

## **Chapter 68.**

### **Rehabilitation And Liquidation Of Insurance Companies.**

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#### **23-68-102. Definitions.**

For the purpose of this chapter:

- (1) "Impairment" or "insolvency". The capital of a stock insurer or the surplus of a mutual or reciprocal insurer shall be deemed to be impaired and the insurer shall be deemed to be insolvent when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and

- outstanding capital stock if a stock insurer, or the minimum surplus if a mutual or reciprocal insurer, required by the Arkansas Insurance Code to be maintained for the kind or kinds of insurance it is then authorized to transact.
- (2) "Insurer" means any person, firm, corporation, association, or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization or conservation by the commissioner or the equivalent insurance supervisory official of another state.
  - (3) "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this chapter for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer.
  - (4) "State" means any state of the United States and also the District of Columbia and Puerto Rico.
  - (5) "Foreign country" means territory not in any state.
  - (6) "Domiciliary state" means the state in which an insurer is incorporated or organized, or in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States, and any such insurer is deemed to be domiciled in such state.
  - (7) "Ancillary state" means any state other than a domiciliary state.
  - (8) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of the Uniform Insurers Liquidation Act, as defined in § 23-68-101, are in force, including the provisions requiring that the commissioner of insurance or equivalent insurance supervisory official be the receiver of a delinquent insurer.
  - (9) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and, as to such specifically encumbered property, the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in the United States shall be deemed general assets.
  - (10) "Preferred claim" means any claim with respect to which the law of the state or of the United States accords priority of payments from the general assets of the insurer.
  - (11) "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 general assets.
  - (12) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claim or claims against general assets. The term also includes claims which more than four (4) months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of

- judicial process.
- (13) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.
  - (14) "Hazardous financially" means the existence of any condition or the omission or commission of any act which would, in the reasonable discretion of the commissioner, seriously affect the advisability of an insurer's continued operation in this state or, as a result of its financial condition or other matters, would render the insurer's continued operation in this state perilous to the general public or to the policyholders or creditors of the insurer. The commissioner is authorized to promulgate regulations to set forth standards by which he might make a determination that the continued operation of an insurer might be hazardous financially.

**23-68-103. Delinquency proceedings generally.**

- (a) The Circuit Court of Pulaski County shall have original jurisdiction of delinquency proceedings under this chapter, and that court is authorized to make all necessary or proper orders to carry out the purposes of this chapter.
- (b) The venue of delinquency proceedings against a domestic, foreign, or alien insurer shall be in the Circuit Court of Pulaski County.
- (c) Delinquency proceedings pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings unless the petition has been filed in the name of the state on the relation of the Insurance Commissioner.
- (d) An appeal shall lie to the Supreme Court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

**23-68-104. Commencement of delinquency proceedings.**

The Insurance Commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers, or the public may require.

**23-68-105. Injunctions - Commissioner as party to suits.**

- (1) Upon application by the Insurance Commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.
- (2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the

- commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.
- (3) Notwithstanding any other provision of law, no bond shall be required of the commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this section.
  - (4) No judgment or order rendered by any court of this state in any action pending by or against the delinquent insurer after the commencement of delinquency proceedings shall be binding upon the commissioner unless the commissioner shall have been made a party to such suit.
  - (5) The commissioner shall not be required to plead any suit in which he may be a proper party plaintiff or defendant in any of the courts of this state until ninety (90) days after the date of his appointment as receiver.

**23-68-106. Grounds for rehabilitation - Domestic insurers.**

The Insurance Commissioner may apply to the court for an order appointing him in his official capacity and his successors in office as receiver of and directing him to rehabilitate a domestic insurer upon one (1) or more of the following grounds:

