

HOUSE BILL No. 5930

May 20, 2004, Introduced by Reps. Robertson, Milosch, Voorhees, Shaffer, Wenke, Julian and Hune and referred to the Committee on Insurance.

A bill to amend 1956 PA 218, entitled
"The insurance code of 1956,"
(MCL 500.100 to 500.8302) by adding section 8115a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 8115a. (1) Notwithstanding any other provision of this
2 act, including any other provision of this act permitting the
3 modification of contracts, or other law of the state, a person
4 shall not be stayed or prohibited from exercising any of the
5 following:

6 (a) A contractual right to terminate, liquidate, or close out
7 any netting agreement or qualified financial contract with an
8 insurer because of the commencement of a formal delinquency
9 proceeding under this chapter or the insolvency, financial
10 condition, or default of the insurer at any time, provided that
11 the right is enforceable under applicable law other than this

1 act.

2 (b) Any right under a pledge, security, collateral, or
3 guarantee agreement or any other similar security arrangement or
4 credit support document relating to a netting agreement or
5 qualified financial contract.

6 (c) Subject to section 8130(2), any right to set off or net
7 out any termination value, payment amount, or other transfer
8 obligation arising under or in connection with a netting
9 agreement or qualified financial contract where the counterparty
10 or its guarantor is organized under the laws of the United States
11 or a state or foreign jurisdiction approved by the securities
12 valuation office of the national association of insurance
13 commissioners and approved by the commissioner as eligible for
14 netting.

15 (2) Upon termination of a netting agreement, the net or
16 settlement amount, if any, owed by a nondefaulting party to an
17 insurer against which an application or petition has been filed
18 under this chapter shall be transferred to or on the order of the
19 receiver for the insurer, even if the insurer is the defaulting
20 party, notwithstanding any provision in the netting agreement
21 that may provide that the nondefaulting party is not required to
22 pay any net or settlement amount due to the defaulting party upon
23 termination. Any limited 2-way payment provision in a netting
24 agreement with an insurer that has defaulted shall be considered
25 to be a full 2-way payment provision as against the defaulting
26 insurer. Any such property or amount shall, except to the extent
27 it is subject to 1 or more secondary liens or encumbrances, be a

1 general asset of the insurer.

2 (3) In making any transfer of a netting agreement or
3 qualified financial contract of an insurer subject to a
4 proceeding under this chapter, the receiver shall do either of
5 the following:

6 (a) Transfer to 1 party, other than an insurer subject to a
7 proceeding under this chapter, all netting agreements and
8 qualified financial contracts between a counterparty or any
9 affiliate of the counterparty and the insurer that is the subject
10 of the proceeding, including all rights and obligations of each
11 party under each such netting agreement and qualified financial
12 contract and all property, including any guarantees or credit
13 support documents, securing any claims of each party under each
14 such netting agreement and qualified financial contract.

15 (b) Transfer none of the netting agreements, qualified
16 financial contracts, rights, obligations, or property referred to
17 in subdivision (a) with respect to the counterparty and any
18 affiliate of the counterparty.

19 (4) If a receiver for an insurer makes a transfer of 1 or
20 more netting agreements or qualified financial contracts, then
21 the receiver shall use its best efforts to notify any person who
22 is party to the netting agreements or qualified financial
23 contracts of the transfer by 12 noon of the receiver's local time
24 on the business day following the transfer. For purposes of this
25 subsection, "business day" means a day other than a Saturday,
26 Sunday, or any day on which either the New York stock exchange or
27 the federal reserve bank of New York is closed.

1 (5) Notwithstanding any other provision of this act, a
2 receiver may not avoid a transfer of money or other property
3 arising under or in connection with a netting agreement or
4 qualified financial contract or any pledge, security, collateral,
5 or guarantee agreement or any other similar security arrangement
6 or credit support document relating to a netting agreement or
7 qualified financial contract that is made before the commencement
8 of a formal delinquency proceeding under this chapter. However,
9 a transfer may be avoided under section 8126 if the transfer was
10 made with actual intent to hinder, delay, or defraud the insurer,
11 a receiver appointed for the insurer, or existing or future
12 creditors.

13 (6) In exercising any of its powers under this chapter to
14 disaffirm or repudiate a netting agreement or qualified financial
15 contract, the receiver shall take action with respect to each
16 netting agreement or qualified financial contract and all
17 transactions entered into in connection with the netting
18 agreement or qualified financial contract in its entirety.
19 Notwithstanding any other provision of this chapter, any claim of
20 a counterparty against the estate arising from the receiver's
21 disaffirmance or repudiation of a netting agreement or qualified
22 financial contract that has not been previously affirmed in the
23 liquidation or immediately preceding rehabilitation case shall be
24 determined and shall be allowed or disallowed as if the claim had
25 arisen before the date of the filing of the petition for
26 liquidation or, if a rehabilitation proceeding is converted to a
27 liquidation proceeding, as if the claim had arisen before the

1 date of the filing of the petition for rehabilitation. The
2 amount of the claim shall be the actual direct compensatory
3 damages determined as of the date of the disaffirmance or
4 repudiation of the netting agreement or qualified financial
5 contract.

