Senate Bill 303

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CHAPTER 89, LAWS OF 1967

AN ACT to repeal 20.460 (1) (j), 200.08 (1) to (5), (7) and (8), 200.09. 200.26 (9), 201.13 (1) and (2), 201.27 (2), 201.51 and chapter 616; to renumber 201.27 (1); to renumber and amend 200.08 (6) and 201.13 (3); to amend 102.65 (15), 200.03 (18), 201.16 (2), 206.19 and 286.12; and to create chapter 645 of the statutes, relating to delinquency proceedings in insurance.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 20.460 (1) (j) of the statutes is repealed.

SECTION 2. 102.65 (15) of the statutes is amended to read:

102.65 (15) The expense of administering the stock fund shall be paid out of the stock fund, the expense of administering the mutual fund shall be paid out of the mutual fund, and the expense of administering the reciprocal fund shall be paid out of the reciprocal fund. In the case of domestic carriers, the expenses as fixed by the commissioner of insurance shall be subject to the approval of the court ~~as provided for in subsection (5) of section 200.08.~~ The commisisoner of insurance and the industrial commissioners as co-administrators of the funds shall serve without additional compensation, but may be allowed and paid from any fund expenses incurred in the performance of their duties in connection with

such fund. The compensation of those persons employed by the commissioner of insurance shall be deemed administration expenses payable from the funds. The commissioner of insurance shall include in his annual report to the governor a statement of the annual receipts and disbursements and the condition of each fund.

SECTION 3. 200.03 (18) of the statutes is amended to read:

200.03 (18) He shall have such powers and perform such duties as are given to him or required of him and may perform such functions as he is permitted under s. 200.26, and for purposes of enforcing ~~the provisions of~~ that section may proceed under ss. ~~200.08,~~ 200.13 and 200.14 *and ch. 645* to the same extent and in the same manner as if such organizations were domestic insurance corporations.

SECTION 4. 200.08 (1) to (5), (7) and (8) of the statutes are repealed.

SECTION 5. 200.08 (6) of the statutes is renumbered 200.08 and amended to read:

200.08 INSURERS REHABILITATION AND LIQUIDATION; RULES. To carry out the purposes of ~~this section~~ *ch. 645*, the commissioner ~~shall have power~~ *may*, subject to the approval of the court, ~~to~~ make and prescribe such rules ~~and regulations~~ as ~~to him shall seem~~ *he deems* proper.

SECTION 6. 200.09 of the statutes is repealed.

SECTION 7. 200.26 (9) of the statutes is repealed.

SECTION 8. 201.13 (1) and (2) of the statutes are repealed.

SECTION 9. 201.13 (3) of the statutes is renumbered 201.13 and amended to read:

201.13 Every ~~such~~ *mutual insurance* corporation having assets in excess of one percent of the amount of its insurance in force shall, before being licensed to do business in this state, file with the application for such a license a resolution duly adopted by its board of directors and signed by its president and secretary, wherein it ~~shall agree~~ *agrees* that its assets shall be distributed in accordance with ~~subsections (1) and (2) of this section. And~~ *s. 645.72 (2)*. No license shall be issued to such company until after the adoption and filing of such resolution.

SECTION 10. 201.16 (2) of the statutes is amended to read:

201.16 (2) In a mutual company organized for the insurance or guarantee of depositors or deposits in banks or trust companies, the maximum single risk may be fixed at a higher amount by the bylaws. Any such company may effect reinsurance in any authorized or unauthorized company, that complies with ~~the provisions of subsection (1) of~~ s 201.27, ~~providing that.~~ Insurance in any unauthorized company shall be reported annually and the same taxes paid upon the premiums as are paid by authorized companies.

SECTION 11. 201.27 (2) of the statutes is repealed.

SECTION 12. 201.27 (1) of the statutes is renumbered 201.27.

SECTION 13. 201.51 of the statutes is repealed.

SECTION 14. 206.19 of the statutes is amended to read:

206.19 Whenever the assets of any life insurance company ~~shall~~ *do* not equal its liabilities, the commissioner ~~shall~~ *may* give notice to such company and its agents to discontinue issuing policies within this state until such time as its assets have become equal to its liabilities. Any officer or agent who, after such notice has been given, issues or delivers a policy

on behalf of such company before a new certificate of authority is issued shall forfeit for each offense not less than $100 nor more than $1,000.

SECTION 15. 286.12 of the statutes is amended to read:

286.12 BANKING, INJUNCTION. Whenever any corporation, having banking ~~or insurance~~ powers, ~~shall become~~ *becomes* insolvent or ~~neglect~~ *neglects* or ~~refuse~~ *refuses* to pay its due debts on demand or ~~shall have~~ *has* violated any of the provisions of its act of incorporation or of any other law binding on it, such corporation and its officers may be enjoined from exercising any of its corporate rights and from receiving any debts or demands, and from paying out or transferring or delivering any of its property until the court ~~shall~~ otherwise ~~order~~ *orders*.

SECTION 16. Chapter 616 of the statutes is repealed.

SECTION 17. Chapter 645 of the statutes is created to read:

CHAPTER 645.

INSURERS REHABILITATION AND LIQUIDATION.

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SUBCHAPTER IV.

INTERSTATE RELATIONS

PRELIMINARY COMMENT: This chapter is the first product of the comprehensive study and revision of the insurance laws authorized by s. 13.84. It re-examines and comprehensively redesigns all aspects of delinquency proceedings in insurance. Its purpose can best be understood in relation to the problems it attempts to solve.

Basic Problems

Several major groups of problems can be isolated for consideration in a study of delinquency proceedings in insurance. As they appear in logical sequence they are as follows:

(1) The causes of insolvency,

(2) The detection of incipient difficulty in the insurance company operation,

(3) The devising of ways to induce the insurance commissioner to take early action to correct remediable defects in insurer operation, before the sickness has become serious,

(4) The provision of effective procedures for rehabilitation of companies seriously sick but still salvageable,

(5) For companies that cannot be saved, the development of efficient, inexpensive, and expeditious procedures for liquidation that will distribute the unavoidable burden fairly, and

(6) The complications superimposed on the above problems by the existence of a federal system as the setting for delinquency proceedings.

This chapter deals with all of these groups of problems, though with some much more than with others. The first 2 are treated least fully, because they are more closely connected with substantive regulation than with delinquency proceedings. The others are dealt with in succession.

Insurance commissioners do not now deal with difficulty in insurance company operation, in many instances at least, until long after it is common knowledge in the industry and even in regulatory circles that the company is in serious trouble. Reluctance to take effective action despite adequate knowledge is a fundamental problem of insurance regulation, and this chapter has approached the solution of that problem by providing new summary procedures.

Summary Procedures

In order to encourage early action by the commissioner of a more discriminating sort than is possible using traditional methods, very flexible summary procedures were devised. Since the commissioner has previously had available to him only rather gross methods that usually involved the destruction of the company through liquidation or through an ineffective effort to save it by formal and public rehabilitation procedures, he has often been hesitant to take action until all hope was lost. Moreover, when he has merely suspected difficulty he has been unwilling to proceed because he was not sure of his ground for action and because the publicity attendant upon any proceeding was destructive of the company.

It is true that under former s. 200.09, the commissioner has had summary power to seize an insurance company in an emergency, but he has never used it. That restraint seems wise since the statute was devised to deal with bank insolvencies and is poorly designed for insurance companies. Hence it is necessary to equip the commissioner with a variety of discriminating weapons that will enable him to deal effectively and promptly with incipient difficulty, if he will use them. Unlike traditional regulatory tools, the new procedures are designed to eliminate unnecessary damage to the insurer and needless intervention in the industry.

There should be no reason why the commissioner would not use the new procedures. They are not novel devices; they have counterparts in the Wisconsin banking law and in similar procedures in the California insurance statutes. Nor are they dangerous. They are hedged about with procedural safeguards against arbitrariness by the commissioner, including quick and easy access to judicial review. Moreover, because they can be used with minimum publicity and less massive intervention, they can be used with less risk of destruction and interference with the company and are thus less dangerous than more formal methods.

The chapter creates 2 kinds of summary procedures, one a simple order, either mandatory or inhibitory, and the other a seizure order. Normally, the former type of order would be obtained after a hearing; in emergency situations the commissioner may issue such an order without hearing, but subject to immediate and speedy court control at the instance of the company. The seizure order would normally be issued by a court, and only in an emergency by the commissioner.

These devices will enable the commissioner to deal effectively with single practices that endanger the company solvency or the public interest. Where venal manipulation of assets is feared, he will be able to seize assets and books quickly enough to protect them and to learn what is

happening. The prospect of immediate court supervision and the possibility of devastating criticism of his action in the insurance world where he values his reputation highly will suffice to keep the commissioner from abusing this carefully limited power. In addition, a commissioner will not be unaware of possible tort liability if he should act improperly. Indeed, the greater difficulty is to give the commissioner sufficiently discriminating weapons to induce him to act as soon as he should; nearly always he is inclined to do nothing until it is too late.

Formal Procedures

The summary proceedings just described will not always be appropriate. When difficulties have reached a certain point, more formal action is necessary. Statutes generally distinguish between rehabilitation and liquidation, and this distinction is retained. However, rehabilitation has been conceived heretofore in the same legalistic way as liquidation—the problem is seen erroneously as one of undertaking formalized legal action to save the company—perhaps through merger, consolidation, mutualization, conversion to the stock form, or other reorganization. Occasionally these formal devices may be useful, but the emphasis has been altogether misplaced.

What is needed for rehabilitation of an insurance company is new management with the capacity to see what is wrong and the power to correct it. The chapter, therefore, tries to devise a rehabilitation procedure with a focus on management expertise. The key to success is twofold. Early action is one-half and obtaining a satisfactory rehabilitator the other half. The rehabilitator cannot be the insurance commissioner, except in a formal sense, for the commissioner has too many other things to do and may or may not know how to manage an insurance company, however able he may be as a regulator. He should not be a practicing lawyer, unless he is also management oriented and trained. He should be a manager of talent and experience in the insurance business. It is important to draw from the industry an experienced executive of recognized ability who will regard it both as his public duty and his private opportunity to save the company.

