
SENATE BILL 5065

State of Washington

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By Senators Mullet and Benton

Read first time 01/16/13. Referred to Committee on Financial Institutions, Housing & Insurance.

1 AN ACT Relating to the settling of certain insurer transactions;
2 amending RCW 48.31.020; and adding a new section to chapter 48.31 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 48.31.020 and 2005 c 432 s 1 are each amended to read
5 as follows:

6 (1) For the purposes of this chapter, other than as to RCW
7 48.31.010, and in addition to persons included under RCW 48.99.010, the
8 term "insurer" shall be deemed to include an insurer authorized under
9 chapter 48.05 RCW, an insurer or institution holding a certificate of
10 exemption under RCW 48.38.010, a health care service contractor
11 registered under chapter 48.44 RCW, and a health maintenance
12 organization registered under chapter 48.46 RCW, as well as all persons
13 engaged as, or purporting to be engaged as insurers, institutions
14 issuing charitable gift annuities, health care service contractors, or
15 health maintenance organizations in this state, and to persons in
16 process of organization to become insurers, institutions issuing
17 charitable gift annuities, health care service contractors, or health
18 maintenance organizations.

1 (2) The definitions in this subsection apply throughout this
2 chapter unless the context clearly requires otherwise.

3 (a) "Exceeded its powers" means the following conditions:

4 (i) The insurer has refused to permit examination of its books,
5 papers, accounts, records, or affairs by the commissioner, his or her
6 deputies, employees, or duly commissioned examiners as required by this
7 title or any rules adopted by the commissioner;

8 (ii) A domestic insurer has unlawfully removed from this state
9 books, papers, accounts, or records necessary for an examination of the
10 insurer;

11 (iii) The insurer has failed to promptly comply with the filing of
12 any applicable financial reports as required by this title or any rules
13 adopted by the commissioner;

14 (iv) The insurer has neglected or refused to observe a lawful order
15 of the commissioner to comply, within the time prescribed by law, with
16 any prohibited deficiency in its applicable capital, capital stock, or
17 surplus;

18 (v) The insurer is continuing to transact insurance or write
19 business after its license has been revoked or suspended by the
20 commissioner;

21 (vi) The insurer, by contract or otherwise, has unlawfully or has
22 in violation of an order of the commissioner or with respect to a
23 transaction to which the insurer has without first having obtained
24 written approval of the commissioner if approval is required by law:

25 (A) Totally reinsured its entire outstanding business; or

26 (B) Merged or consolidated substantially its entire property or
27 business with another insurer; or

28 (vii) The insurer engaged in any transaction in which it is not
29 authorized to engage under this title or any rules adopted by the
30 commissioner.

31 (b) "Consent" means agreement to administrative supervision by the
32 insurer.

33 (c) "CEA" means the commodity exchange act (7 U.S.C. Sec. 1 et
34 seq.)

35 (d) "Delinquency proceeding" means any proceeding instituted
36 against an insurer for the purpose of liquidating, rehabilitating or
37 conserving the insurer, and any summary proceeding under a receivership
38 court's rehabilitation order under RCW 48.31.040.

1 (e) "FDICIA" means the federal deposit insurance corporation
2 improvement act of 1991, P.L. 102-242.

3 (f) "Formal delinquency proceeding" means any conservation,
4 rehabilitation, or liquidation proceeding.

5 (g) "Insolvency" or "insolvent" means the insurer is unable to pay
6 its obligations when they are due or does not have admitted assets at
7 least equal to all its liabilities or has a total adjusted capital that
8 is less than its mandatory control level RBC as defined in RCW
9 48.05.430 or 48.43.300, whichever is applicable to that insurer. For
10 purposes of this chapter, "assets" and "liabilities" have the meanings
11 and must be treated in the same manner as "assets" and "liabilities" in
12 chapter 48.12 RCW.

13 (h) "Netting agreement" means:

14 (i) A contract or agreement (including any terms and conditions
15 incorporated by reference), including a master agreement (which master
16 agreement, together with all schedules, confirmations, definitions, and
17 addenda thereto and transactions under any thereof, is treated as one
18 netting agreement), that documents one or more transactions between the
19 parties to the agreement for or involving one or more qualified
20 financial contracts and that provides for the netting, liquidation,
21 setoff, termination, acceleration, or close out under or in connection
22 with one or more qualified financial contracts or present or future
23 payment or delivery obligations or payment or delivery entitlements
24 thereunder (including liquidation or close-out values relating to such
25 obligations or entitlements) among the parties to the netting
26 agreement;

27 (ii) Any master agreement or bridge agreement for one or more
28 master agreements described in (h)(i) of this subsection; or

29 (iii) Any security agreement or arrangement or other credit
30 enhancement or guarantee or reimbursement obligation related to any
31 contract or agreement described in (h)(i) or (ii) of this subsection.
32 However, any contract or agreement described in (h)(i) or (ii) of this
33 subsection relating to agreements or transactions that are not
34 qualified financial contracts is a netting agreement only with respect
35 to those agreements or transactions that are qualified financial
36 contracts.

