior to the rights of a trans-
71 feree within the meaning of subsection (d) of this section, if
72 such consequences would follow only from the lien or purchase
73 itself, or from the lien or purchase followed by any step wholly
74 within the control of the respective lienholder or purchaser,
75 with or without the aid of ministerial action by public officials.
76 A lien could not, however, become superior and such a pur-
77 chase could not create superior rights for the purpose of
78 subsection (d) of this section through any acts subsequent to the
79 obtaining of such a lien or subsequent to such a purchase which

80 require the agreement or concurrence of any third party or
81 which require any further judicial action or ruling.

82 (f) A transfer of property for or on account of a new and
83 contemporaneous consideration which is considered under
84 subsection (d) of this section to be made or suffered after the
85 transfer because of delay in perfecting it does not thereby
86 become a transfer for or on account of an antecedent debt if any
87 acts required by the applicable law to be performed in order to
88 perfect the transfer as against liens or bona fide purchasers'
89 rights are performed within twenty-one days or any period
90 expressly allowed by the law, whichever is less. A transfer to
91 secure a future loan, if such a loan is actually made, or a
92 transfer which becomes security for a future loan, shall have the
93 same effect as a transfer for or on account of a new and
94 contemporaneous consideration.

95 (g) If any lien deemed voidable under subsection (b) of this
96 section has been dissolved by the furnishing of a bond or other
97 obligation, the surety on which has been indemnified directly
98 or indirectly by the transfer of or the creation of a lien upon any
99 property of an insurer before the filing of a petition under this
100 article which results in a liquidation order, the indemnifying
101 transfer or lien shall also be considered voidable.

102 (h) The property affected by any lien considered voidable
103 under subsections (a), (b) and (g) of this section shall be
104 discharged from the lien and that property and any of the
105 indemnifying property transferred to or for the benefit of a
106 surety shall pass to the liquidator, except that the court may on
107 due notice order any such lien to be preserved for the benefit of
108 the estate and the court may direct that such conveyance be
109 executed as may be proper or adequate to evidence the title of
110 the liquidator.

111 (i) The circuit court shall have summary jurisdiction of any
112 proceeding by the liquidator to hear and determine the rights of
113 any parties under this section. Reasonable notice of any hearing
114 in the proceeding shall be given to all parties in interest,
115 including the obligee of a releasing bond or other like obliga-
116 tion. Where an order is entered for the recovery of indemnify-
117 ing property in kind or for the avoidance of an indemnifying
118 lien the court, upon application of any party in interest, shall in
119 the same proceeding ascertain the value of the property or lien
120 and if the value is less than the amount for which the property
121 is indemnity or than the amount of the lien, the transferee or
122 lienholder may elect to retain the property or lien upon payment
123 of its value, as ascertained by the court, to the liquidator within
124 such reasonable times as the court shall fix.

125 (j) The liability of the surety under a releasing bond or other
126 like obligation shall be discharged to the extent of the value of
127 the indemnifying property recovered or the indemnifying lien
128 nullified and avoided by the liquidator or where the property is
129 retained under subsection (i) of this section to the extent of the
130 amount paid to the liquidator.

131 (k) If a creditor has been preferred, and afterward in good
132 faith gives the insurer further credit without security of any
133 kind, for property which becomes a part of the insurer's estate,
134 the amount of the new credit remaining unpaid at the time of
135 the petition may be set off against the preference which would
136 otherwise be recoverable from him or her.

137 (l) If an insurer shall, directly or indirectly, within four
138 months before the filing of a successful petition for liquidation
139 under this article, or at any time in contemplation of a proceed-
140 ing to liquidate it, pay money or transfer property to an attor-
141 ney-at-law for services rendered or to be rendered, the transac-
142 tions may be examined by the court on its own motion or shall
143 be examined by the court on petition of the liquidator and shall

144 be held valid only to the extent of a reasonable amount to be
145 determined by the court and the excess may be recovered by the
146 liquidator for the benefits of the estate provided that where the
147 attorney is in a position of influence in the insurer or an affiliate
148 thereof payment of any money or the transfer of any property
149 to the attorney-at-law for services rendered or to be rendered
150 shall be governed by the provision of subdivision (3), subsec-
151 tion (b) of this section.