To obtain the "right" person requires help from the industry. If they will, insurance executives can help find the man and can help convince him and his present employer that on the grounds of public service and private career opportunity he must take the job. He should be compensated liberally so that he does not lose financially. He should then be given wide discretion in management, subject only to general court supervision, so that he can take such action as is necessary to revitalize the company. Conceptually he should be treated as new management with especially broad powers, including the power to propose to the court the formal legal reorganizational devices that have heretofore been the focus of rehabilitation but that should normally be subordinated in the future to the larger management task. This change is more one of "tone"—of attitude—than of change in the formally stated rules. But tone or attitude can be a decisive factor in achieving success in a complex undertaking.

Grounds for Formal Proceedings

Traditionally the grounds upon which action might be instituted against an insurer were the same for rehabilitation as for liquidation, the choice between remedies depending on an estimate of probable success if the former were attempted. The chapter retains this notion in part but tries to tailor it to reality. Rehabilitation is not appropriate at a point where a company has been allowed to approach insolvency, unless substantial additional resources are poured into the enterprise *immediately* by contributors of capital funds. A serious error in recent insurance regulation has been the futile hope that insolvent enterprises might yet survive,

held long after it was too late. Consequently the grounds are now separate: those that suggest insolvency are grounds for liquidation while those that indicate only difficulty of a different order are now grounds for rehabilitation. Flexibility is preserved (1) by making either procedure *possible* on any ground, though the chapter points the procedure in one direction or the other, depending on the situation, and (2) by permitting conversion from one type of proceeding to the other.

One indication of approach is the elimination of failure to remedy an impairment of capital after a commissioner's order as a ground for liquidation. Insolvency now includes every case of impairment of capital; whenever an order to restore impaired capital is necessary, it is too late and the company should be put into liquidation. Generosity on this matter would be misplaced. The only exception to a rule that such a company should be liquidated immediately is if money is poured into the enterprise so quickly that it is again clearly solvent before the commissioner irreversibly commits the company to the liquidation process. He should not wait to begin to do what is necessary to protect the public while efforts are made to find money.

Liquidations

Liquidation is an unfortunate end to an enterprise, to be handled as efficiently and expeditiously and economically as possible and with as equitable as possible an allocation of the inevitable loss.

The influence of the Federal Bankruptcy Act is quite apparent in the sections dealing with liquidation. That act provides a time tested, though not ideal, source for liquidation procedures. But the Act has not been blindly followed, when the special problems of insurance liquidation and regulation or other considerations urge a departure from the model.

The chapter tries to provide for an orderly and complete procedure; for a technique for the handling of claims, especially third party claims, in which everyone makes some concessions to the common necessity and no one suffers too much; for a system of priorities in claims that will enable some classes of claims to be paid earlier than they are now and that will ensure that the insurance company comes as close as possible to performing its social function even in its death throes; for powerful and discriminating devices to recover assets improperly dissipated while the patient was in a coma.

Interstate Problems

The chapter adopts the Uniform Insurers Liquidation Act, formerly ch. 616, in substance and effect. In form, however, the Uniform Act has been broken up and integrated into the fabric of this completely reorganized treatment of delinquency proceedings. Some changes, fully noted where they appear, have also been made. By integrating the Act in this chapter, a more logical structure was achieved. At the same time, all benefits of enactment of the Uniform Act's provisions are retained. It is still appropriate to regard this state as a "reciprocal state" within the meaning of the Uniform Act, as that term is defined as s. 645.03 (9) and in the Uniform Act. Although the Uniform Act may be regarded as the cornerstone of the chapter's approach to interstate problems, that Act is both modified and extended to assume more efficient regulation of interstate delinquency problems.

SUBCHAPTER I.

GENERAL PROVISIONS.

645.01 TITLE, CONSTRUCTION AND PURPOSE. (1) SHORT TITLE. This chapter may be cited as the "Insurers Rehabilitation and Liquidation Act."

(2) CONSTRUCTION: NO LIMITATION OF POWERS. This chapter shall not

be interpreted to limit the powers granted the commissioner by other provisions of the law.

Comment on sub. (2): This chapter specifies the law in more detail than the remainder of the present Wisconsin insurance statutes. There is a danger that the change in the pattern of specificity may be interpreted as a negation of powers previously granted in other chapters of the code. This subsection therefore declares that the chapter is not intended to restrict powers of the commissioner granted elsewhere.

(3) LIBERAL CONSTRUCTION. This chapter shall be liberally construed to effect the purpose stated in sub. (4).

(4) PURPOSE. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating co-operation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

Comment on sub. (4): The motif of par. (a) pervades the chapter. Thus the section on summary orders (s. 645.21) provides for selective application of a light hammer tap when and where necessary, instead of the traditional sledge hammer blow.

The goal of par. (b) is partly implemented in s. 645.33 (1). Rehabilitation should emphasize the management process, not the legal process. Flexibility, informality and expertise should be encouraged, as they are in this chapter. Help from the insurance industry should be sought where appropriate.

Par. (c) recognizes the fact that insurance codes have traditionally given only skeletal treatment to delinquency procedures, leaving regulators and courts with inadequate and uncertain directions. This chapter attempts to put flesh on the skeleton of the law dealing with delinquency proceedings in order to provide more ample and more certain directions, thereby lessening the need for litigation. General directions are not enough in an area where there is too little experience to build firm tradition.

Par. (d) states a pervasive goal of this chapter. The priority system has been structured to make the insurance institution do its job better and to apportion loss equitably. Provisions relating to fraudulent conveyances and preferential transfers and liens are carefully tailored to maximize equity in the distribution of the limited assets. See especially ss. 645.52 to 645.55 and 645.68.

The goals of par. (e) are sought in this chapter by inclusion of the Uniform Insurers Liquidation Act as a basic part of this chapter, mainly in ss. 645.83 to 645.89, and by extending personal jurisdiction over agents, reinsurers, officers and other insiders outside the state as far as modern concepts of due process will allow, so long as unreasonable hardship will not result. See s. 645.04 (5).

Par. (f) has a precise purpose. It is intended to make it clear beyond doubt that this chapter is perceived by the legislature as, and in fact is, part of the regulatory structure. It is a part of the regulatory system because this chapter will have considerable effect on the way the insurance business is conducted by reinsurers, agents, premium financers, and others. If the courts see clearly that the chapter is a part of the regulatory system, it should be possible to overcome what would otherwise be a limiting interpretation of federal statutes. This problem is of special importance in s. 645.68, on priorities, as explained in the comment on s. 645.68 (5).

645.02 PERSONS COVERED. The proceedings authorized by this chapter may be applied to:

(1) All insurers who are doing, or have done, an insurance business in this state, and against whom claims arising from that business may exist now or in the future;

(2) All insurers who purport to do an insurance business in this state;

(3) All insurers who have insureds resident in this state;

(4) All other persons organized or in the process of organizing with the intent to do an insurance business in this state; and

(5) All nonprofit service plans as defined in s. 200.26 (1) and all fraternal benefit and mutual benefit societies as defined in s. 208.01 (1).

Comments: This section brings together in one place a statement of the types of insurers covered by this chapter. The equivalent law was scattered in various places in the statutes.

The purpose of this section is to make clear what persons are subject to delinquency proceedings, and not to specify what persons may be affected by or involved in them. For example, the duty to co-operate in s. 645.07 extends to many people whose business could not be liquidated under this chapter. Thus persons not insurers are subject to various provisions of the chapter, in connection with the liquidation of *insurers*. It is unnecessary to provide, as do California s. 1010 and New York s. 510, that agents and brokers are subject to delinquency procedures. If they are also insurers they are caught by this section without express mention. If they are not insurers they would be subject to the Federal Bankruptcy Act.

Under the terms of this section, insurers are covered who are no longer doing an insurance business here. This seems to extend the application of Wisconsin law. Former ss. 200.08 and 616.01 (1) spoke only in the present tense. On the other hand, an insurer no longer writing policies is still considered in some states to be engaging in the insurance business, and under the definition in s. 645.03 (3) would be an insurer now. However, some courts reject the notion that such companies are still doing business. For this reason, insurers are included in this section and in s. 645.03 (3) both in present and past tense in order to make certain that delinquency procedures are available even if the insurer is no longer issuing new policies. Nebraska s. 44-132 is an example of similar statutory extension of coverage. The wider application will only rarely be of importance, but occasionally it may matter a great deal.

Sub. (5) is intended to preserve exactly the status of peripheral insurance-type organizations so far as insurance delinquency proceedings are concerned. The basic provisions of former Wisconsin insurance law dealing with delinquent and insolvent insurers, s. 200.08, was made applicable to nonprofit service plans by s. 200.03 (18). But in the absence of express provisions, nonprofit service plans are not subject to the insurance laws. See, e.g. s. 148.03 (2). For this reason, nonprofit service plans must be specifically mentioned in this section, or they would not be included, however general the language. Nonprofit service plans include plans for sickness care pursuant to s. 148.03; for hospital service pursuant to s. 182.032; for dental care pursuant to s. 152.53; and for prepaid prescription plans pursuant to s. 151.17.

The general definition section of the insurance code, s. 201.01, defines "company" to include "all corporations, associations, partnerships, and individuals engaged as principals in the business of insurance, except mutual benefit societies." Despite this exclusion of mutual benefit societies from the meaning of "companies," they were expressly covered under s. 200.08, dealing with delinquency proceedings. Further, fraternals are declared by s. 208.01 (1) to be synonymous with mutual benefit societies. For clarity, they were also listed specifically in s. 200.08. Hence, as a precaution, mutual benefit societies and fraternals are both expressly listed here as subject to this chapter. This does not alter the prior rule.