37 (i) "Qualified financial contract" means any commodity contract,
38 forward contract, repurchase agreement, securities contract, swap

1 agreement, and any similar agreement that the commissioner determines
2 by regulation, resolution, or order to be a qualified financial
3 contract for the purposes of this chapter.

4 (i) "Commodity contract" means:

5 (A) A contract for the purchase or sale of a commodity for future
6 delivery on, or subject to the rules of, a board of trade or contract
7 market under the CEA or a board of trade outside the United States;

8 (B) An agreement that is subject to regulation under section 19 of
9 the CEA and that is commonly known to the commodities trade as a margin
10 account, margin contract, leverage account, or leverage contract;

11 (C) An agreement or transaction that is subject to regulation under
12 section 4c(b) of the CEA and that is commonly known to the commodities
13 trade as a commodity option;

14 (D) Any combination of the agreements or transactions referred to
15 in this subsection; or

16 (E) Any option to enter into an agreement or transaction referred
17 to in this subsection.

18 (ii) "Forward contract," "repurchase agreement," "securities
19 contract," and "swap agreement" have the same meanings as in the FDICIA
20 (12 U.S.C. Sec. 1821(e)(8)(D)).

21 (j) "Receiver" means liquidator, rehabilitator, conservator, or
22 ancillary receiver, as the context requires.

23 (k) "Receivership" means any liquidation, rehabilitation,
24 conservation, or ancillary receivership, as the context requires.

25 (l) "Transfer" includes the sale and every other and different
26 mode, direct or indirect, of disposing of or of parting with property
27 or with an interest in property, including a setoff, or with the
28 possession thereof or of fixing a lien upon property or upon an
29 interest in property, absolutely or conditionally, voluntarily or
30 involuntarily, by or without judicial proceedings. The retention of a
31 security title in property delivered to an insurer and foreclosure of
32 the insurer's equity of redemption is a transfer suffered by the
33 insurer.

34 NEW SECTION. Sec. 2. A new section is added to chapter 48.31 RCW
35 to read as follows:

36 (1) Notwithstanding any other provision of this chapter, including

1 any other provision of this chapter permitting the modification of
2 contracts, or other law of a state, a person is not prohibited from
3 exercising:

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

8 (i) The insolvency, financial condition, or default of the insurer
9 at any time, when the right is enforceable under applicable law other
10 than this chapter; or

11 (ii) The commencement of a formal delinquency proceeding under this
12 chapter;

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

17 (c) Subject to RCW 48.31.290, any right to set off or net out any
18 termination value, payment amount, or other transfer obligation arising
19 under or in connection with one or more qualified financial contracts
20 where the counterparty or its guarantor is organized under the laws of
21 the United States or a state or a foreign jurisdiction approved by the
22 securities valuation office of the national association of insurance
23 commissioners as eligible for netting.

24 (2) If a counterparty to a master netting agreement or a qualified
25 financial contract with an insurer subject to a proceeding under this
26 chapter terminates, liquidates, closes out, or accelerates the
27 agreement or contract, damages are measured as of the date or dates of
28 termination, liquidation, close out or acceleration. The amount of a
29 claim for damages must be actual direct compensatory damages calculated
30 in accordance with subsection (7) of this section.

31 (3) Upon termination of a netting agreement or qualified financial
32 contract, the net or settlement amount, if any, owed by a nondefaulting
33 party to an insurer against which an application or petition has been
34 filed under this chapter must be transferred to or on the order of the
35 receiver for the insurer, even if the insurer is the defaulting party,
36 notwithstanding any walkaway clause in the netting agreement or
37 qualified financial contract. For purposes of this subsection,
38 "walkaway clause" means a provision in a netting agreement or a

1 qualified financial contract that, after calculation of a value of a
2 party's position or an amount due to or from one of the parties in
3 accordance with its terms upon termination, liquidation, or
4 acceleration of the netting agreement or qualified financial contract,
5 either does not create a payment obligation of a party or extinguishes
6 a payment obligation of a party in whole or in part solely because of
7 the party's status as a nondefaulting party. Any limited two-way
8 payment or first method provision in a netting agreement or qualified
9 financial contract with an insurer that has defaulted is a full two-way
10 payment or second method provision as against the defaulting insurer.
11 Any such property or amount is a general asset of the insurer, except
12 to the extent it is subject to one or more secondary liens or
13 encumbrances or rights of netting or setoff.