152 (m)(1) Every officer, manager, employee, shareholder,
153 member, subscriber, attorney or any other person acting on
154 behalf of the insurer who knowingly participates in giving any
155 preference when he or she has reasonable cause to believe the
156 insurer is or is about to become insolvent at the time of the
157 preference shall be personally liable to the liquidator for the
158 amount of the preference. It is permissible to infer that there is
159 a reasonable cause to so believe if the transfer was made within
160 four months before the date of filing of this successful petition
161 for liquidation.

162 (2) Every person receiving any property from the insurer or
163 the benefit thereof as a preference voidable under subsections
164 (a) and (b) of this section shall be personally liable therefor and
165 shall be bound to account to the liquidator.

166 (3) Nothing in this subsection shall prejudice any other
167 claim by the liquidator against any person.

§33-10-26a. Fraudulent transfers prior to petition.

1 (a) Every transfer made or suffered and every obligation
2 incurred by an insurer within one year prior to the filing of a
3 successful petition for rehabilitation or liquidation under this
4 article is fraudulent as to then existing and future creditors if
5 made or incurred without fair consideration, or with actual
6 intent to hinder, delay or defraud either existing or future

7 creditors. A transfer made or an obligation incurred by an
8 insurer ordered to be rehabilitated or liquidated under this
9 article, which is fraudulent under this section, may be avoided
10 by the receiver, except as to a person who in good faith is a
11 purchaser, lienor or obligee for a present fair equivalent value
12 and except that any purchaser, lienor or obligee, who in good
13 faith has given a consideration less than fair for such transfer,
14 lien or obligation, may retain the property, lien or obligation as
15 security for repayment. The court may, on due notice, order any
16 such transfer or obligation to be preserved for the benefit of the
17 estate and in that event, the receiver shall succeed to and may
18 enforce the rights of the purchaser, lienor or obligee.

19 (b) A transfer under this section will be considered to have
20 been made as follows:

21 (1) A transfer of property other than real property shall be
22 deemed to be made or suffered when it becomes so far per-
23 fected that no subsequent lien obtainable by legal or equitable
24 proceedings on a simple contract could become superior to the
25 rights of the transferee under subsection (e), section twenty-six
26 of this article.

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

31 (3) A transfer which creates an equitable lien shall not be
32 deemed to be perfected if there are available means by which a
33 legal lien could be created.

34 (4) Any transfer not perfected prior to the filing of a
35 petition for liquidation shall be deemed to be made immediately
36 before the filing of the successful petition.

37 (5) The provisions of this subsection apply whether or not
38 there are or were creditors who might have obtained any liens
39 or persons who might have become bona fide purchasers.

40 (c) Any transaction of the insurer with a reinsurer shall be
41 deemed fraudulent and may be avoided by the receiver under
42 subsection (a) of this section if:

43 (1) The transaction consists of the termination, adjustment
44 or settlement of a reinsurance contract in which the reinsurer is
45 released from any part of its duty to pay the originally specified
46 share of losses that had occurred prior to the time of the
47 transactions, unless the reinsurer gives a present fair equivalent
48 value for the release; and

49 (2) Any part of the transaction took place within one year
50 prior to the date of filing of the petition through which the
51 receivership was commenced.

52 (d) Every person receiving any property from the insurer or
53 any benefit thereof which is a fraudulent transfer under subsec-
54 tion (a) of this section shall be personally liable therefore and
55 shall be bound to account to the liquidator.

§33-10-26b. Recoupment from affiliates.

1 (a) If an order instituting a delinquency proceeding against
2 an insurer authorized to do business in this state is entered
3 under this article, the receiver appointed under the order has a
4 right to recover on behalf of the insurer from any affiliate that
5 controlled the insurer the amount of distributions, other than
6 stock dividends paid by the insurer on its capital stock, made at
7 any time during the five years preceding the petition for
8 liquidation, rehabilitation or conservation. This recovery is
9 subject to the limitations of subsections (b) through (g),
10 inclusive, of this section.

11 (b) No dividend is recoverable if the recipient shows that,
12 when paid, the distribution was lawful and reasonable and that
13 the insurer did not know and could not reasonably have known
14 that the distribution might adversely affect its solvency.

