

SUBSTITUTE FOR
SENATE BILL NO. 937

A bill to amend 1956 PA 218, entitled
"The insurance code of 1956,"
by amending section 8115a (MCL 500.8115a), as added by 2004 PA 217.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 8115a. (1) Notwithstanding any other provision of this
2 act, including **SECTION 8141**, any ~~other~~ provision of this act
3 permitting the modification of contracts, or other law of ~~the~~ **THIS**
4 state, a person shall not be stayed or prohibited **UNDER THIS**
5 **CHAPTER** from exercising any of the 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 the

1 right is enforceable under applicable law other than this act.

2 (b) Any right under ~~a~~**ANY OF THE FOLLOWING:**

3 (i) **A PLEDGE, SECURITY, COLLATERAL, REIMBURSEMENT, OR GUARANTEE**
4 **AGREEMENT OR ANY SIMILAR SECURITY AGREEMENT WITH A STATE OR**
5 **FEDERALLY CHARTERED FINANCIAL INSTITUTION ORGANIZED UNDER THE LAWS**
6 **OF ANY STATE OR OF THE UNITED STATES.**

7 (ii) **A** pledge, security, collateral, **REIMBURSEMENT,** or
8 guarantee agreement or any ~~other~~ similar security arrangement
9 **AGREEMENT** or credit support document **ENHANCEMENT** relating to ~~a~~**AT**
10 **LEAST 1** netting agreement or qualified financial contract.

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

19 (2) Upon termination of a netting agreement, the net or
20 settlement amount, if any, owed by a nondefaulting party to an
21 insurer against which an application or petition has been filed
22 under this chapter shall be transferred to or on the order of the
23 receiver for the insurer, even if the insurer is the defaulting
24 party, notwithstanding any provision in the netting agreement that
25 may provide that the nondefaulting party is not required to pay any
26 net or settlement amount due to the defaulting party upon
27 termination. Any limited 2-way payment provision in a netting

1 agreement with an insurer that has defaulted shall be considered to
2 be a full 2-way payment provision as against the defaulting
3 insurer. Any such property or amount shall, except to the extent it
4 is subject to 1 or more secondary liens or encumbrances, be a
5 general asset of the insurer.

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

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

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

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

(5) ~~Notwithstanding~~ **EXCEPT AS PROVIDED IN SUBSECTION (6), NOTWITHSTANDING** any other provision of this act, a receiver may not avoid a transfer of money or other property arising ~~under or in~~ connection with ~~a~~ **ANY OF THE FOLLOWING THAT IS MADE BEFORE THE COMMENCEMENT OF A FORMAL DELINQUENCY PROCEEDING UNDER THIS CHAPTER:**

(A) A netting agreement or qualified financial contract. ~~or any~~

(B) A PLEDGE, SECURITY, COLLATERAL, REIMBURSEMENT, OR GUARANTEE AGREEMENT OR SIMILAR SECURITY AGREEMENT WITH A STATE OR FEDERALLY CHARTERED FINANCIAL INSTITUTION ORGANIZED UNDER THE LAWS OF ANY STATE OR OF THE UNITED STATES.

(C) A pledge, security, collateral, **REIMBURSEMENT**, or guarantee agreement or any ~~other~~ similar security arrangement **AGREEMENT** or credit support document **ENHANCEMENT** relating to a netting agreement or qualified financial contract. ~~that is made before the commencement of a formal delinquency proceeding under this chapter. However,~~

(6) **NOTWITHSTANDING SUBSECTION (5)**, a transfer may be avoided under section 8126 if the transfer was made with actual intent to hinder, delay, or defraud the insurer, a receiver appointed for the insurer, or existing or future creditors.

(7) ~~(6)~~ In exercising any of its powers under this chapter to disaffirm or repudiate a netting agreement or qualified financial contract, the receiver shall take action with respect to each

1 netting agreement or qualified financial contract and all
2 transactions entered into in connection with the netting agreement
3 or qualified financial contract in its entirety. Notwithstanding
4 any other provision of this chapter, any claim of a counterparty
5 against the estate arising from the receiver's disaffirmance or
6 repudiation of a netting agreement or qualified financial contract
7 that has not been previously affirmed in the liquidation or
8 immediately preceding rehabilitation case shall be determined and
9 shall be allowed or disallowed as if the claim had arisen before
10 the date of the filing of the petition for liquidation or, if a
11 rehabilitation proceeding is converted to a liquidation proceeding,
12 as if the claim had arisen before the date of the filing of the
13 petition for rehabilitation. The amount of the claim shall be the
14 actual direct compensatory damages determined as of the date of the
15 disaffirmance or repudiation of the netting agreement or qualified
16 financial contract.

17 (8) ~~(7)~~—This section does not apply to persons who are
18 affiliates of the insurer that is the subject of the proceeding.

19 (9) ~~(8)~~—All rights of counterparties under this act apply to
20 netting agreements and qualified financial contracts entered into
21 on behalf of the general account or separate accounts if the assets
22 of each separate account are available only to counterparties to
23 netting agreements and qualified financial contracts entered into
24 on behalf of that separate account.