Not all specialized insurance-type organizations are catalogued in this section however, because many are exempt from present Wisconsin insurance law dealing with delinquent insurers. This category would include ch. 185 organizations, specifically co-operative sickness care plans under s. 185.981 and voluntary benefit plans in schools under s. 185.991. Also in this category are annuity organizations under ch. 199, motor club service organizations under s. 201.71, and employe welfare funds under ch. 211.

645.03 DEFINITIONS. For the purposes of this chapter:

(1) "Commissioner" means the commissioner of insurance or equivalent insurance supervisory official.

Comment on sub. (1): This is the equivalent of former s. 616.01 (13). Context will determine to which commissioner a provision refers.

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

Comment on sub. (2): This was s. 616.01 (12). It is s. 1 (12) of the Uniform Insurers Liquidation Act. For a discussion of that Act and its adoption by this chapter, see General Comment on Subchapter IV.

(3) "Insurer" means any person who is doing, has done, purports to do or is licensed to do an insurance business and is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization or conservation by, a commissioner. For purposes of this chapter, all other persons included under s. 645.02 shall be deemed to be insurers.

Comment on sub. (3): This is similar to former s. 616.01 (1).

(4) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary proceeding under ss. 645.21 to 645.24.

Comment on sub. (4): This is the same as former s. 616.01 (2), except for the reference to the summary proceedings, which is necessitated by the creation of those new proceedings. The word "delinquency" is not ideal but is now entrenched in the law.

(5) "State" means any state of the United States and the Panama Canal zone.

Comment on sub. (5): This is similar to former s. 616.01 (3), part of the former Wisconsin version of the Uniform Insurers Liquidation Act, which created potential problems by omitting "of the United States," and might therefore include foreign national states. Former s. 616.01 (3) also added the Panama Canal Zone.

The District of Columbia and Puerto Rico are not mentioned; they are within the general definition of "state" in Wisconsin law, s. 990.01 (40), and hence are included without explicit mention. So also are territories, which thus are put by Wisconsin law in the same position as states, without the need for express mention. To exclude them from coverage would be to treat them as foreign countries.

The Panama Canal Zone and some other covered jurisdictions now have no insurance commissioner, no insurance regulation as such, and have not adopted and could not adopt, in the present posture of their laws, the

Uniform Insurers Liquidation Act. Nonetheless, they are within the general terms of this chapter, and if they should later adopt the Uniform Act, they would be considered reciprocal states.

(6) "Foreign country" means territory not in any state.

Comment on sub. (6): This is the same in meaning as former s. 616.01 (4).

(7) "Domiciliary state" means the state in which an insurer is incorporated or organized or, in the case of an alien insurer, the state in which the insurer has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and on deposit for the benefit of policyholders and creditors in the United States.

Comment on sub. (7): This is based on former s. 616.01 (5).

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

Comment on sub. (8): This was s. 616.01 (6).

(9) "Reciprocal state" means any state other than this state in which in substance and effect ss. 645.42 (1), 645.83 (1) and (3), 645.84 and 645.86 to 645.89 are in force, and in which provisions are in force requiring that the commissioner be the receiver of a delinquent insurer, and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

Comment on sub. (9): This has the same meaning as former s. 616.01 (7).

(10) "General assets" means all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or limited classes of persons, and as to specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sums secured thereby. Assets held in trust and on deposit for the security or benefit of all policyholders or all policyholders and creditors, in more than a single state, shall be treated as general assets.

Comment on sub. (10): This is basically the same as former s. 616.01 (8), except for a change in the last sentence. If a trust or special deposit applied to all of the states and territories except one, the fund would then not fall within the definition of general assets. For that reason the language of the Uniform Insurers Liquidation Act in the last sentence was changed so that funds or deposits applying to more than one state though less than all states would meet the definition of general assets.

(11) "Preferred claim" means any claim with respect to which the law accords priority of payment from the general assets of the insurer.

Comment on sub. (11): This is similar to former s. 616.01 (9), but has been changed in one important respect. The definition here refers to "law", not to the "law of a state or of the United States", because this chapter seeks to foreclose the priorities otherwise provided by federal law. See the comment on s. 645.68 (5) for discussion of this point.

(12) "Special deposit claim" means any claim secured by a deposit made pursuant to law for the security or benefit of one or more limited classes of persons, but not including any claim secured by general assets.

Comment on sub. (12): This is essentially the same as former s. 616.01 (10), with a slight technical correction.

(13) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which have become liens upon specific assets by reason of judicial process, except where they have been invalidated.

Comment on sub. (13): This is similar to former s. 616.01 (11), except for a change from the Uniform Insurers Liquidation Act, in the second sentence, which formerly read: "The term also includes claims which, more than 4 months prior to the commencement of delinquency proceedings in

the state of the insurer's domicile, have become liens upon specific assets by reason of judicial process." The change was necessary to adapt the Uniform Insurers Liquidation Act to the somewhat more extensive invalidation of judicial liens provided by this chapter.

(14) "Insolvency" means:

(a) For an insurer organized under ch. 202, the inability to pay any loss within 30 days after the due date specified in the first assessment notice issued pursuant to s. 202.11 after the date of the loss, or any other uncontested debt as it becomes due.

(b) For any other insurer, that it is unable to pay its debts or meet its obligations as they mature or that its assets do not exceed its liabilities plus the greater of 1.) any capital and surplus required by law to be constantly maintained, or 2.) its authorized and issued capital stock. For purposes of this subsection, "assets" includes one-half of the maximum total assessment liability of the policyholders of the insurer, and "liabilities" includes reserves required by law. For policies issued on the basis of unlimited assessment liability, the maximum total liability, for purposes of determining solvency only, shall be deemed to be that amount that could be obtained if there were 100% collection of an assessment at the rate of 10 mills.

Comment on sub. (14): Par. (a), for town mutuals, contemplates a definite rule for the time when the assessment must be made, in order that "insolvency" will have a definite and precise meaning. Par. (b) includes all other insurers, whether operating on an assessable or non-assessable basis. In determining solvency, some account must be taken of the unlikelihood of 100% collection of assessments; it is unwise to assume 100% collection for this purpose. In a going concern, 90 or 95% collection would not be unusual, but the percentage will sharply decline when it is apparent to the policy holder that he is paying for a "dead horse." Therefore only one-half of the maximum assessment liability may be included as an asset of the insurer. That seems a reasonably conservative assumption.

Those companies issuing policies subject to unlimited assessments have an asset incapable of valuation, were it not for the provisions of the last sentence of the subsection. This limits the value of assessability to the amount determined by a 10-mill assessment. This provision in no way affects the ability of the company to assess at a greater rate according to the terms of the policy. It is applicable only to define insolvency. It is necessary to have some measure of balance-sheet solvency even for an insurer with theoretically unlimited assessment possibilities.

In the portion of par. (b) concerned with payment of debts as they mature, "obligations" has been added to take care of insurers issuing service contracts where monetary payments may not be involved. This eliminates any problem arising from any ambiguity in the term "debt."

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

(a) When in exchange for such property or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or services are rendered or obligation is incurred or an antecedent debt is satisfield; or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared to the value of the property or obligation obtained.

Comment on sub. (15): This is adopted from s. 242.03, slightly altered. It is similar to Federal Banruptcy Act s. 67d (1) (e).

(16) "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent.

Comment on sub. (16): This is the same as s. 242.01 (3), with a minor amendment.

(17) "Transfer" includes the sale and every other method, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by the debtor.

Comment on sub. (17): This follows Federal Bankruptcy Act s. 1 (30), slightly altered in a way that simplifies it without changing its meaning.

(18) "Doing business" has the meaning designated in s. 201.42 (2) (a).

645.04 JURISDICTION AND VENUE. (1) ACTIONS BY COMMISSIONER. Except as provided in sub. (2) and s. 645.45 (1), no delinquency proceeding shall be commenced under this chapter by anyone other than the commissioner of this state and no court shall have jurisdiction to entertain, hear or determine any proceeding commenced by any other person.

Comment on sub. (1): This section places control of delinquency proceedings in the commissioner and eliminates the possibility of private receiverships or liquidations of insurers, which have historically been wasteful and inefficient. Furthermore, it guarantees that regulatory controls are not cut off or impaired at the very moment of most urgent need, when an insurer is in trouble.

(2) ACTIONS BY JUDGMENT CREDITORS. (a) The judgment creditors of 3 or more unrelated judgments may commence proceedings under the conditions and in the manner prescribed in this subsection, by serving notice upon the commissioner and the insurer of intention to file a petition for liquidation under s. 645.41 or 645.82. Each of the judgments must:

1. Have been rendered against the insurer by a court in this state having jurisdiction over the subject matter and the insurer;

2. Have been entered more than 60 days before the service of notice;

3. Not have been paid in full;

4. Not be the subject of a valid contract between the insurer and any judgment creditor for payment of the judgment, unless the contract has been breached by the insurer; and

5. Not be a judgment on which an appeal or review is pending.

(b) If any one of the judgments in favor of a petitioning creditor remains unpaid for 30 days after service of the notice, and the commissioner has not then filed a petition for liquidation, the creditor may file in the name of the commissioner a verified petition for liquidation of the insurer under s. 645.41 or 645.82 alleging the conditions stated in this subsection. The commissioner shall be served and joined in the action.

Comment on sub. (2): Only in the event of unpaid judgment debts on judgments rendered in this state may anyone other than the commissioner institute proceedings. In this matter this section is adapted from Illinois s. 813, with substantial modification. Nevada s. 687.060 is similar to the Illinois provision.

There are conflicting interests to be balanced here. If a commissioner is dilatory in the performance of his duty, it would be well to permit someone else to apply to the court. On the other hand, if too many private persons, even interested ones, can apply there is a possibility of undue harassment. The best balance is to permit several unpaid judgment creditors, but no one else, to join and institute proceedings under certain circumstances, after notice to the insurer and an opportunity for the insurer to pay the judgments. The power is carefully circumscribed and can be nullified by payment within 30 days after notice is given.

(3) EXCLUSIVENESS OF PROCEEDINGS. No court of this state shall have jurisdiction to entertain, hear or determine any complaint praying for

the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than in accordance with this chapter.