15 (c) The maximum amount recoverable under this section is
16 the amount needed, in excess of all other available assets, to
17 pay all claims under the receivership, reduced for each recipient
18 by any amount the recipient has already paid to receivers under
19 similar laws of other states.

20 (d) Any person who was an affiliate that controlled the
21 insurer at the time the distributions were paid is liable up to the
22 amount of distributions received. Any person who was an
23 affiliate that controlled the insurer at the time the distributions
24 were declared is liable up to the amount of distributions the
25 person would have received if the distributions had been paid
26 immediately. If two or more persons are liable regarding the
27 same distributions, they are jointly and severally liable.

28 (e) If any person liable under subsection (d) of this section
29 is insolvent, all affiliates that controlled that person at the time
30 the dividend was declared or paid are jointly and severally
31 liable for any resulting deficiency in the amount recovered from
32 the insolvent affiliate.

33 (f) This section does not reduce the personal liability of a
34 director under existing law.

35 (g) An action or proceeding under this section may not be
36 commenced after the earlier of:

37 (1) Two years after the appointment of a liquidator pursuant
38 to this article; or

39 (2) The date the rehabilitation or liquidation is terminated.

§33-10-26c. Fraudulent transfer after petition.

1 (a) After a petition for rehabilitation or liquidation has been
2 filed, a transfer of any of the real property of the insurer made
3 to a person acting in good faith shall be valid against the
4 receiver if made for a present fair equivalent value or, if not
5 made for a present fair equivalent value, then to the extent of
6 the present consideration actually paid therefore, for which
7 amount the transferee shall have a lien on the property so
8 transferred. The commencement of a proceeding in rehabilita-
9 tion or liquidation shall be constructive notice upon the
10 recording of a copy of the petition for or order of rehabilitation
11 or liquidation with the clerk of the county commission of the
12 county where any real property in question is located. The
13 exercise by a court of the United States or any state or jurisdic-
14 tion to authorize or effect a judicial sale of real property of the
15 insurer within any county in any state shall not be impaired by
16 the pendency of such a proceeding unless the copy is recorded
17 in the county prior to the consummation of the judicial sale.

18 (b) After a petition for rehabilitation or liquidation has been
19 filed and before either the receiver takes possession of the
20 property of the insurer or an order of rehabilitation or liquida-
21 tion is granted:

22 (1) A transfer of any of the property of the insurer, other
23 than real property, made to a person acting in good faith shall
24 be valid against the receiver if made for a present fair equiva-
25 lent value; or, if made for less than a present fair equivalent
26 value, then to the extent of the present consideration actually
27 paid therefore, for which amount the transferee shall have a lien
28 on the property so transferred;

29 (2) A person indebted to the insurer or holding property of
30 the insurer may, if acting in good faith, pay the indebtedness or
31 deliver the property, or any part thereof, to the insurer or upon

32 his or her order, with the same effect as if the petition were not
33 pending;

34 (3) A person having actual knowledge of the pending
35 rehabilitation or liquidation shall be considered not to act in
36 good faith;

37 (4) A person asserting the validity of a transfer under this
38 section shall have the burden of proof. Except as elsewhere
39 provided in this section, no transfer by or on behalf of the
40 insurer after the date of the petition for liquidation by any
41 person other than the liquidator shall be valid against the
42 liquidator.

43 (c) Every person receiving any property from the insurer or
44 any benefit thereof which is a fraudulent transfer under this
45 section shall be personally liable therefore and shall be bound
46 to account to the liquidator.

47 (d) Nothing in this article shall impair the negotiability of
48 currency or negotiable instruments.

§33-10-26d. Claims of holders of void or voidable rights.

1 (a) No claim of a creditor who has received or acquired a
2 preference, lien, conveyance, transfer, assignment or encum-
3 brance voidable under this article shall be allowed unless the
4 creditor surrenders the preference, lien, conveyance, transfer,
5 assignment or encumbrance. If the avoidance is effected by a
6 proceeding in which a final judgment has been entered, the
7 claim will not be allowed unless the money is paid or the
8 property is delivered to the liquidator within thirty days from
9 the date of entry of the final judgment, except that the court
10 having jurisdiction over the liquidation may allow further time
11 if there is an appeal or other continuation of the proceeding.