- (1) The insurer is impaired or insolvent;
- (2) The insurer has refused to submit any of its books, records, accounts, or affairs to reasonable examination by the commissioner;
- (3) The insurer has concealed or removed records or assets or otherwise violated § 23-69-134;
- (4) The insurer has failed to comply with an order of the commissioner to make good an impairment of capital or surplus or both;
- (5) The insurer has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business into that of any other insurer without having first obtained the written approval of the commissioner;
- (6) The insurer has willfully violated its charter or articles of incorporation or any law of this state;
- (7) The insurer has an officer, director, or manager who has refused to be examined under oath concerning its affairs;
- (8) The insurer has been or is the subject of an application for the appointment of a receiver, trustee, custodian, or sequestrator of the insurer or its property otherwise than pursuant to the provisions of the Arkansas Insurance Code, but only if the appointment has been made or is imminent and its effect is or would be to oust the courts of this state of jurisdiction hereunder;
- (9) The insurer has consented to an order through a majority of its directors, stockholders, members, or subscribers;
- (10) The insurer has failed to pay a final judgment rendered against it in this state upon any insurance contract issued or assumed by it, within thirty (30) days after the judgment became final, or within thirty (30) days after the time for taking an

appeal has expired, or within thirty (30) days after dismissal of an appeal before final termination, whichever date is the later;

- (11) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public;
- (12) There is a reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's assets, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to, the insurer that if established would endanger assets in an amount threatening the solvency of the insurer;
- (13) The insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person if the person has been found after notice and hearing by the commissioner to be dishonest or untrustworthy in a way affecting the insurer's business;
- (14) Control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in a person or persons found after notice and hearing to be untrustworthy; or
- (15) The insurer has failed to file its annual statement or other financial report required by law within the time allowed by law and, after written demand by the commissioner, has failed to give an adequate explanation immediately.

#### **23-68-107. Grounds for liquidation.**

The Insurance Commissioner may apply to the court for an order appointing him as receiver, if his appointment as receiver shall not be then in effect, and directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusteed assets in this state, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in § 23-68-106, or if the insurer:

- (1) Has ceased transacting business for a period of one (1) year; or
- (2) Is an insolvent insurer and has commenced voluntary liquidation or dissolution or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs or to dissolve its corporate charter or to procure the appointment of a receiver, trustee, custodian, or sequestrator under any law except the Arkansas Insurance Code.

#### **23-68-108. Grounds for conservation - Domestic, foreign, and alien insurers.**

- (a) The Insurance Commissioner may apply to the court for an order appointing him as receiver and directing him to conserve the assets of a domestic insurer upon any of the grounds specified in § 23-68-106 or § 23-68-107.
- (b) The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver and directing him to conserve the assets within this state of a foreign insurer upon any of the following grounds:
  - (1) Upon any of the grounds specified in § 23-68-106 or § 23-68-107; or
  - (2) Upon the ground that its property has been sequestered in its domiciliary sovereignty or in any other sovereignty.

- (c) The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver and directing him to conserve the assets within this state of any alien insurer upon any of the following grounds:
  - (1) Upon any of the grounds specified in § 23-68-106 or § 23-68-107;
  - (2) Upon the ground that the insurer has failed to comply within the time designated by the commissioner with an order made by him to make good an impairment of its trusteed funds; or
  - (3) Upon the ground that the property of the insurer has been sequestered in its domiciliary sovereignty or elsewhere.

**23-68-109. Grounds for ancillary liquidation - Foreign insurers.**

The Insurance Commissioner may apply to the court for an order appointing him as ancillary receiver of and directing him to liquidate the business of a foreign insurer having assets, business, or claims in this state upon the appointment in the domiciliary state of the insurer of a receiver, liquidator, conservator, rehabilitator, or other officer by whatever name called for the purpose of liquidating the business of the insurer.

**23-68-110. Order of rehabilitation.**

- (a) An order to rehabilitate a domestic insurer shall direct the Insurance Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.
- (b) If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.
- (c) The commissioner, or any interested person upon due notice to the commissioner, at any time may apply to the court for an order terminating the rehabilitation proceedings and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be made or entered except when, after a hearing, the court has determined that the purposes of the proceeding have been fully accomplished.