Comment on sub. (3): This subsection makes this chapter the exclusive law for all delinquency proceedings in the courts of this state. Indiana s. 39-3410 provides essentially the same thing. There is no good reason to permit general equity receiverships in this state, as does New Hampshire s. 411:23 for life companies. The rules of this chapter are carefully worked out with special reference to the insurance context, with which courts are not generally familiar, and the courts should not have the option of applying other rules developed in connection with other problems. Adequate discretionary power remains in the courts within the framework of the chapter to deal with any special problems that arise.

(4) CHANGE OF VENUE. Venue for proceedings arising under this chapter shall be laid initially as specified in the sections providing for such proceedings. All other actions and proceedings initiated by the receiver may be commenced and tried where the delinquency proceedings are then pending, or where venue would be laid by ch. 261 or other applicable law. All other actions and proceedings against the receiver shall be commenced and tried in the county where the delinquency proceedings are pending. At any time upon motion of any party, venue may be changed by order of the court or the presiding judge thereof to any other circuit court in this state, as the convenience of the parties and witnesses and the ends of justice may require. This subsection relates only to venue and is not jurisdictional.

Comment on sub. (4): The basic distinction made here between delinquency proceedings, i.e., proceedings arising under this chapter, and other proceedings or actions by and against the receiver is important but not always perceived.

Venue is laid for most delinquency proceedings in either Dane county or the county in which the home office is located, whereas the former law called for the commissioner to apply to the circuit court of the home county of the insurer. See former s. 200.08 (1). That option continues in the commissioner, if he wishes to exercise it, even though venue should most often be in Dane county, the location of the office of the insurance commissioner, to assure the most expeditious and expert handling. This would concentrate such cases in the court with the most experience with regulatory affairs of all kinds, including insurance. Cf. s. 227.16, which concentrates appeals from administrative agencies in Dane county. This subsection only extends that general policy. This is not unprecedented in the insurance context. Ohio s. 3903.03 gives the commissioner the option of initiating delinquency matters in Franklin county or the county in which the home office is located. Ohio s. 39.03.08 also permits subsequent removal to Franklin county. New York s. 530 similarly provides for subsequent removal to Albany county; Washington s. 48.31.210 to Thurston county.

The commissioner may apply for a seizure order (s. 645.22) in any circuit court, since seizure may be needed anywhere.

Venue may be transferred anywhere upon motion of either party, to serve the interest of convenience or fairness. Similar provisions for transfer for economy and efficiency are Hawaii s. 181-671, Indiana s. 39-3407 (b), New York s. 530, Washington s. 48.31.210.

(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 262.06 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

(a) If the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation;

(b) If the person served is a reinsurer who has at any time written a policy of reinsurance for an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced, or is an agent or broker of or for the reinsurer, in any action on or incident to the reinsurance contract; or

(c) If the person served is or has been an officer, manager, trustee, organizer, promoter or person in a position of comparable authority or influence in an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced, in any action result from the relationship with the insurer.

Comment on sub. (5): This subsection extends the jurisdiction of the Wisconsin court in order to strengthen the hand of the receiver. In so doing, however, it still assures "fair play and substantial justice," (see *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)) to any defendants affected by this new basis of jurisdiction. When a formal delinquency proceeding begins, agents' balances are likely to constitute a large share of the insurer's assets. Moreover, they are assets difficult to collect. To facilitate gathering the funds, the Wisconsin courts are given expanded personal jurisdiction, making it easier and more economical to reduce these claims to judgment. Of course, actual collection will still require proceedings where the defendant's assets can be found, but the full faith and credit clause and the Uniform Enforcement of Foreign Judgments Act (s. 270.46) will make that part of the task easier. The other 2 grounds for jurisdiction may be used to help undo transactions by which the insurer's assets were systematically depleted, if appropriate defendants can be found. The connections between the insurer and the persons listed in this subsection are close enough that a statute giving such personal jurisdiction, for purposes of actions arising out of the relationship, satisfies the requirements of due process.

The Uniform Insurers Liquidation Act gives the domiciliary receiver the primary right to collect agents' balances. Par. (a) facilitates his doing so when this state is the domiciliary state by providing for jurisdiction here. See s. 645.83 (1) for the Uniform Act provision giving the primary right where another state is the domiciliary state.

Par. (b) is unnecessary for responsible reinsures, but may help in recovering assets lost through collusive arrangements.

Par. (c) is very similar to s. 262.05 (8), but reaches more persons and more transactions.

(6) FORUM NON CONVENIENS. If the court on motion of any party finds that any action commenced under sub. (5) should as a matter of substantial justice be tried in a forum outside this state, the court may enter an order under s. 262.19 to stay further proceedings on the action in this state.

645.05 INJUNCTIONS AND ORDERS. (1) INJUNCTIONS IN THIS STATE. Any receiver appointed in a proceeding under this chapter may at any time apply for and any court of general jurisdiction in this state may grant, under the relevant sections of ch. 268, such restraining orders, temporary and permanent injunctions, and other orders as are deemed necessary and proper to prevent:

(a) The transaction of further business;
(b) The transfer of property;
(c) Interference with the receiver or with the proceedings;
(d) Waste of the insurer's assets;
(e) Dissipation and transfer of bank accounts;

(f) The institution or further prosecution of any actions or proceedings;

(g) The obtaining of preferences, judgments, attachments, garnishments or liens against the insurer or its assets;

(h) The levying of execution against the insurer or its assets;

(i) The making of any sale or deed for nonpayment of taxes or assessments that would lessen the value of the assets of the insurer;

(j) The withholding from the receiver of books, accounts, documents or other records relating to the business of the insurer; or

(k) Any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of the proceeding.

Comment on sub. (1): This section is based upon California s. 1020 and Minnesota s. 60.875 (24). It defines the right of the receiver to seek injunctive relief and other orders to maintain the integrity of the proceedings. New York s. 528 deals less comprehensively with the same subject; it is followed by Indiana s. 39-3409; Washington s. 48.31.200 and others. See also Nevada s. 687.070. The section makes no reference to *ex parte* orders, leaving the propriety of such orders to be determined by the general law as stated in ch. 268. Section 645.88 directly prohibits attachment, garnishment or execution, but an injunction may provide additional protection by stopping proceedings which may be expensive even if they might later be nullified by s. 645.88.

Section 286.12 gives the injunctive powers in the absence of proceedings under this chapter and should be regarded as supplementing this subsection, not as conflicting with it.

The word "records" under par. (j) clearly includes electronically recorded data, making it unnecessary to list tapes, disks, and other storage devices.

Actions outside this state may be enjoined as effectively as in the state, if there is personal jurisdiction over the defendant, since injunction acts on the litigant, not on the court.

(2) INJUNCTIONS ELSEWHERE. The receiver may apply to any court outside of this state for the relief described in sub. (1).

Comment on sub. (2): This provision may only codify the law applicable in the absence of statute, but is inserted here as a precaution.

645.06 COSTS AND EXPENSES OF LITIGATION. In any proceeding under this chapter, the court may award such costs and other expenses of litigation as justice requires, without regard to the limitations otherwise prescribed by law. If costs and expenses are taxed against the commissioner, they shall be paid from the appropriation under s. 20.460 (1) (a).

Comment: This section is framed broadly but is mainly intended to afford insurers protection against arbitrary action by a commissioner. Petitions for delinquency proceedings could be harassing and expensive, even if they did no other damage. Repeated petitions would be much worse. A conscientious commissioner may even hesitate to institute proceedings for fear of rendering insolvent a company in difficulty but still salvageable. He should be able to do his duty as he sees it, without placing an unjust burden on an insurer. The cost to the state will be small and the possibility of doing justice substantially enhanced. To ensure that justice is done and that the full burden of the proceeding is placed on the appropriate party, the court may award costs and other expenses of defense, without regard to the traditional limits on taxable costs.

Of course this provision does nothing to compensate for the damage done by the adverse publicity attendant upon formal proceedings. It is possible, however, that an insurer might occasionally have a tort remedy against the commissioner. If the commissioner were liable, but acted in good faith, the state would pay the judgment under s. 270.58 (1). New

Hampshire s. 402:34 provides for payment of taxable costs by the state when the commissioner's petition for liquidation is dismissed.

645.07 CO-OPERATION OF OFFICERS AND EMPLOYES. (1) DUTY TO CO-OPERATE. Any officer, manager, trustee or general agent of any insurer and any other person with executive authority over or in charge of any segment of the insurer's affairs shall co-operate with the commissioner in any proceeding under this chapter or any investigation preliminary or incidental to the proceeding. "To co-operate" includes, but is not limited to the following:

(a) To reply promptly in writing to any inquiry from the commissioner requesting such a reply; and

(b) To make available and deliver to the commissioner any books, accounts, documents or other records, or information or property of or pertaining to the insurer and in his possession, custody or control.

Comment on sub. (1): Par. (a) is adapted from s. 201.49. It is more comprehensive as to persons covered than the model, which applies only to insurance agents and duly elected officials of insurers, but it applies only to the field of delinquency proceedings, not to all questions "relative to the business of insurance," as does s. 201.49.

(2) DUTY NOT TO OBSTRUCT. No person shall obstruct or interfere with the commissioner in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto.

(3) RIGHT TO DEFEND. This section shall not render it illegal to resist by legal proceedings the petition for liquidation or other delinquency proceedings, or other orders.

(4) SANCTION. Any person included within sub. (1) who fails to co-operate with the commissioner, or any person who obstructs or interferes with the commissioner in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto, may be fined not more than $5,000 or imprisoned in the county jail not more than one year or both.

Comment: There have been many instances of delay and obstruction of delinquency proceedings by failure or refusal of directors, officers, and others connected with the insurer to co-operate with the commissioner in ascertaining the condition of the insurer and taking steps to protect its assets. Such failures make a bad situation worse, since an insurer involved in delinquency proceedings may already have less than perfect books and records.