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

8 (8) All rights of counterparties under this act apply to
9 netting agreements and qualified financial contracts entered into
10 on behalf of the general account or separate accounts if the
11 assets of each separate account are available only to
12 counterparties to netting agreements and qualified financial
13 contracts entered into on behalf of that separate account.

14 (9) As used in this section:

15 (a) "Actual direct compensatory damages" includes normal and
16 reasonable costs of cover or other reasonable measures of damages
17 utilized in the derivatives market for the contract and agreement
18 claims, but does not include punitive and exemplary damages,
19 damages for lost profit or lost opportunity, or damages for pain
20 and suffering.

21 (b) "Commodity contract" means any of the following:

22 (i) A contract for the purchase or sale of a commodity for
23 future delivery on, or subject to the rules of, a board of trade
24 designated as a contract market by the commodity futures trading
25 commission under the commodity exchange act, 7 USC 1 to 27f, or
26 board of trade outside the United States.

27 (ii) An agreement that is subject to regulation under section

1 23 of the commodity exchange act, 7 USC 23, and that is commonly
2 known to the commodities trade as a margin account, margin
3 contract, leverage account, or leverage contract.

4 (iii) An agreement or transaction that is subject to
5 regulation under section 6c of the commodity exchange act, 7 USC
6 6c, and that is commonly known to the commodities trade as a
7 commodity option.

8 (c) "Contractual right" includes any right, whether or not
9 evidenced in writing, arising under statutory or common law, a
10 rule or bylaw of a national securities exchange, national
11 securities clearing organization, or securities clearing agency,
12 a rule or bylaw, or a resolution of the governing body, of a
13 contract market or its clearing organization, or under law
14 merchant.

15 (d) "Forward contract" means a contract for the purchase,
16 sale, or transfer of a commodity, as defined in section 1a of the
17 commodity exchange act, 7 USC 1a, or any similar good, article,
18 service, right, or interest that is presently or in the future
19 becomes the subject of dealing in the forward contract trade, or
20 product or by-product thereof, with a maturity date more than 2
21 days after the date the contract is entered into, including, but
22 not limited to, a repurchase transaction, reverse repurchase
23 transaction, consignment, lease, swap, hedge transaction,
24 deposit, loan, option, allocated transaction, unallocated
25 transaction, or a combination of these or option on any of them.
26 Forward contract does not include a commodity contract.

27 (e) "Netting agreement" means a contract or agreement,

1 including terms and conditions incorporated by reference in the
2 contract or agreement, that documents 1 or more transactions
3 between the parties to the agreement for or involving 1 or more
4 qualified financial contracts and that provides for the netting
5 or liquidation of qualified financial contracts or present or
6 future payment obligations or payment entitlements thereunder,
7 including liquidation or close-out values relating to those
8 obligations or entitlements, among the parties to the netting
9 agreement. Netting agreement includes a master agreement that
10 otherwise meets this definition. A master agreement includes all
11 schedules, confirmations, definitions, and addenda to it and
12 transactions under it, which shall be treated as 1 netting
13 agreement.

14 (f) "Qualified financial contract" means a commodity
15 contract, forward contract, repurchase agreement, securities
16 contract, swap agreement, and any similar agreement that the
17 commissioner determines by regulation, resolution, or order to be
18 a qualified financial contract for the purposes of this chapter.

19 (g) "Repurchase agreement", including a reverse repurchase
20 agreement, means an agreement, including related terms, that
21 provides for the transfer of certificates of deposit, eligible
22 bankers' acceptances, or securities that are direct obligations
23 of, or that are fully guaranteed as to principal and interest by,
24 the United States or an agency of the United States against the
25 transfer of funds by the transferee of the certificates of
26 deposit, eligible bankers' acceptances, or securities with a
27 simultaneous agreement by the transferee to transfer to the

1 transferor certificates of deposit, eligible bankers'
2 acceptances, or securities as described above, at a date certain
3 not later than 1 year after the transfers or on demand, against
4 the transfer of funds. For the purposes of this definition, the
5 items that may be subject to an agreement include
6 mortgage-related securities, a mortgage loan, and an interest in
7 a mortgage loan, and shall not include any participation in a
8 commercial mortgage loan, unless the commissioner determines by
9 regulation, resolution, or order to include the participation
10 within the meaning of the term.

11 (h) "Securities contract" means a contract for the purchase,
12 sale, or loan of a security, including an option for the
13 repurchase or sale of a security, certificate of deposit, or
14 group or index of securities, including an interest therein or
15 based on the value thereof, or an option entered into on a
16 national securities exchange relating to foreign currencies, or
17 the guarantee of a settlement of cash or securities by or to a
18 securities clearing agency. As used in this definition,
19 "security" includes a mortgage loan, mortgage-related securities,
20 and an interest in any mortgage loan or mortgage-related
21 security.

22 (i) "Swap agreement" means an agreement, including the terms
23 and conditions incorporated by reference in an agreement, that is
24 a rate swap agreement, basis swap, commodity swap, forward rate
25 agreement, interest rate future, interest rate option, forward
26 foreign exchange agreement, spot foreign exchange agreement, rate
27 cap agreement, rate floor agreement, rate collar agreement,

1 currency swap agreement, cross-currency rate swap agreement,
2 currency future, or currency option or any other similar
3 agreement, and includes any combination of agreements and an
4 option to enter into an agreement.