12 (b) A claim allowable under subsection (a) of this section

13 by reason of the avoidance, whether voluntary or involuntary,
14 of a preference, lien, conveyance, transfer, assignment or
15 encumbrance, may be filed as a late filing if filed within thirty
16 days from the date of the avoidance, or within the further time
17 allowed by the court under subsection (a) of this section. A
18 claimant having a late filed claim under this section may be
19 permitted by the liquidator to share in distribution as though the
20 claim were not late, to the extent that the payment will not
21 interfere with the orderly administration of the liquidation.

§33-10-28. Setoffs.

1 (a) In all cases of mutual debts or mutual credits between
2 the insurer and another person in connection with any action or
3 proceeding under this article, the credits and debts shall be set
4 off and the balance only shall be allowed or paid, except as
5 provided in subsection (b), below.

6 (b) No setoff may be allowed in favor of any such person
7 where:

8 (1) The obligation of the insurer to the person would not at
9 the date of the entry of any liquidation order or otherwise, as
10 provided in section twenty-five of this article, entitle him or her
11 to share as a claimant in the assets of the insurer;

12 (2) The obligation of the insurer to the person was pur-
13 chased by or transferred to the person with a view of its being
14 used as a setoff;

15 (3) The obligation of the person is to pay an assessment
16 levied against the members of a mutual insurer, or against the
17 subscribers of a reciprocal insurer, or is to pay a balance upon
18 the subscription to the capital stock of a stock insurer;

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

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

25 (6) The obligations between the person and the insurer arise
26 from transactions by which the person or the insurer assumed
27 risk and obligations from the other party and ceded back
28 substantially the same risks and obligations except the receiver
29 may permit setoffs if in his or her discretion, a setoff is appro-
30 priate because of specific circumstances.

31 (c) Notwithstanding the provisions of subsection (b) of this
32 section, a setoff of sums due on obligations in the nature of
33 those set forth in subdivision (6), subsection (b) of this section
34 shall be allowed for those sums accruing from business written
35 where the contracts were entered into, renewed or extended
36 with the approval of the commissioner of insurance of the state
37 of domicile of the now insolvent insurer, when in the judgment
38 of such commissioner it was necessary to provide reinsurance
39 in order to prevent or mitigate a threatened impairment or
40 insolvency of a domiciliary insurer in connection with the
41 exercise of the commissioner's regulatory responsibilities.

42 (d) The provisions of this section shall supersede any
43 agreements or contractual provisions which might be construed
44 to enlarge the setoff rights of any person under any contract
45 with the insurer.

§33-10-29. Allowance of certain claims.

1 (a) No contingent claim may share in a distribution of the
2 assets of an insurer which has been adjudicated to be insolvent
3 by an order made pursuant to this article, except that such claim

4 shall be considered, if properly presented, and may be allowed
5 to share where:

6 (1) It does not prejudice the orderly administration of the
7 liquidation; or

8 (2) There is a surplus and the liquidation is thereafter
9 conducted upon the basis that the insurer is solvent.

10 (b) Where an insurer has been so adjudicated to be insol-
11 vent any person who has a cause of action against an insured of
12 the insurer under a policy issued by the insurer shall have the
13 right to file a claim in the liquidation proceeding, regardless of
14 the fact that the claim may be contingent and the claim may be
15 allowed:

16 (1) If it may be reasonably inferred from the proof pre-
17 sented upon the claim that such person would be able to obtain
18 a judgment upon the cause of action against the insured; and

19 (2) If such person furnishes suitable proof, unless the court
20 for good cause shown otherwise directs, that no further valid
21 claim against the insurer arising out of his or her cause of action
22 other than those already presented can be made; and

23 (3) If the total liability of the insurer to all claimants arising
24 out of the same act of its insured is no greater than its maximum
25 liability would be were it not in liquidation.

26 (c)(1) No judgment against such an insured taken after the
27 date of entry of the liquidation order may be considered in the
28 liquidation proceedings as evidence of liability, or of the
29 amount of damages, and no judgment against an insured taken
30 by default or by collusion prior to the entry of the liquidation
31 order may be considered as conclusive evidence in the liquida-
32 tion proceedings, either of the liability of the insured to the

33 person upon the cause of action or of the amount of damages to
34 which the person is therein entitled.