This section establishes the obligation of various persons to co-operate with the commissioner, and makes failure to do so a misdemeanor punishable by fine or imprisonment. Although criminal sanctions sometimes may now be brought to bear on those who do not fulfil their responsibilities in liquidation, there is a distinct advantage in clarifying the duty to co-operate.

Of course, the person to whom questions are put may exercise his constitutional or legal privileges against self-incrimination, without special mention in this section. Often, an injunction or order followed by civil contempt proceedings may be more effective than criminal sanctions. Power to pursue such remedies is provided in s. 645.05 and need not be repeated in this section. Probably in most instances equitable remedies would be more effective than criminal sanctions. Inclusion of sanctions in this chapter is not intended to suggest that they be used routinely.

Connecticut s. 38-15; Indiana s. 39-3412 (a); and Rhode Island s. 27-1-21 deal with *part* of the same subject. None tries to deal with it as comprehensively as this section. The Rhode Island provision is noteworthy for permitting a fine up to $10,000, or imprisonment up to 3 years, for failure to deliver property on demand. Indiana s. 39-3412 (b) provides

immunity from prosecution in exchange for incriminating testimony or documents. This may well be a trap into which the commissioner may easily fall; in any case the Indiana provision is much too generous to the offender.

645.08 BONDS. In any proceeding under this chapter the commissioner and his deputies shall be responsible on their official bonds for the faithful performance of their duties. If the court deems it desirable for the protection of the assets, it may at any time require an additional bond from the commissioner or his deputies.

Comment: This section is adopted from the bonding provision of s. 2 (2) of the Uniform Insurers Liquidation Act, which was omitted from the former Wisconsin version of that Act, in s. 616.02. It was apparently omitted before because the bonding rules for the state were thought already adequate. The first sentence may not add anything to existing law but it is desirable to state it to make sure that the official bonds are applicable. The second sentence makes additional bonding possible, which is desirable in view of the large amounts that may be involved in some proceedings. It is interesting to compare Indiana s. 39.3411 (a), which allows the commissioner, rather than the court, to set the penal sums for the bonds of his special deputies in delinquency proceedings. It is better to have the court set the penalty, because the commissioner is inevitably involved in the matter. The bonding requirement is needed to protect insurers from a dishonest or incompetent commissioner or deputy.

In one respect the provision goes beyond the Uniform Act, in making the bonding provisions specifically applicable to the commissioner as ancillary receiver or other receiver for nondomestic insurers. The existing bonds are also applicable to summary procedures. No special bond can be required in the case of a summary proceeding (including a seizure order), however, as a special bond requirement would be inconsistent with the need for speed. Furthermore, because of the short-term nature of such proceedings, and other built-in procedural safeguards, the chances of serious damage by summary action are minimized.

There may be circumstances under which the commissioner or his deputy may find it difficult to obtain a bond in the amount required by the court. A market does not necessarily exist because the legislature thinks one should. However, this disadvantage can be tempered by the court's exercise of wise discretion in controlling the delinquency proceeding and in setting the penalty of the bond.

Texas s. 21.28 (2) (d) is similar to this section. The Federal Bankruptcy Act, s. 50, requires a faithful performance bond of the referee, receiver, and trustee, in the amount of $5,000 for the referee and in amounts to be determined by the bankruptcy court for the others. Arizona s. 20-614, Florida s. 631.041 (3) and Georgia s. 56-1414 (3) require no bond for injunctions; Rhode Island s. 27-1-14 creates no bond requirement except as imposed by the court. In North Dakota, s. 26-21-04, the court may require a bond "as in other receiverships." These illustrate the wide variation in provisions to be found in the statutes.

645.09 COMMISSIONER'S REPORTS. (1) GENERAL REPORT OF PROCEEDINGS. The commissioner shall include in his annual report:

(a) *Formal proceedings.* The names of the insurers proceeded against under ss. 645.31, 645.41, 645.45, 645.81, 645.82 and 645.84, and such other facts as indicate in reasonable detail his formal proceedings under this chapter; and

(b) *Informal proceedings.* Such facts as generally indicate the utili-

zation and effectiveness of proceedings under ss. 645.21, 645.22 and 645.23.

Comment on sub. (1): This is a modified version of former s. 200.08 (7). Many states require reports such as those under par. (1) (a). Some of them are Connecticut s. 38-13; Hawaii s. 181.675; Idaho s. 41-3324; Kentucky s. 304.975; Nebraska s. 44-130; New York s. 529; North Carolina s. 58-155.24; Washington s. 48.31.250. South Carolina has an interesting variation. In addition to the annual report, which is made to the governor (s. 37-297.15) the South Carolina commissioner must make a special annual report on these matters to the court (s. 37-297.14). Of course the court can require full reports from the commissioner as liquidator at any time in view of its supervisory powers and duties, but no regular report to the court is proposed.

(2) SPECIAL REPORTS. (a) *Causes of delinquency.* The commissioner shall include in his annual report, not later than the 2nd annual report following the initiation of any formal proceedings under this chapter, a detailed analysis of the basic causes and the contributing factors making the initiation of formal proceedings necessary, and shall make recommendations for remedial legislation. For this purpose the commissioner may appoint a special assistant qualified in insurance, finance and accounting to conduct the study and prepare the analysis, and may determine his compensation, which shall be paid from the appropriation under s. 20.460 (1) (a).

Comment on sub. (2) (a): The special assistant may well be an academician, or a lawyer or accountant in practice. The objective of this provision is to get post-mortem studies of the demise of the insurer. This will begin the provision of useful literature to further the understanding of the pathology of dying or seriously ill insurance companies.

(b) *Final study.* The commissioner shall include in his annual report, not later than the 2nd annual report following discharge of the receiver, a detailed study of the delinquency proceeding for each insurer subjected to a formal proceeding, with an analysis of the problems faced and their solutions. He shall also suggest alternative solutions, as well as other material of interest, for the purpose of assisting and guiding liquidators or rehabilitators in the future. For this purpose the commissioner may appoint a special assistant qualified to conduct the study and prepare the analysis, and may determine his compensation, which shall be paid from the appropriation under s. 20.460 (1) (a).

Comment on sub. (2) (b): The special assistant in this case may well be the special deputy who handled the liquidation or rehabilitation. In any event it would need to be someone close to the proceeding, or knowledgeable about the problems of liquidation. It should not be the commissioner himself. The purpose of this paragraph is the same as of sub. (2) (a).

(3) REPORTS ON INSURERS SUBJECT TO PROCEEDINGS. The commissioner as receiver shall make and file annual reports and any other required reports for the companies proceeded against under ss. 645.31, 645.41, 645.45, 645.81, 645.82 and 645.84 in the manner and form and within the time required by law of insurers authorized to do business in this state, and under the same penalties for failure to do so.

Comment on sub. (3): This provision is essentially the same as former s. 201.51. It presents some theoretical difficulty inasmuch as the commissioner is also the receiver and thus must file these reports with himself. However, the important thing is that proper reports be on record, especially when rehabilitation is involved. The special deputy who actually does the work would file these in the same way any other management would. Of course, reports of companies subject to summary proceedings would be made by the management of those companies and not by the commissioner.

645.10 CONTINUATION OF DELINQUENCY PROCEEDINGS. Every proceeding commenced before the enactment of this chapter (1967) is deemed to have commenced under this chapter for the purpose of conducting the proceeding thereafter, except that in the discretion of the commissioner the proceeding may be continued, in whole or in part, as it would have been continued had this chapter not been enacted.

Comment: This section is essentially the same as former s. 616.13. It closely follows New York s. 546. Compare Illinois s. 833 where the old act continues to apply. In Indiana, under s. 39-3430 (b), the commissioner may petition the court for permission to proceed under the new act, but there the prior act permitted a private receiver.

This section permits immediate application of the new law when the commissioner deems it desirable and practicable. There might be circumstances under which application to old transactions of one or other of the new rules would be unconstitutional. It can be assumed that the commissioner will then not apply the new law, or at least that portion of it, and that if he did, the court would simply treat the application of the new law as inappropriate and would correct the error, without invalidating the entire proceeding. For the most part, however, the changes are merely remedial and will not affect substantive rights in any way that would open the door to constitutional challenge.

Discretion seems more appropriately lodged in the commissioner than in the court, since the decision should ordinarily turn on considerations of practicality and administrative convenience.

SUBCHAPTER II.

SUMMARY PROCEEDINGS.

General comment: In this chapter, 2 kinds of informal and summary proceedings are provided: summary orders and seizure orders. Each exists in regular and in emergency form. Seizure orders will normally be issued by the court, but in an emergency may be issued by the commissioner. Summary orders are normally issued after a hearing held by the commissioner, but in an emergency may be issued before hearing.

The summary order is served directly on the insurer by the commissioner, who specifies therein the corrective action to be taken. In an emergency the summary order may be issued and served without hearing. However, in that case, the commissioner must also serve simultaneously a notice of hearing and the insurer is also entitled to full and immediate judicial protection. This device is quick and the corrective action can be of very short duration. Judicial control of the proceeding is also expeditious, so that while the commissioner has the tools to eliminate or prevent unsafe acts or conditions, even if he takes inappropriate action it should produce no serious harm.

The 2 seizure orders are designed to facilitate both investigation and quick action to prevent dissipation of resources and dispersal of records. They represent the next 2 phases in the continuum of carefully modulated regulatory controls available to the commissioner. With the issuance of a court seizure order, the commissioner is able quickly to obtain possession and control of an insurer, when procedural delays would endanger the interests of the public, policyholders or creditors. Though the court has no discretion but is required to issue the seizure order at once without hearing, forces are automatically set in motion which guarantee judicial control and ultimate decision.

The commissioner's seizure order is designed for those extraordinary emergencies when even the delay incident to asking for an *ex parte* court order would be dangerous. As in the case of the summary order, the seizure order may be issued with immediate effect and also without judicial intervention.