**23-68-111. Order of liquidation - Domestic and alien insurers.**

- (a)(1) An order to liquidate the business of a domestic insurer shall direct the Insurance Commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as commissioner or in the name of the insurer, as the court may direct, and to give notice to all creditors who may have claims against the insurer to present the claims.
- (2) The commissioner may apply for and secure an order dissolving the corporate existence of a domestic insurer upon his application for an order of liquidation of the insurer or at any time after the order of liquidation has been granted.
- (b) An order to liquidate the business of a United States branch of an alien insurer having trusteed assets in this state shall be in the same terms as those prescribed for domestic insurers, save and except only that the assets of the business of such United States branch shall be the only assets included therein.

**23-68-112. Order of conservation or liquidation - Foreign and alien insurers.**

- (a) An order to conserve the assets of a foreign or alien insurer shall require the Insurance Commissioner forthwith to take possession of the property of the insurer within this state and to conserve it, subject to the further direction of the court.
- (b) An order to liquidate the assets in this state of a foreign insurer shall require the commissioner forthwith to take possession of the property of the insurer within this state and to liquidate it subject to the orders of the court and with due regard to the rights and powers of the domiciliary receiver, as provided in this chapter.

**23-68-113. Conduct of delinquency proceedings against domestic and alien insurers.**

- (1) Whenever under this chapter a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the Insurance Commissioner as such receiver. The court shall order the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.
- (2) As a domiciliary receiver, the commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer or to liquidate the United States branch of an alien insurer domiciled in this state; and he shall have the right to recover the same and reduce the same to possession, except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are herein prescribed for ancillary receivers appointed in this state as to assets located in this state.
- (3) The filing or recording of the order directing possession to be taken, or a certified copy thereof, in any office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.
- (4) The commissioner as domiciliary receiver shall be responsible for the proper administration of all assets coming into his possession or control. The court may at any time require a bond from him or his deputies if deemed desirable for the protection of such assets.
- (5) Upon taking possession of the assets of an insurer, the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer.
- (6) In connection with delinquency proceedings, the commissioner may appoint one (1) or more special deputy commissioners to act for him, and he may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks, or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of duties imposed upon them, special

deputies shall possess all the powers given to and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings.

**23-68-114. Disposition of funds held pursuant to § 23-68-113.**

- (a)(1) The Liquidation Division of the State Insurance Department is authorized to deposit funds now held pursuant to the provisions of § 23-68-113, and the Circuit Court of Pulaski County, in one (1) or more accounts, in one (1) or more state or national banks, savings banks, savings and loan associations, or trust companies.
  - (2) These funds may be combined to yield the highest rate of return on the deposits, or in any other way to facilitate the efficient operation of the division and the respective receiverships under the jurisdiction of the division.
  - (3) These funds may be used for the purpose of operating the division and the respective receiverships that may, from time to time, fall under its jurisdiction, and for no other purpose.
- (b) The funds referred to in subsection (a) of this section shall come from the accounts now held by the division, composed of assets sequestered from domestic insurers, and shall in no way be commingled or combined with funds of the State of Arkansas.

**23-68-115. Conduct of delinquency proceedings against foreign insurers.**

- (1) Whenever under this chapter an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the Insurance Commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment on the grounds set forth in § 23-68-109:
- (a) If he finds that there are sufficient assets of the insurer located in this state to justify the appointment of an ancillary receiver; or
  - (b) If ten (10) or more persons resident in this state having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.
- (2) The domiciliary receiver for the purpose of liquidation of an insurer domiciled in a reciprocal state shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer located in this state; and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He shall also be entitled to recover the other assets of the insurer located in this state, except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from his respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. He shall promptly transfer all remaining assets to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets as a receiver of an insurer

domiciled in this state.

- (3) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which he may be entitled under the laws of this state.

**23-68-116. Claims of nonresidents against domestic insurers.**

(1) In a delinquency proceeding begun in this state against a domestic insurer, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(2) Controverted claims belonging to claimants residing in reciprocal states may either:

- (a) Be proved in this state; or
- (b) If ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state, as provided in § 23-68-117 with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

**23-68-117. Claims against foreign insurers.**

(1) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(2) Controverted claims belonging to claimants residing in this state may either:

- (a) Be proved in the domiciliary state as provided by the law of that state; or
- (b) If ancillary proceedings have been commenced in this state, be proved in those proceedings.