35 (2) A claim by a third party founded upon a policy may be
36 allowed without requiring the claim to be reduced to judgment,
37 provided it can be reasonably inferred from the proof presented
38 that the claimant would be able to obtain a judgment upon his
39 or her cause of action against the insured and that the judgment
40 would represent a liability of the insurer in liquidation under the
41 policy upon which the claim is founded.

42 (d) No claim of any secured claimant may be allowed at a
43 sum greater than the difference between the value of the claim
44 without security and the value of the security itself as of the
45 date of the entry of the order of liquidation or such other date
46 set by the court for determining rights and liabilities as pro-
47 vided in section twenty-five of this article unless the claimant
48 surrenders his or her security to the commissioner, in which
49 event the claim shall be allowed in the full amount for which it
50 is valued.

51 (e) Whenever a creditor, whose claim against an insurer is
52 secured, in whole or in part, by the undertaking of another
53 person, fails to prove and file that claim, the other person may
54 do so in the creditor's name and shall be subrogated to the
55 rights of the creditor, whether the claim has been filed by the
56 creditor or by the other person in the creditor's name, to the
57 extent that he or she discharges the undertaking. In the absence
58 of an agreement with the creditor to the contrary, the other
59 person shall not be entitled to any distribution, however, until
60 the amount paid to the creditor on the undertaking plus the
61 distributions paid on the claim from the insurer's estate to the
62 creditor equals the amount of the entire claim of the creditor.
63 Any excess received by the creditor shall be held by him or her
64 in trust for such other person. The term "other person", as used

65 in this section, is not intended to apply to a guaranty association
66 or foreign guaranty association.

67 (f) Unless such claim is filed in the manner and within the
68 time provided in sections eighteen and thirty of this article, it
69 shall not be entitled to filing or allowance and no action may be
70 maintained thereon. In the liquidation, pursuant to the provi-
71 sions of this article, of any domestic insurer which has issued
72 policies insuring the lives of persons, the commissioner shall,
73 within thirty days after the last day set for the filing of claims,
74 make a list of the persons who have not filed proofs of claim
75 with him or her and to whom, according to the books of the
76 insurer, there are amounts owing under such policies and he or
77 she shall set opposite the name of each person the amount so
78 owing to the person. Each person whose name appears upon the
79 list shall be considered to have duly filed, prior to the last day
80 set for the filing of claims, a claim for the amount set opposite
81 his or her name on the list.

82 (g)(1) Claims founded upon unliquidated or undetermined
83 demands must be filed within the time limit provided in this
84 article for the filing of claims, but claims founded upon such
85 demands shall not share in any distribution to creditors of a
86 person proceeded against under section nineteen-a of this article
87 until the claims have been definitely determined, proved and
88 allowed. Thereafter, the claims shall share ratably with other
89 claims of the same class in all subsequent distributions.

90 (2) An unliquidated or undetermined claim or demand
91 within the meaning of this article shall be considered to be any
92 claim or demand upon which a right of action has accrued at the
93 date of the order of liquidation and upon which the liability has
94 not been determined or the amount thereof liquidated.

95 (h) The commissioner may require, as a condition of
96 payment of the final liquidation dividend to a lender, or his or

97 her assignee, who has filed a claim for an unearned premium as
98 an assignee of the insured for valuable consideration:

99 (1) That such assignee of the insured shall assign to the
100 liquidator all his or her right, title and interest in any unsatisfied
101 debt of the insured to the assignee, pertaining to policies of the
102 insolvent insurer, remaining unpaid after crediting the final
103 liquidation dividend, if the amount of the unsatisfied debt is less
104 than one hundred dollars and one cent; and

105 (2) That all of the documents giving rise to the debt be
106 delivered to him or her.

107 (i) The commissioner may determine whether or not it will
108 be feasible to attempt to collect any assigned debt. If the
109 commissioner determines not to pursue collection of any such
110 debt, he or she shall file a declaration to that effect with the
111 liquidation court and be relieved of any further responsibility in
112 respect to the debt.

113 (j) As used in this section, "insured" means a natural person
114 who purchased insurance or coverage from the insolvent insurer
115 for personal, family, or household purposes.

§33-10-30. Time within which claims to be filed.