These proceedings have 2 advantages of great importance from the point of view of the regulated industry: (a) they permit simple, economical, and singular intervention to deal with individual matters, without the necessity of the massive involvement in the company's affairs that every receivership brings, and (b) they are summary and can be quickly initiated and quickly terminated, with little or no publicity. This crucial, since publicity is a weapon always available to the commissioner, and it is a crude weapon that nearly always completely destroys. What is afforded here is gentler and more discriminating. In the hands of an able and wise commissioner it can do much good; in the hands of a bad commissioner it cannot do as much harm as the resort to formal procedures which are always available to every commissioner. Even the uncontrolled and uncontrollable weapon of publicity is far more dangerous.

645.21 COMMISSIONER'S SUMMARY ORDERS. (1) SUMMARY ORDER AFTER HEARING. Whenever the commissioner has reasonable cause to believe, and determines, after a hearing held as prescribed in sub. (3), that any insurer has committed or engaged in, or is committing or engaging in or is about to commit or engage in any act, practice or transaction that would subject it to formal delinquency proceedings under this chapter, he may make and serve upon the insurer and any other persons involved, such orders other than seizure orders under ss. 645.22 and 645.23 as are reasonably necessary to correct, eliminate or remedy such conduct, condition or ground. If the order is for a restoration of or addition to capital, it shall be carried out as provided in s. 200.06.

Comment on sub. (1): This provision is based upon California s. 1065.1, added by California Statutes 1965, ch. 1579. The entire California enactment is entitled "Stop Order Power of the Commissioner."

The summary order procedure is intended for use only where grounds for formal proceedings exist or are likely to come into existence in the immediate future. It is not designed to provide the commissioner summary power to do everything the commissioner may want to do in regulating the business. For example, he may not issue summary orders to deal with unfair trade practices unless they are serious enough to be grounds for formal proceedings. Such practices and other acts are regulated in accordance with statutory provisions made applicable in other chapters, and are not included here.

A commissioner can use the summary order proceeding instead of a formal delinquency proceeding when he believes the dangerous condition is easily correctible by a single order. If more extensive surveillance or control is required, a receivership is indicated, either rehabilitation or liquidation depending on circumstances.

The power given in this section is carefully hedged about with precautions in the form of judicial control which can be utilized very expeditiously. Almost paradoxically, but actually, the ready availability of summary order power is the best guarantee against abusive use of his power by the commissioner. Lacking the power to apply discriminating and subtle pressure with respect to single problems, the commissioner may have only the choice between doing nothing or applying a heavy hand by instituting liquidation proceedings. If he feels the need to do something, he uses the tool that is available. The best protection against arbitrariness is not withholding power but expeditious recourse to the courts.

(2) SUMMARY ORDER BEFORE HEARING. If the conditions of sub. (1) are satisfied, and if it appears to the commissioner that irreparable harm to the property or business of the insurer or to the interests of its policyholders, creditors or the public may occur unless he issues with immediate effect the orders described in sub. (1), he may make and serve such orders without notice and before hearing, simultaneously serving upon the insurer notice of hearing under sub. (3).

Comment on sub. (2): This is adapted from California s. 1065.2 (a) and (b). It would be susceptible to abuse if it were not for the immediate judicial review that is possible under sub. (4), as well as the requirement that the commissioner himself begin a hearing procedure at once. It is important to realize that this section provides for orders *before* hearing, and not *without* hearing. There is a significant difference.

(3) SERVICE, NOTICE, HEARING. The notice of hearing under sub. (1) or (2) and the summary order issued under sub. (1) or (2) shall be served under s. 200.11. The notice of hearing under sub. (1) shall state the time and place of hearing, and the conduct, condition or ground upon which the commissioner would base his order; the notice of hearing under sub. (2) shall state the time and place of hearing. Unless mutually agreed between the commissioner and the insurer, the hearing shall occur not less than 10 days nor more than 30 days after notice is served and shall be either in Dane county or in some other place convenient to the parties to be designated by the commissioner.

Comment on sub. (3): California s. 1065.7 is a comparable provision. The service requirements under this provision are quite strict because of the serious character of the proceeding. The notice of hearing under sub. (2) does not need to contain as much information as the one under sub. (1) because it is accompanied by the order itself.

(4) JUDICIAL RELIEF. If the commissioner issues a summary order before hearing under sub. (2), the insurer may at any time waive the commissioner's hearing and apply for immediate judicial relief by means of any remedy afforded by law without first exhausting administrative remedies. Subsequent to a hearing the insurer or any person whose interests are substantially affected shall be entitled to judicial review of any order issued by the commissioner.

Comment on sub. (4): This provision is based upon California s. 1065.2 (c), but is changed to give additional protection to the insurer. If an order has been issued without a hearing the insurer may seek judicial relief at any time thereafter, whether prior to, during or after the hearing that will subsequently be held by the commissioner. In a proper case, where the commissioner has acted with unnecessary haste, the insurer may seek an ex parte restraining order under s. 268.025, and prevent enforcement of the commissioner's summary order until after more deliberate consideration. Thus the commissioner is provided with an expeditious and flexible weapon to use where speed and discrimination are essential, while at the same time equally expeditious and effective defensive devices are available to the insurer.

(5) SANCTION. If any person has violated any order issued under this section which as to him was then still in effect, he shall be liable to forfeit a sum not to exceed $10,000. The penalty shall be imposed and collected in an action brought by the attorney general and shall be paid into the state treasury for the common school fund.

Comment on sub. (5): No significant practical advantage seems to be gained by having the commissioner himself declare a forfeiture, since a subsequent action is needed to collect it, anyway. Therefore, provision is made for collection of penalties by the attorney general.

If the order is a proper one, it should be obeyed. If it is not proper, it can be challenged by application for immediate judicial relief under sub. (4). If the person subject to the order is content to take the more leisurely course of waiting for the commissioner's hearing, he should obey the order in the meantime. Otherwise, the summary order has no summary character. Equitable aid for enforcement of orders may be needed, and if so may be sought under sub. (6).

(6) ENFORCEMENT BY INJUNCTION. The commissioner may apply for and any court of general jurisdiction may grant, under the relevant sec-

tions of ch. 268, such restraining orders, temporary and permanent injunctions and other orders as are deemed necessary to enforce a summary order.

645.22 COURT'S SEIZURE ORDER. (1) ISSUANCE. Upon the filing by the commissioner in any circuit court in this state of a verified petition alleging any ground that would justify a court order for a formal delinquency proceeding against an insurer under this chapter and that the interests of policyholders, creditors or the public will be endangered by delay, and setting out the order deemed necessary by the commissioner, the court shall issue forthwith, ex parte and without a hearing, the requested order which may a) direct the commissioner to take possession and control of all or a part of the property, books, accounts, documents and other records of an insurer and of the premises occupied by it for the transaction of its business, and b) until further order of the court, enjoin the insurer and its officers, managers, agents, and employes from disposition of its property and from transaction of its business except with the written consent of the commissioner.

(2) DURATION. The court shall specify in the order what its duration shall be, which shall be such time as the court deems necessary for the commissioner to ascertain the condition of the insurer. On motion of either party or on its own motion, the court may hold such hearings as it deems desirable after such notice as it deems appropriate, and may extend, shorten or modify the terms of the seizure order. The court shall vacate the seizure order if the commissioner fails to commence a formal proceeding under this chapter after having had a reasonable opportunity to do so. The issuance of an order of the court pursuant to a formal proceeding under this chapter vacates the seizure order.

(3) ANTICIPATORY BREACH. Entry of a seizure order under this section shall not constitute an anticipatory breach of any contract of the insurer.

Comment: This procedure is modeled after California ss. 1011 and 1012. It has been used regularly in California.

Whenever he thinks delay will endanger vital interests, the commissioner has, under this section, power to seize assets and control a business pending further investigation or full hearing. In the past, the commissioner could achieve this result by petitioning for a liquidation order and simultaneously asking for a temporary injunction. However, the invocation of the formal procedure of a liquidation hearing is a drastic step involving the probable destruction of the insurer, whether or not the commissioner's action was justified.

Under this chapter, the commissioner may still institute formal proceedings, but this summary procedure enables the commissioner to take the action necessary to protect the interests of policyholders, creditors, and the public without crossing the Rubicon. If closer examination of the books and assets shows the commissioner that he acted in error, he can retreat quickly without serious damage to the insurer. There will at least be a short breathing space before the countdown must begin. If a formal proceeding is called for, it can be instituted at any time; if moderate corrective measures will suffice, they can be applied and withdrawal can take place quickly.

This is neither an arbitrary nor a dangerous procedure; it is as well protected against the capricious action of the commissioner as any formal order. He must verify his petition, which must on its face show adequate grounds for formal action. At any time that he could ask for a seizure order he could also start the much more drastic and destructive liquidation proceeding.

645.23 Introductory comment: The seizure power provided the commissioner by this section already existed in this state, though it was never

used. Former s. 200.09 gave the insurance commissioner the same powers for insolvency proceedings as the banking commissioner gets from s. 220.08, which includes summary seizure power in an emergency situation. See the last sentence of s. 220.08 (1).

645.23 COMMISSIONER'S SEIZURE ORDER. (1) ISSUANCE. If it appears to the commissioner that the interests of creditors, policyholders or the public will be endangered by the delay incident to asking for a court seizure order, then on any ground that would justify a court seizure order under s. 645.22, without notice and without applying to the court, he may issue a seizure order which must contain a verified statement of the grounds of his action. As directed by the seizure order, the commissioner's representatives shall forthwith take possession and control of all or part of the property, books, accounts, documents and other records of the insurer, and of the premises occupied by the insurer for the transaction of its business. The commissioner shall retain possession and control until the order is vacated or is replaced by an order of the court pursuant to a proceeding commenced under sub. (2) or a formal proceeding under this chapter.

