

SENATE BILL No. 166

By Committee on Financial Institutions and Insurance

2-11

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

4
5 *Be it enacted by the Legislature of the State of Kansas:*

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

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

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

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

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

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

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

36 (b) Upon termination of a netting agreement or qualified financial

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

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

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

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

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

33 (2) transfer none of the netting agreements, qualified financial
34 contracts, rights, obligations or property referred to in paragraph (1) of this
35 subsection with respect to the counterparty and any affiliate of such
36 counterparty.

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

42 (2) For purposes of this subsection, "business day" means a day other
43 than a Saturday, Sunday or any day on which either the New York stock

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

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

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

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

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

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

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

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

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

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

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

1 contract and agreement claims.

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

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

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

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

9 (C) national securities exchange;

10 (D) national securities association;

11 (E) securities clearing agency;

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

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

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

16 (2) any right, whether or not evidenced in writing, arising under
17 statutory or common law, or under merchant law, or by reason of normal
18 business practice.

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

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

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

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

32 Sec. 2. K.S.A. 40-3607 is hereby amended to read as follows: 40-
33 3607. For the purposes of this act:

34 (a) "Ancillary state" means any state other than a domiciliary state.

35 (b) "Commissioner" means the commissioner of insurance.

36 (c) "Creditor" means a person having any claim, whether matured or
37 unmatured, liquidated or unliquidated, secured or unsecured, absolute,
38 fixed or contingent.

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

43 (e) "Doing business" includes, but is not necessarily limited to, any of

1 the following acts, whether effected by mail or otherwise:

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

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

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

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

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

12 (f) "Domiciliary state" means the state in which an insurer is
13 incorporated or organized; or, in the case of an alien insurer, its state of
14 entry.

15 (g) "Fair consideration" is given for property or obligation:

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

19 (2) when such property or obligation is received in good faith to
20 secure a present advance or antecedent debt in amount not
21 disproportionately small as compared to the value of the property or
22 obligation obtained.

23 (h) "Foreign country" means any other jurisdiction not in any state.

24 (i) "General assets" means all property, real, personal or otherwise,
25 not specifically mortgaged, pledged, deposited or otherwise encumbered
26 for the security or benefit of specified persons or classes of persons. As to
27 specifically encumbered property, "general assets" includes all such
28 property or its proceeds in excess of the amount necessary to discharge the
29 sum or sums secured hereby. Assets held in trust and on deposit for the
30 security or benefit of all policyholders or all policyholders and creditors, in
31 more than a single state, shall be treated as general assets.

32 (j) "Guaranty association" means the Kansas insurance guaranty
33 association created by K.S.A. 40-2901, and amendments thereto, the
34 Kansas life and health insurance guaranty association created by K.S.A.
35 40-3001, and amendments thereto, and any other similar entity now or
36 hereafter created by the legislature of this state for the payment of claims
37 of insolvent insurers.—"Foreign guaranty association" means any similar
38 entities now in existence in or hereafter created by the legislature of any
39 other state.

40 (k) "Insolvency" or "insolvent" means:

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

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

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

4 (2) For any other insurer, that it is unable to pay its obligations when
5 they are due, or when its admitted assets do not exceed its liabilities plus
6 the greater of:

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

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

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

14 (l) "Insurer" means any person who has done, purports to do, is doing
15 or is licensed to do an insurance business, and is or has been subject to the
16 authority of, or to liquidation, rehabilitation, reorganization, supervision or
17 conservation by, any insurance commissioner. For purposes of this act, any
18 other persons included under K.S.A. 40-3606, *and amendments thereto*,
19 shall be deemed to be insurers.

20 (m) "Person" means any individual, aggregation of individuals, trust,
21 association, partnership, corporation or any affiliate thereof.

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

25 (o) "Receiver" means receiver, liquidator, rehabilitator or conservator
26 as the context requires.

27 (p) "Reciprocal state" means any state other than this state in which in
28 substance and effect subsection (a) of K.S.A. 40-3622 and K.S.A. 40-
29 3650, 40-3651 and 40-3653 through 40-3655, *and amendments thereto*, are
30 in force, and in which provisions are in force requiring that the
31 commissioner or equivalent official be the receiver of a delinquent insurer,
32 and in which some provision exists for the avoidance of fraudulent
33 conveyances and preferential transfers.

34 (q) "Secured claim" means any claim secured by mortgage, trust
35 deed, pledge, deposit as security, escrow or otherwise; but not including,
36 special deposit claims or claims against general assets. The term also
37 includes claims which have become liens upon specific assets by reason of
38 judicial process.

39 (r) "Special deposit claim" means any claim secured by a deposit
40 made pursuant to statute for the security or benefit of a limited class or
41 classes of persons, but not including any claim secured by general assets.

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

1 (t) "Transfer" shall include the sale and every other and different
2 mode, direct or indirect, of disposing of or of parting with property or
3 within an interest therein, or with the possession thereof or of fixing a lien
4 upon property or upon an interest therein, absolutely or conditionally,
5 voluntarily, by or without judicial proceedings. The retention of a security
6 title to property delivered to a debtor shall be deemed a transfer suffered
7 by the debtor.

8 (u) *"Commodity contract" means any of the following:*

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

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

13 (B) *board of trade outside the United States.*

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

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

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

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

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

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

30 (x) *"Netting agreement" means:*

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

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

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

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

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

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

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

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

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

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

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

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