In the event that any such claimant elects to prove his claim in this state, he shall file his claim with the ancillary receiver and shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least forty (40) days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver within thirty (30) days after the giving of such notice shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this state involving adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount and shall also be accepted as

conclusive as to its priority, if any, against special deposits or other security located within this state.

**23-68-118. Form of claim - Notice - Hearing.**

(1) All claims against an insurer against which delinquency proceedings have been begun shall set forth in reasonable detail the amount of the claim, or the basis upon which such amount can be ascertained, the facts upon which the claim is based, and the priorities asserted, if any. All such claims shall be verified by the affidavit of the claimant, or someone authorized to act on his behalf and having knowledge of the facts, and shall be supported by such documents as may be material thereto.

(2) All claims filed in this state shall be filed with the receiver, whether domiciliary or ancillary, in this state, on or before the last date for filing as specified in this chapter.

(3) Within ten (10) days of the receipt of any claim, or within such further period as the court may, for good cause shown, fix, the receiver shall report the claim to the court, specifying in such report his recommendation with respect to the action to be taken thereon. Upon receipt of such report, the court shall fix a time for hearing the claim and shall direct that the claimant or the receiver, as the court shall specify, shall give such notice as the court shall determine to such persons as shall appear to the court to be interested therein. All such notices shall specify the time and place of the hearing and shall concisely state the amount and nature of the claim, the priorities asserted, if any, and the recommendation of the receiver with reference thereto.

(4) At the hearing, all persons interested shall be entitled to appear, and the court shall enter an order allowing, allowing in part, or disallowing the claim. Any such order shall be deemed to be an appealable order.

**23-68-119. Priority of certain claims.**

(1) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(2) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

(3) The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

- (4) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this chapter, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amounts shall be conclusive; otherwise, the amount shall be determined in the delinquency proceeding in the domiciliary state.

**23-68-120. Attachment and garnishment of assets.**

During the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four (4) months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

**23-68-121. Disposition of moneys collected.**

- (a) The moneys collected by the Insurance Commissioner in a proceeding under this chapter shall be from time to time deposited in one (1) or more state or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depository which is an institution organized and supervised under the laws of this state, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking laws of this state.
- (b) The commissioner may in his discretion deposit such moneys or any part thereof in a national bank or trust company as a trust fund.

**23-68-122. Exemption from fees.**

The Insurance Commissioner shall not be required to pay any fee to any public officer in this state for filing, recording, issuing a transcript or certificate, or authenticating any paper or instrument pertaining to the exercise by the commissioner of any of the powers or duties conferred upon him under this chapter, whether or not the paper or instrument is executed by the commissioner or his deputies, employees, or attorneys of record and whether or not it is connected with the commencement of any action or proceeding by or against the commissioner, or with the subsequent conduct of the action or proceeding.

**23-68-123. Borrowing on pledge of assets.**

- (a) For the purpose of facilitating the rehabilitation, liquidation, conservation, or dissolution of an insurer pursuant to this chapter, the Insurance Commissioner may, subject to the approval of the court, borrow money and execute, acknowledge, and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust, or hypothecation of

any or all of the property, whether real, personal, or mixed, of the insurer, and the commissioner, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any loan and to provide for the repayment thereof.

- (b) The commissioner shall be under no obligation personally or in his official capacity to repay any loan made pursuant to this section.

#### **23-68-124. Date of rights and liabilities upon liquidation.**

The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers, and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of this chapter with respect to the rights of claimants holding contingent claims.

#### **23-68-125. Voidable transfers and liens.**

- (a) Any transfer of, or lien upon, the property of an insurer which is made or created within four (4) months prior to the granting of an order to show cause under this chapter with the intent of giving to any creditor a preference or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by the creditor having reasonable cause to believe that the preference will occur, shall be voidable.
- (b) Every director, officer, employee, stockholder, member, subscriber, and any other person acting on behalf of the insurer who shall be concerned in any act or deed and every person receiving thereby any property of the insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the Insurance Commissioner.
- (c) The commissioner as receiver in any proceeding under this chapter may avoid any transfer of or lien upon the property of an insurer which any creditor, stockholder, subscriber, or member of such insurer might have avoided and may recover the property so transferred unless such person was a bona fide holder for value prior to the date of the entering of an order to show cause under this chapter. The property or its value may be recovered from anyone who has received it except a bona fide holder for value as herein specified.