Comment on sub. (1): This subsection is based on California s. 1013. It provides for emergency seizure when the interests of the creditors, policyholders or the public would be endangered by even such delay as is incident to a court seizure order under s. 645.22. The commissioner may then issue a seizure order himself, to be accompanied by a verified statement of the ground of his action. Once the order is served, the stage is immediately set for full-scale judicial review. This emergency procedure should be used rarely. There are easily conceivable situations, however, in which it will be appropriate. A corrupt management group may be about to decamp with the books and the assets because of fear of the commissioner's contemplated intervention. It may then be important to be able to act before a court order could be obtained. This summary proceeding has only once been used in California, after at least 30 years in the statute book, although the equivalent of the court seizure order is often used.

(2) JUDICIAL REVIEW. At any time after seizure under sub. (1), the insurer may apply to the circuit court for Dane county or for the county in which the insurer's principal office is located. The court shall thereupon order the commissioner to appear forthwith and shall proceed thereafter as if the order were a court seizure order issued under s. 645.22.

Comment on sub. (2): Unlike the procedure in California s. 1015, this subsection does not provide for immediate and automatic conversion of the commissioner's order to a court seizure order, since it may be that the commissioner will very quickly be convinced that he was in error and should withdraw. Under this subsection he can withdraw without difficulty and without harm to the insurer. If the procedure were automatically converted to a court procedure, the insurer and the commissioner might tend to be irrevocably engaged. This way leaves readily available options. The insurer is fully protected by the power to convert the commissioner's order into a court order and procedure by applying to the court. The difference between the 2 procedures is no more than a few hours.

(3) DUTY TO ASSIST COMMISSIONER. Every law enforcement officer shall assist the commissioner in making and enforcing any such seizure, and every sheriff's and police department shall furnish him with such deputies, patrolmen or officers as are necessary to assist him.

Comment on sub. (3): This is similar to California s. 1014. If the commissioner anticipates anything other than a completely peaceful seizure, it will be preferable to have experienced police officers do it. Deputy insurance commissioners and subordinate persons in the department are not usually habituated to violent action.

(4) ANTICIPATORY BREACH. Entry of a seizure order under this sec-

tion shall not constitute an anticipatory breach of any contract of the insurer.

Comment on sub. (4): This is purely cautionary and states the result that probably would be reached in the absence of statute.

645.24 Introductory comment: One of the factors that contribute to the commissioner's historical reluctance to institute formal delinquency proceedings is the fear that resulting publicity might destroy a salvageable company, in the same way that a report of difficulty is apt to start a run on a bank. If the commissioner can persuade an insurer to act voluntarily to remedy its weaknesses, all publicity can easily be avoided. At the opposite end of the spectrum, if a formal proceeding is needed and is commenced, it is neither possible nor desirable for it to be anything other than completely public. No proceeding so far-reaching and with so much latent capacity for harm to the public should be tolerated without the public having full access to information about it. Between informal negotiation and formal proceedings lie the summary proceedings. While the traditional Wisconsin opposition to secret hearings and meetings has great merit, and should be supported strongly as an abstract proposition, these summary proceedings present a special case where the arguments for limitations on disclosure seem overwhelming.

The reason for not compelling disclosure of the summary proceedings is that if they were open, as a practical matter they probably would never be used. The commissioner would do as he tended to do in the past, delay taking action until it is perfectly clear that the insurer is insolvent. Then when it would be too late to save the insurer or protect the interests of the policyholders and the public, he would precipitate a liquidation. Thus, insistence on disclosure, which is highly desirable in the abstract, would not result in more information being made available, but in inaction. The public would not know more, but it would in fact be protected much less. The principle of full disclosure should not be pushed indiscriminately and irrationally into a situation in which it does not belong.

Some summary proceedings, especially most seizure orders, are investigatory in nature and purpose. They are like grand jury investigations and deliberations, where it has always been regarded as reasonable for the proceedings to be as confidential as the nature of the matter permits. Other summary proceedings are preliminary and will be followed very quickly thereafter by formal proceedings. In such instances, the question of confidentiality is not important, since there will be full knowledge as soon as formal proceedings begin. There are other cases where what is wrong will be quickly corrected with a summary order. Moreover, there are the important instances in which the commissioner's action, though taken in good faith and reasonably, is mistaken and he wishes to and should back away quickly as soon as he learns that intervention is not justified. In the last 2 cases public knowledge of the matter, through the "run on the bank" psychology, might destroy a sound insurer. This section provides for all summary proceedings to be confidential in nature, without being intended in any way to disparage the traditional Wisconsin opposition to secret hearings and meetings. Without confidentiality the procedures probably would not be used much and the public would have no more information and a great deal less protection. The insurer is fully protected. It may always demand public hearings. The public interest is protected by the court, which also may order the proceedings to be made public under sub. (3), after first hearing argument on the question. The commissioner may easily make the matter public by beginning a formal proceeding. The process of disclosure and nondisclosure is subject to careful checks and balances provided by the insurer, the commissioner and the court.

645.24 CONDUCT OF HEARINGS IN SUMMARY PROCEEDINGS.

(1) CONFIDENTIALITY OF COMMISSIONER'S HEARINGS. The commissioner shall hold all hearings in summary proceedings privately unless the insurer requests a public hearing, in which case the hearing shall be public.

(2) CONFIDENTIALITY OF COURT HEARINGS. The court may hold all hearings in summary proceedings and judicial reviews thereof privately in chambers, and shall do so on request of the insurer proceeded against.

(3) RECORDS. In all summary proceedings and judicial reviews thereof, all records of the company, other documents, and all insurance department files and court records and papers, so far as they pertain to or are a part of the record of the summary proceedings, shall be and remain confidential except as is necessary to obtain compliance therewith, unless the court, after hearing arguments from the parties in chambers, shall order otherwise, or unless the insurer requests that the matter be made public. Until such court order, all papers filed with the clerk of the court shall be held by him in a confidential file.

(4) PARTIES. If at any time it appears to the court that any person whose interest is or will be substantially affected by an order did not appear at the hearing and has not been served, the court may order that notice be given and the proceedings be adjourned to give him opportunity to appear on such terms as may be just.

(5) SANCTIONS. Any person having possession or custody of and refusing to deliver any of the property, books, accounts, documents or other records of an insurer against which a seizure order or a summary order has been issued by the commissioner or by the court, may be fined not more than $10,000 or imprisoned in the county jail for not more than one year or both.

SUBCHAPTER III.

FORMAL PROCEEDINGS.

General comment: The principal formal proceedings to be used in dealing with insurers in difficulty are rehabilitation and liquidation. The first may be used when there is a chance of saving the insurer without unduly endangering the interests of others; the latter must be used when the insurer's assets are to be distributed and the insurer dissolved. Neither should be used if a simple and singular change in practice will solve the problem. In the latter case, negotiation backed up by the power to issue a summary order under s. 645.21 enables the commissioner to correct the situation without need of formal proceedings.

Preliminary comment on rehabilitation (ss. 645.31 to 645.35): In statutes dealing with insurers, it is traditional to provide for separate rehabilitation and liquidation procedures. This chapter continues that pattern.

The chapter departs from the traditional pattern of cataloguing one set of grounds available both for rehabilitation and liquidation. In other codes, an additional ground or 2 may sometimes be available for liquidation, as in Arizona and Oklahoma. This chapter makes a sharp separation, listing in s. 645.31 those criteria that seem normally appropriate to rehabilitation, and in s. 645.41 those that seem normally appropriate to liquidation. In effect this division points out to the commissioner and the court the preferred direction of movement. In sub. (1) of each section, however, the 2 sets of grounds are made interchangeable, and criteria to guide the interchange are supplied. These criteria are (1) the degree of risk of additional loss imposed on creditors and others if the rehabilitation effort is first made, and (2) the prospects of success in the effort. Although the criteria provide a maximum of informative direction for both the commissioner and the court, they leave the commissioner considerable discretion to decide on direction depending on the specific facts of the individual case, subject of course to court control.

645.31 Introductory comment: Insurance codes generally include a substantial list of grounds for rehabilitation. New York s. 511, for example, lists a dozen or more different grounds. Wisconsin's former law, s. 200.08, contained 7 grounds which could be the basis for either liquidation or rehabilitation. This section, together with s. 645.41 (Grounds for Liquidation), adopts all the conventional grounds in one form or another. It also adds several grounds not found in other codes.

Many of the grounds are quite specific, though others are broadly stated and generalized, providing both ample discretion and informative direction. The section is committed to a high degree of specificity in order to establish as clear and firm a basis for the commissioner's action as possible, and also to give as much precise guidance as possible. Such specific statutory guidance should enhance the ability of the commissioner to deal with unsound insurers at the earliest possible moment.

645.31 GROUNDS FOR REHABILITATION. The commissioner may apply by verified petition to the circuit court for Dane county or for the county in which the principal office of the insurer is located for an order directing him to rehabilitate a domestic insurer or an alien insurer domiciled in this state on any one or more of the following grounds:

(1) Any ground on which he may apply for an order of liquidation under s. 645.41, whenever he believes that the insurer may be successfully rehabilitated without substantial increase in the risk of loss to creditors of the insurer or to the public;

Comment on sub. (1): Under s. 645.35, the rehabilitation may at any time be easily and quickly converted to liquidation, if the original decision proves erroneous, or if the situation changes. This section is intended to permit, not require, an attempt to rehabilitate, and vests discretion in the commissioner to choose, subject to court approval.

(2) That the commissioner has reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's assets, forgery or fraud affecting the insurer or other illegal conduct in, by or with respect to the insurer, that if established would endanger assets in an amount threatening the solvency of the insurer;

Comment on sub. (2): This ground is new. It applies if the amount of money probably involved is large enough to threaten solvency. Uncertainty about the extent of damage leads to a desire to preserve the possibility of retreat. Therefore, rehabilitation is called for, rather than liquidation. Such a case is likely to be too complex for treatment by a summary or seizure order under ss. 645.21 to 645.23.

(3) That information coming into the commissioner's possession has disclosed substantial and not adequately explained discrepancies between the insurer's records and the most recent annual report or other official company reports;

Comment on sub. (3): This ground is new. It has special relevance to the regulatory process, which is attuned to looking at insurers through a stream of reports and records. If an insurer's reports are not reliable, proper supervision is impossible and steps need to be taken to make them reliable in the future. Sometimes a summary order under s. 645.21 may be enough; sometimes the problem may be more complex and necessitate rehabilitation.