14 (4) In making any transfer of a netting agreement or qualified
15 financial contract of an insurer subject to a proceeding under this
16 chapter, the receiver shall either:

17 (a) Transfer to one party (other than an insurer subject to a
18 proceeding under this chapter) all netting agreements and qualified
19 financial contracts between a counterparty or any affiliate of the
20 counterparty and the insurer that is the subject of the proceeding,
21 including:

22 (i) All rights and obligations of each party under each netting
23 agreement and qualified financial contract; and

24 (ii) All property, including any guarantees or other credit
25 enhancement, securing any claims of each party under each netting
26 agreement and qualified financial contract; or

27 (b) Transfer none of the netting agreements, qualified financial
28 contracts, rights, obligations, or property referred to in (a) of this
29 subsection (with respect to the counterparty and any affiliate of the
30 counterparty).

31 (5) If a receiver for an insurer makes a transfer of one or more
32 netting agreements or qualified financial contracts, then the receiver
33 shall use its best efforts to notify any person who is party to the
34 netting agreements or qualified financial contracts of the transfer by
35 twelve o'clock noon (the receiver's local time) on the business day
36 following the transfer. For purposes of this subsection, "business
37 day" means a day other than a Saturday, Sunday, or any day on which

1 either the New York stock exchange or the federal reserve bank of New
2 York is closed.

3 (6) Notwithstanding any other provision of this chapter, a receiver
4 may not avoid a transfer of money or other property arising under or in
5 connection with a netting agreement or qualified financial contract (or
6 any pledge, security, collateral, or guarantee agreement or any other
7 similar security arrangement or credit support document relating to a
8 netting agreement or qualified financial contract) that is made before
9 the commencement of a formal delinquency proceeding under this chapter.
10 However, a transfer may be avoided under RCW 48.31.270(3) if the
11 transfer was made with actual intent to hinder, delay, or defraud the
12 insurer, a receiver appointed for the insurer, or existing or future
13 creditors.

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

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

21 (ii) Disaffirm or repudiate none of the netting agreements and
22 qualified financial contracts referred to in (a) of this subsection
23 (with respect to the person or any affiliate of the person).

24 (b) Notwithstanding any other provision of this chapter, any claim
25 of a counterparty against the estate arising from the receiver's
26 disaffirmance or repudiation of a netting agreement or qualified
27 financial contract that has not been previously affirmed in the
28 liquidation or immediately preceding conservation or rehabilitation
29 case must be determined and allowed or disallowed as if the claim had
30 arisen before the date of the filing of the petition for liquidation
31 or, if a conservation or rehabilitation proceeding is converted to a
32 liquidation proceeding, as if the claim had arisen before the date of
33 the filing of the petition for conservation or rehabilitation. The
34 amount of the claim is the actual direct compensatory damages
35 determined as of the date of the disaffirmance or repudiation of the
36 netting agreement or qualified financial contract. "Actual direct
37 compensatory damages" does not include punitive or exemplary damages,
38 damages for lost profit or lost opportunity, or damages for pain and

1 suffering, but does include normal and reasonable costs of cover or
2 other reasonable measures of damages utilized in the derivatives,
3 securities, or other market for the contract and agreement claims.

4 (8) "Contractual right" as used in this section includes any right
5 set forth in a rule or bylaw of a derivatives clearing organization (as
6 defined in the CEA), a multilateral clearing organization (as defined
7 in the FDICIA), a national securities exchange, a national securities
8 association, a securities clearing agency, a contract market designated
9 under the CEA, a derivatives transaction execution facility registered
10 under the CEA, or a board of trade (as defined in the CEA) or in a
11 resolution of the governing board thereof and any right, whether or not
12 evidenced in writing, arising under statutory or common law, or under
13 law merchant, or by reason of normal business practice.

14 (9) This section does not apply to persons who are affiliates of
15 the insurer that is the subject of the proceeding.

16 (10) All rights of counterparties under this chapter apply to
17 netting agreements and qualified financial contracts entered into on
18 behalf of the general account or separate accounts if the assets of
19 each separate account are available only to counterparties to netting
20 agreements and qualified financial contracts entered into on behalf of
21 that separate account.

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