1 (a) If upon the granting of an order of liquidation under this
2 article or at any time thereafter during the liquidation proceed-
3 ing, the insurer shall not be clearly solvent, the court shall, after
4 notice and hearing as provided in this article, make an order
5 declaring the insurer to be insolvent. Thereupon regardless of
6 any prior notice which may have been given to creditors, the
7 commissioner shall notify all persons who may have claims
8 against the insurer and who have not filed proper proofs thereof
9 to present the same to him or her, at a place specified in the
10 notice, within four months from the date of entry of the order,
11 or if the commissioner shall certify that it is necessary, within

12 such longer time as the court shall prescribe. The last day for
13 filing of proofs of claims shall be specified in the notice and
14 notice shall be given in a manner to be determined by the court.

15 (b) Proofs of claim may be filed subsequent to the date
16 specified, but no such claim may share in the distribution of the
17 assets until all allowed claims, proofs of which have been filed
18 before said date, have been paid in full with interest, except as
19 provided in section twenty-six-d of this article.

§33-10-36. Early access to distribution.

1 (a) Within one hundred twenty days of a final determina-
2 tion of insolvency of an insurance company by the circuit court,
3 the commissioner shall make application to the court for
4 approval of a proposal to disburse assets out of the company's
5 marshaled assets, from time to time as such assets become
6 available, to the appropriate guaranty association having
7 obligations because of the insolvency. "Appropriate guaranty
8 association" means guaranty association and foreign guaranty
9 association as those terms are defined in section one of this
10 article. If the commissioner determines that there are insuffi-
11 cient assets to disburse, the application required by this section
12 shall be satisfied by a filing by the commissioner stating the
13 reasons for this determination.

14 (b) The proposal shall at least include provisions for:

15 (1) Reserving amounts for the payment of expenses of
16 administration and of claims falling within the priorities
17 established in section nineteen-a of this article but only with
18 respect to such priorities higher than that of the associations;

19 (2) Disbursement of the assets marshaled to date and
20 subsequent disbursement of assets as they become available;

21 (3) Equitable allocation of disbursements to each of the
22 associations entitled thereto;

23 (4) The securing by the commissioner from each of the
24 associations entitled to disbursements pursuant to this section
25 of an agreement to return to the commissioner such assets,
26 together with income earned on assets previously disbursed, as
27 may be required to pay claims of secured creditors and claims
28 falling within the priorities established in section nineteen-a of
29 this article but only with respect to such priorities higher than
30 that of the associations. No bond shall be required of any such
31 association; and

32 (5) A full report to be made by the association to the
33 commissioner accounting for all assets so disbursed to the
34 association, all disbursements made therefrom, any interest
35 earned by the association on such assets and any other matter as
36 the court may direct.

37 (c) The commissioner's proposal shall provide for disburse-
38 ments to the association in amounts estimated at least equal to
39 the claim payments made or to be made thereby for which the
40 association could assert a claim against the commissioner, and
41 shall further provide that if the assets available for disbursement
42 from time to time do not equal or exceed the amount of the
43 claim payments made or to be made by the association, then
44 disbursements shall be in the amount of available assets.

45 (d) Notice of the commissioner's application shall be given
46 to the associations in and to the commissioners of insurance of
47 each of the states. Any such notice shall be considered to have
48 been given when deposited in the United States mail, first class
49 postage prepaid, at least thirty days prior to submission of the
50 application to the court. Action on the application may be taken
51 by the court provided the notice required in this subsection has
52 been given and provided that the commissioner's proposal

53 complies with subdivisions (1) and (2), subsection (b) of this
54 section.

§33-10-38. Unclaimed and withheld funds; termination of proceedings.

1 (a) All unclaimed funds subject to distribution remaining in
2 the liquidator's hands when he or she is ready to apply to the
3 court for discharge, including the amount distributable to any
4 creditor, shareholder, member or other person who is unknown
5 or cannot be found, shall be deposited with the state treasurer
6 and shall be paid without interest to the person entitled thereto
7 or his or her legal representative upon proof satisfactory to the
8 state treasurer of his or her right thereto. Any amount on deposit
9 not claimed within six years from the discharge of the liquida-
10 tor shall be considered to have been abandoned and shall be
11 escheated to the state of West Virginia without formal escheat
12 proceedings and be deposited with the general fund.