#### **23-68-126. Priority of distribution of general assets.**

- (a)(1) The priority of distribution of claims from the general assets of the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section.
  - (2) Every claim in each class shall be paid in full, or adequate funds retained for the payment, before the members of the next class receive any payment.
  - (3) No subclasses shall be established within any class.
- (b) The order of distribution of claims shall be:
  - (1) **Class 1.** The costs and expenses of administration, including, but not limited to, the following:

- (A) The actual and necessary costs of preserving or recovering the assets of the insurer;
  - (B) Compensation for all services rendered in the liquidation;
  - (C) Any necessary filing fees from which the receiver is not exempt under § 23-68-122;
  - (D) The fees and mileage payable to witnesses;
  - (E) Reasonable attorney's fees; and
  - (F) The reasonable expenses of the Arkansas Property and Casualty Insurance Guaranty Fund, or any other domestic or foreign guaranty fund or guaranty association, for the handling of claims;
- (2) **Class 2.**
- (A) All claims under policies for losses incurred, including third-party claims, and all claims of a domestic or foreign guaranty fund or guaranty association.
  - (B) All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, shall be treated as loss claims.
  - (C) That portion of any loss, for which indemnification is provided by other benefits or advantages recovered by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support, or by way of succession at death, or as proceeds of life insurance, or as gratuities.
  - (D) No payment by an employer to his employee shall be treated as a gratuity;
- (3) **Class 3.** Claims under nonassessable policies for unearned premium or other premium refunds;
- (4) **Class 4.** Claims of the federal government not included in Class 2 or 3 above;
- (5) **Class 5.** Debts due to employees for services performed to the extent that they do not exceed one thousand dollars (\$1,000) and represent payment for services performed within one (1) year before the filing of the petition for liquidation. Officers and directors shall not be entitled to the benefit of this priority. The priority shall be in lieu of any similar priority which may be authorized by law as to wages or compensation of employees;
- (6) **Class 6.** All claims against the insurer for liability for bodily injury to or destruction of tangible property which are not under policies, and claims of general creditors;
- (7) **Class 7.** Claims of any state or local government. Claims, including those of any state or local governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of the claim shall be postponed to the class of claims under subdivision (b)(10) of this section;
- (8) **Class 8.** Claims filed late or any other claims other than claims under subdivisions (b)(9) and (10) of this section;
- (9) **Class 9.** Surplus notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be

limited in accordance with law;

(10) **Class 10.** The claims of shareholders or other owners.

(c)(1) Every claim under a separate account established under the provisions of § 23-81-402 providing that the income, gains, and losses, realized and unrealized, from assets allocated to the separate account shall be credited to or charged against the account without regard to other income, gains, or losses of the life insurance company and, to the extent provided under the applicable contracts, that that portion of the assets of any such separate account equal to the reserves and other contract liabilities with respect to the separate account shall not be chargeable with liabilities arising out of any other business the company may conduct, shall be satisfied out of the assets in the separate account equal to the reserves maintained in the account for the contracts.

(2) To the extent, if any, reserves maintained in the separate account are in excess of the amounts needed to satisfy claims under the separate account contracts, the excess shall be treated as general assets of the life insurance company.

#### **23-68-127. Offsets.**

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

(b) No offset shall be allowed in favor of any such person where:

(1) The obligation of the insurer to the person would not at the date of the entry of any liquidation order or otherwise, as provided in § 23-68-124, entitle him to share as a claimant in the assets of the insurer;

(2) The obligation of the insurer to the person was purchased by or transferred to the person with a view of its being used as an offset; or

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

#### **23-68-128. Allowance of certain claims.**

(a) No contingent and unliquidated claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to this chapter, except that the claim shall be considered, if properly presented, and may be allowed to share where:

(1) The claim becomes absolute against the insurer on or before the last day for filing claims against the assets of the insurer; or

