

40-3659. Qualified financial contracts; procedures; duties of receiver. *Qualified financial contracts.* (a) (1)

No person shall be stayed, enjoined or prohibited from exercising any of the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) (A) The term "actual direct compensatory damages" does not include punitive or exemplary damages, damages

for lost profit or lost opportunity or damages for pain and suffering.

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

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

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

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

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

(C) national securities exchange;

(D) national securities association;

(E) securities clearing agency;

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

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

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

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

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

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

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

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

History: L. 2013, ch. 46, § 1; Apr. 18.