25 (10) ~~(9)~~—As used in this section:

26 (a) "Actual direct compensatory damages" includes normal and
27 reasonable costs of cover or other reasonable measures of damages

1 utilized in the derivatives market for the contract and agreement
2 claims, but does not include punitive and exemplary damages,
3 damages for lost profit or lost opportunity, or damages for pain
4 and suffering.

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

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

11 (ii) An agreement that is subject to regulation under section
12 23 of the commodity exchange act, 7 USC 23, and that is commonly
13 known to the commodities trade as a margin account, margin
14 contract, leverage account, or leverage contract.

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

18 (c) "Contractual right" includes any right, whether or not
19 evidenced in writing, arising under statutory or common law, a rule
20 or bylaw of a national securities exchange, national securities
21 clearing organization, or securities clearing agency, a rule or
22 bylaw, or a resolution of the governing body, of a contract market
23 or its clearing organization, or under law merchant.

24 (D) "FINANCIAL INSTITUTION" INCLUDES, BUT IS NOT LIMITED TO, A
25 BANK OR TRUST COMPANY.

26 (E) ~~(d)~~ "Forward contract" means a contract for the purchase,
27 sale, or transfer of a commodity, as defined in section 1a of the

1 commodity exchange act, 7 USC 1a, or any similar good, article,
2 service, right, or interest that is presently or in the future
3 becomes the subject of dealing in the forward contract trade, or
4 product or by-product thereof, with a maturity date more than 2
5 days after the date the contract is entered into, including, but
6 not limited to, a repurchase transaction, reverse repurchase
7 transaction, consignment, lease, swap, hedge transaction, deposit,
8 loan, option, allocated transaction, unallocated transaction, or a
9 combination of these or option on any of them. Forward contract
10 does not include a commodity contract.

11 (F) ~~(e)~~—"Netting agreement" means a contract or agreement,
12 including terms and conditions incorporated by reference in the
13 contract or agreement, that documents 1 or more transactions
14 between the parties to the agreement for or involving 1 or more
15 qualified financial contracts and that provides for the netting or
16 liquidation of qualified financial contracts or present or future
17 payment obligations or payment entitlements thereunder, including
18 liquidation or close-out values relating to those obligations or
19 entitlements, among the parties to the netting agreement. Netting
20 agreement includes a master agreement that otherwise meets this
21 definition. A master agreement includes all schedules,
22 confirmations, definitions, and addenda to it and transactions
23 under it, which shall be treated as 1 netting agreement.

24 (G) ~~(f)~~—"Qualified financial contract" means a commodity
25 contract, forward contract, repurchase agreement, securities
26 contract, swap agreement, and any similar agreement that the
27 commissioner determines by regulation, resolution, or order to be a

1 qualified financial contract for the purposes of this chapter.

2 **(H)** ~~(g)~~—"Repurchase agreement", including a reverse repurchase
3 agreement, means an agreement, including related terms, that
4 provides for the transfer of certificates of deposit, eligible
5 bankers' acceptances, or securities that are direct obligations of,
6 or that are fully guaranteed as to principal and interest by, the
7 United States or an agency of the United States against the
8 transfer of funds by the transferee of the certificates of deposit,
9 eligible bankers' acceptances, or securities with a simultaneous
10 agreement by the transferee to transfer to the transferor
11 certificates of deposit, eligible bankers' acceptances, or
12 securities as described above, at a date certain not later than 1
13 year after the transfers or on demand, against the transfer of
14 funds. For the purposes of this definition, the items that may be
15 subject to an agreement include mortgage-related securities, a
16 mortgage loan, and an interest in a mortgage loan, and shall not
17 include any participation in a commercial mortgage loan, unless the
18 commissioner determines by regulation, resolution, or order to
19 include the participation within the meaning of the term.

20 **(I)** ~~(h)~~—"Securities contract" means a contract for the
21 purchase, sale, or loan of a security, including an option for the
22 repurchase or sale of a security, certificate of deposit, or group
23 or index of securities, including an interest therein or based on
24 the value thereof, or an option entered into on a national
25 securities exchange relating to foreign currencies, or the
26 guarantee of a settlement of cash or securities by or to a
27 securities clearing agency. As used in this definition, "security"

1 includes a mortgage loan, mortgage-related securities, and an
2 interest in any mortgage loan or mortgage-related security.

3 (J) ~~(i)~~—"Swap agreement" means an agreement, including the
4 terms and conditions incorporated by reference in an agreement,
5 that is a rate swap agreement, basis swap, commodity swap, forward
6 rate agreement, interest rate future, interest rate option, forward
7 foreign exchange agreement, spot foreign exchange agreement, rate
8 cap agreement, rate floor agreement, rate collar agreement,
9 currency swap agreement, cross-currency rate swap agreement,
10 currency future, or currency option or any other similar agreement,
11 and includes any combination of agreements and an option to enter
12 into an agreement.