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

(b) Where an insurer has been so adjudicated to be insolvent, any person who has a cause of action against an insured of the insurer under a liability insurance policy issued by the insurer shall have the right to file a claim in the liquidation proceeding, regardless of the fact that the claim may be contingent, and the claim may be allowed if:

(1) It may be reasonably inferred from the proof presented upon the claim that the

- person would be able to obtain a judgment upon the cause of action against the insured; and
- (2) The person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claim against the insurer arising out of his cause of action other than those already presented can be made; and
  - (3) If the total liability of the insurer to all claimants arising out of the same act of its insured shall be no greater than its maximum liability would be were it not in liquidation.
- (c) No judgment against an insured taken after the date of entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceedings, either of the liability of the insured to the person upon the cause of action or of the amount of damages to which the person is therein entitled.
- (d) No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of the entry of the order of liquidation or such other date set by the court for determining rights and liabilities as provided in § 23-68-124 unless the claimant shall surrender his security to the commissioner, in which event the claim shall be allowed in the full amount for which it is valued.

**23-68-129. Time for filing claims.**

- (a) If, upon the entry of an order of liquidation under this chapter or at any time thereafter during liquidation proceedings, the insurer shall not be clearly solvent, the court shall, upon hearing after such notice as it deems proper, make and enter an order adjudging the insurer to be insolvent.
- (b)(1) After the entry of the order of insolvency, regardless of any prior notice that may have been given to creditors, the Insurance Commissioner shall notify all persons who may have claims against the insurer to file the claims with him, at a place and within the time specified in the notice, or that the claims shall be forever barred.
  - (2) The time specified in the notice shall be as fixed by the court for filing of claims and which shall be not less than six (6) months after the entry of the order of insolvency.
  - (3) The notice shall be given in such manner and for such reasonable period of time as may be ordered by the court.

**23-68-130. Report and petition for assessment.**

Within three (3) years after the date of the entry of an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer, the Insurance Commissioner may make and file his report and petition to the court setting forth:

- (1) The reasonable value of the assets of the insurer;
- (2) The liabilities of the insurer to the extent thus far ascertained by the commissioner;
- (3) The aggregate amount of the assessment, if any, which the commissioner deems

- reasonably necessary to pay all claims, the costs and expenses of the collection of the assessments, and the costs and expenses of the delinquency proceedings in full; and
- (4) Any other information relative to the affairs or property of the insurer that the commissioner deems material.

**23-68-131. Order and levy of assessment.**

- (a)(1) Upon the filing and reading of the report and petition provided for in § 23-68-130, the court, ex parte, may order the Insurance Commissioner to assess all members or subscribers of the insurer who may be subject to the assessment, in such an aggregate amount as the court finds reasonably necessary to pay all valid claims as may be timely filed and proved in the delinquency proceedings, together with the costs and expenses of levying and collecting assessments and the costs and expenses of the delinquency proceedings in full.
- (2) Any order shall require the commissioner to assess each member or subscriber for his proportion of the aggregate assessment, according to such reasonable classification of such members or subscribers and formula as may be made by the commissioner and approved by the court.
- (b) The court may order additional assessments upon the filing and reading of any amendment or supplement to the report and petition referred to in subsection (a) of this section if the amendment or supplement is filed within three (3) years after the date of the entry of the order of rehabilitation or liquidation.
- (c) After the entry of the order to levy and assess members or subscribers of an insurer referred to in subsection (a) of this section, the commissioner shall levy and assess members or subscribers in accordance with the order.
- (d) The total of all assessments against any member or subscriber with respect to any policy, whether levied pursuant to this chapter or pursuant to any other provision of the Arkansas Insurance Code, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under the Arkansas Insurance Code, except as to any policy which was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, in which event the assessment against the policyholder shall be upon the basis of the minimum rate for such risk.
- (e) No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with §§ 23-69-125 and 23-70-120.