13 (b) When all assets justifying the expense of collection and
14 distribution have been marshaled and distributed under this
15 article, the liquidator shall petition the circuit court to terminate
16 the liquidation proceeding and to close the estate and for other
17 relief as may be appropriate. Subject to approval of the circuit
18 court, after the completion of all post-closure activities for
19 which moneys were reserved, the liquidator is authorized to
20 deposit any remaining assets reserved for administrative
21 expenses incurred in the closing of the estate that may not be
22 practicably or economically distributed to claimants into a
23 segregated account to be known as the closed estate fund
24 account. The commissioner may thereafter use moneys held in
25 the account to fund the administrative expenses of proceedings
26 against insurers subject to this article that lack sufficient assets
27 to fund administration.

§33-10-39. Immunity in receivership proceedings and representation of the special deputy supervisor.

1 (a) No claim of any nature whatsoever that is directly
2 related to the receivership of an insurer shall arise against and
3 no liability shall be imposed upon, the insurance commissioner,
4 special deputy commissioner, or any person or entity acting as
5 a receiver of an insurer, including surety, in rehabilitation,
6 liquidation or conservation as a result of a court order issued on
7 or after the effective date of this article for any statement made
8 or actions taken or not taken in the good faith exercise of their
9 powers under law. However, this immunity shall not extend to
10 acts or omissions which are malicious or grossly negligent. This
11 qualified immunity extends to agents and employees of the
12 receiver.

13 (b) In any civil proceeding filed against a special deputy
14 commissioner appointed pursuant to this article, the special
15 deputy commissioner shall be entitled to be represented by the
16 attorney general.

§33-10-40. Applicability of amendments.

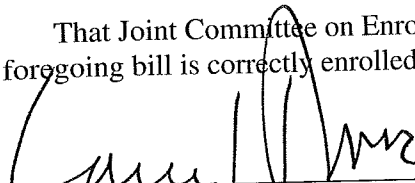
1 From and after the first day of July, two thousand four, any
2 delinquency proceeding commenced against an insurer for the
3 purpose of liquidating, rehabilitating, reorganizing or conserv-
4 ing the insurer shall be undertaken pursuant to this article. Any
5 delinquency proceeding pending against an insurer under this
6 article on the thirtieth day of June, two thousand four, will be
7 administered and concluded under the law in effect at the time
8 the delinquency proceeding was commenced.

ARTICLE 24. HOSPITAL SERVICE CORPORATIONS, MEDICAL SERVICE CORPORATIONS, DENTAL SERVICE CORPORATIONS AND HEALTH SERVICE CORPORATIONS.

§33-24-14. Delinquency proceedings.

1 From and after the first day of July, two thousand four, any
2 delinquency proceeding commenced against a corporation
3 subject to this article for the purpose of liquidating, rehabilitat-
4 ing, reorganizing or conserving the corporation shall be
5 considered to be a delinquency proceeding against an insurance
6 company and shall be undertaken pursuant to the provisions of
7 article ten of this chapter. Any delinquency proceeding pending
8 against a corporation subject to this article prior to the first day
9 of July, two thousand four, will be administered and concluded
10 under the law in effect at the time the delinquency proceeding
11 was commenced.

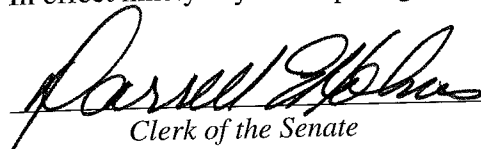
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

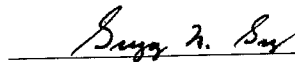

Chairman Senate Committee

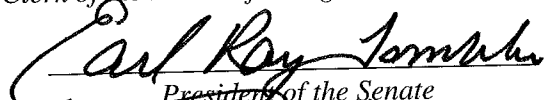

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

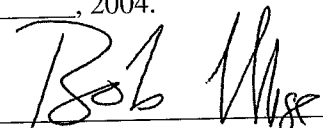

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within was approved this the 5th
day of April, 2004.


Governor

PRESENTED TO THE
GOVERNOR

DATE 5/22/04

TIME 10:00am