**23-68-132. Assessment prima facie correct - Procedures to collect assessment.**

- (a) Any assessment of a subscriber or member of an insurer made by the Insurance Commissioner pursuant to an order of the court fixing the aggregate amount of the assessment against all members or subscribers and approving the classification and formula made by the commissioner under § 23-68-131(a) shall be prima facie correct.
- (b) Each member or subscriber shall be notified of the amount of assessment to be paid by him by written notice mailed to the address of the member or subscriber last of record with the insurer. Failure of the member or subscriber to receive the notice so mailed, within the time specified therein or at all, shall be no defense in any

proceeding to collect the assessment.

- (c) If any member or subscriber fails to pay the assessment within the period specified in the notice, which period shall not be less than twenty (20) days after mailing, the commissioner may obtain an order in the delinquency proceedings requiring the member or subscriber to show cause at a time and place fixed by the court why judgment should not be entered against the member or subscriber for the amount of the assessment together with all costs, and a copy of the order and a copy of the petition therefor shall be served upon the member or subscriber within the time and in the manner designated in the order.
- (d) If the subscriber or member after due service of a copy of the order and petition referred to in subsection (c) of this section is made upon him:
  - (1) Fails to appear at the time and place specified in the order, judgment shall be entered against him as prayed for in the petition; or
  - (2) Appears in the manner and form required by law in response to the order, the court shall hear and determine the matter and enter a judgment in accordance with its decision.
- (e) The commissioner may collect the assessment through any other lawful means.

**23-68-133. Reinsurer's liability.**

- (a) The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of the delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement.
- (b) All reinsurance contracts to which an insurer domiciled in this state is a party that do not contain the provisions required with respect to the obligation of reinsurers in the event of insolvency of the reinsured in order to obtain credit for reinsurance or other applicable statutes, shall be construed to contain the following provisions:
  - (1)(A) In the event of insolvency and the appointment of a receiver, the reinsurance obligation shall be payable to the receiver upon demand, with reasonable provision for verification, on the basis of claims allowed pursuant to this subchapter, without diminution because of the insolvency or because the receiver has failed to pay all or a portion of any claims.
  - (B) Payments by the reinsurer as set forth above shall be made directly to the ceding insurer or to its receiver; and
  - (2)(A) The receiver of a reinsured company shall give written notice of the pendency of a claim against the reinsured company indicating the policy or bond reinsured within a reasonable time after the claim is filed.
  - (B) The receiver of a reinsured company may arrange for the giving of notice of the pendency of claims on reinsured policies by guaranty funds or by other persons responsible for the adjustment and settlement of the reinsured company's claims.
  - (C) Failure to give notice shall not excuse the obligation of the reinsurer unless it is substantially prejudiced thereby.
  - (D) The reinsurer may interpose, at its own expense, in the proceeding where the claim is to be adjudicated, any defense or defenses which it may deem available to the reinsured company or its receiver.

- (c)(1) Payments by the reinsurer as set forth shall be made directly to the ceding insurer or its receiver, except where the contract of insurance or reinsurance specifically provides for another payee in the event of insolvency of the ceding insurer in accordance with any applicable requirements of statutes, rules, or orders of the domiciliary state of the ceding insurer.
- (2) The receiver shall be entitled to recover from any person who unsuccessfully makes a claim directly against the reinsurer the receiver's attorneys' fees and expenses incurred in preventing any collection by the person.
- (d) This section shall become effective on and after January 1, 1998, and shall apply to all contracts entered into, renewed, extended, or amended on or after that date, and to obligations arising from any business written or transaction occurring covered by reinsurance after January 1, 1998, pursuant to any contract, including those in existence prior to the effective date.

**23-68-134. Priority of distribution of claims - Legislative intent.**

It is the intent of the General Assembly that § 23-68-126 as amended by this act apply to pending and future claims in existing delinquency proceedings as well as to claims in delinquency proceedings arising after July 2, 1997; that, in light of the ruling of the United States Supreme Court in *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491 (1993), the General Assembly considers this act to be curative, remedial and not affecting substantive rights in the distribution of assets in delinquency proceedings; that this act is necessary to cure any potential defect in the present priority of distribution scheme that may result from the Fabe decision and to preserve the original intent of the General Assembly with regard to the priorities of payment in delinquency proceedings.