(4) That the insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employe or other person, if the person has been found by the commissioner after notice and hearing to be dishonest or untrustworthy in a way affecting the insurer's business;

Comment on sub. (4): This ground is similar to New York s. 511 (n), but applies to more people. Although they are not razor-sharp, the words

"dishonest or untrustworthy" are sufficiently precise to withstand constitutional challenge. They are in New York s. 511 (n), and also in New Mexico s. 58-6-2 (n). See also New Jersey s. 17:30-1 and North Carolina s. 58-155.2 (10).

(5) That control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in one or more persons found by the commissioner after notice and hearing to be dishonest or untrustworthy;

Comment on sub. (5): This and sub. (4) were inserted because of concern with recent indications that criminal elements are attempting to enter the insurance business.

(6) That any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employe or other person, has refused to be examined under oath by the commissioner concerning its affairs, whether in this state or elsewhere, and after reasonable notice of the fact the insurer has failed promptly and effectively to terminate the employment and status of the person and all his influence on management;

Comment on sub. (6): This is a common ground, except that the escape hatch by discharge, explicitly stated in this provision, is either absent from similar statutes or at most is implicit in them. This subsection is like New York s. 511 (g) and many others.

(7) That after demand by the commissioner the insurer has failed to submit promptly any of its own property, books, accounts, documents or other records, or those of any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer, to reasonable inspection or examination by the commissioner or his authorized representative. If the insurer is unable to submit the property, books, accounts, documents or other records of a person having executive authority in the insurer, it shall be excused from doing so if it promptly and effectively terminates the relationship of the person to the insurer;

Comment on sub. (7): This provision goes beyond other statutes. Reasonable control of insurers requires access not only to the insurer's books but also to those of the additional classes of persons here specified, who might otherwise circumvent or delay action by the commissioner.

(8) That without first obtaining the written consent of the commissioner, the insurer has transferred, or attempted to transfer, substantially its entire property or business, or has entered into any transaction the effect of which is to merge, consolidate or reinsure substantially its entire property or business in or with the property or business of any other person;

Comment on sub. (8): This is substantially the same as New York s. 511 (d) and many other statutes.

(9) That the insurer or its property has been or is the subject of an application for the appointment of a receiver, trustee, custodian, conservator or sequestrator or similar fiduciary of the insurer or its property otherwise than as authorized under this chapter, and that such appointment has been made or is imminent, and that such appointment might oust the courts of this state of jurisdiction or prejudice orderly delinquency proceedings under this chapter;

Comment on sub. (9): This is in substance the same as New York s. 511 (k) and many other statutes, though in form it is changed to produce greater clarity.

(10) That within the previous year the insurer has wilfully violated its charter or articles of incorporation or its bylaws or any insurance law or regulation of any state, or of the federal government, or any valid or-

der of the commissioner under s. 645.21, or having become aware within the previous year of an unintentional violation has failed to take all reasonable steps to remedy the situation resulting from the violation and to prevent future violations;

Comment on sub. (10): This ground is patterned after one that is fairly common in other states. New York s. 511 (f) requires wilful violation; California s. 1011 (e) does not. The requirement of wilfulness makes proof difficult. However, to make an unintentional violation of any law of any state or even of this state a ground for rehabilitation is overly harsh and unfair. Wilfulness was required by former s. 200.08 (1). This subsection applies not only to wilful violations, but also to unintentional violations, if the insurer becomes aware of the infraction and fails to remedy the situation. It is also desirable to have a special "statute of limitations" built into this ground. If a violation of law is ancient history it should not be a ground. Extension to the law of other states and of the federal government and to regulations is novel but sound. An insurer should operate within the law.

Inclusion of the summary orders in this subsection is a natural addition. In one respect the provision is narrowed. There is no reason for rehabilitation to be used as a general law enforcement device. Only violations of the insurance law should be a ground. See also Minnesota s. 60.875 (3) (f); Ohio s. 3903.03 (f).

(11) That the directors of the insurer are deadlocked in the management of the insurer's affairs and that the members or shareholders are unable to break the deadlock and that irreparable injury to the insurer, its creditors, its policyholders or the public is threatened by reason thereof;

Comment on sub. (11): This ground was borrowed from the general law of corporations which permits dissolution on the basis of corporate deadlock. See e.g. s. 180.771 (1) (a) 1. This seldom will be needed but should be available when it is needed.

(12) That the insurer has failed to pay for 60 days after due date any obligation to this state or any political subdivision thereof or any judgment entered in this state, except that such nonpayment shall not be a ground until 60 days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the commissioner or in the courts;

Comment on sub. (12): This provision is based upon Louisiana s. 22:987 (11), dealing with revocation of license of foreign insurers. It adds judgments. The commissioner should not be a bill collector for creditors, even when the state is the creditor, but after a certain point failure to pay bills reflects seriously upon the insurer's solvency or integrity. The provision also borrows from California s. 736. See also North Carolina s. 58-16.

(13) That the insurer has failed to file its annual report or other report within the time allowed by law, and after written demand by the commissioner has failed to give an adequate explanation immediately;

Comment on sub. (13): This is based upon Louisiana s. 22:987 (8), dealing with revocation of license of foreign insurers.

(14) That two-thirds of the board of directors, or the holders of a majority of the shares entitled to vote, or a majority of members or policyholders of an insurer subject to control by its members or policyholders, consent to rehabilitation under this chapter.

Comment on sub. (14): This is patterned after New York s. 511 (L), except that the required number of directors is increased from a majority to two-thirds. This ground is found in several states with a majority requirement. It is conceivable that a salvageable insurer will want the formal aid of the rehabilitation procedure, perhaps because deep-seated controversy within management makes voluntary and unsupervised proce-

dures impracticable. No harm is done by the presence of such a ground. If needed, it will be important for it to be there ready for use.

645.32 Introductory comment: This section is designed to make rehabilitation a very flexible procedure. It is essential that it be regarded as a management rather than as a legal task. Though it is called a formal proceeding because it begins with a formal petition to a court and a hearing, thereafter it should be essentially informal in operation. The order is formulated to emphasize flexibility and informality, and the rehabilitator is given broad powers. He must act under the supervision of the court, of course. but the court's control should be liberal, not strict, and should be provided without cumbersome procedures.

645.32 REHABILITATION ORDERS. (1) APPOINTMENT OF REHABILITATOR. An order to rehabilitate the business of a domestic insurer, or an alien insurer domiciled in this state, shall appoint the commissioner and his successors in office rehabilitator and shall direct the rehabilitator forthwith to take possession of the assets of the insurer and to administer them under the orders of the court. The filing or recording of the order with any register of deeds in the state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

Comment on sub. (1): This subsection makes it clear that publicity is not to be avoided in the formal rehabilitation proceeding. Nor was it avoided under prior statutes.

Because it is a public proceeding, rehabilitation can only work if the rehabilitator pays a good deal of attention to public relations and prevents the "run-on-the-bank" psychology. Rehabilitation may be a futile exercise, if the wrong psychology develops. This danger makes summary proceedings under ss. 645.21 to 645.24 a more desirable alternative when they are appropriate. Rehabilitation, however, is appropriate for insurers in serious difficulty, when the problem is no longer easily correctable, and no choice remains except between rehabilitation and liquidation. Once the commissioner goes beyond fairly simple acts and orders and actually manages a company, the proceeding must be public, and this chapter so provides.

The chapter also makes a more realistic and careful designation of the status of the rehabilitator than does the Uniform Insurers Liquidation Act. That Act contemplates different categories of receivers, but does not adequately distinguish among them. For example, it transfers title to all receivers indiscriminately. However, in a rehabilitation proceeding, the rehabilitator is, in effect, simply the new management of the company and title remains and should remain in the company. From s. 645.33 (2) he gets all the powers of management. If the Uniform Act were followed at this point, the first sentence of sub. (1) would be followed by the sentences that now appear as the 2nd and 3rd sentences in s. 645.42 (1), applying to liquidators. But this chapter distinguishes between the 2 main classes of receivers in accordance with their disparate functions.

(2) ANTICIPATORY BREACH. Entry of an order of rehabilitation shall not constitute an anticipatory breach of any contracts of the insurer.

Comment on sub. (2): The anticipatory breach provision is merely a precaution. The rehabilitator takes over the company as a new manager, and will be able to fulfill all contracts. Sound management practices may sometimes lead him to try to negotiate for the termination of contract rights, however.

645.33 Introductory comment: In this section, the rehabilitator is given only broadly stated powers. In general, this technique is adequate since he simply acts as manager subject to court approval. The analogous section dealing with the powers of the liquidator (645.46) is much more specific. The different nature of the proceeding seems to justify use of more

general language here than for liquidation. Here the rehabilitator is merely made manager; under new management the insurer continues much as before. Rehabilitation must parallel the ordinary processes of management rather than the extraordinary actions in a liquidation.

645.33 POWERS AND DUTIES OF THE REHABILITATOR. (1) SPECIAL DEPUTY COMMISSIONER. The commissioner as rehabilitator shall make every reasonable effort to employ an active or retired senior executive from a successful insurer to serve as special deputy commissioner to rehabilitate the insurer. The special deputy shall have all of the powers of the rehabilitator granted under this section. To obtain a suitable special deputy, the commissioner may consult with and obtain the assistance and advice of executives of insurers doing business in this state. Subject to court approval, the commissioner shall make such arrangements for compensation as are necessary to obtain a special deputy of proven ability. The special deputy shall serve at the pleasure of the commissioner.

Comment on sub. (1): What is needed, if rehabilitation is to succeed, is expert management. It is hoped that the industry can be induced to provide competent men for this purpose as a public service as well as in the self-interest of the industry. If no such person can be obtained, the approach followed in the past is still available. And the new ideal just might work.

The new management concept of rehabilitation is of fundamental importance to set the tone of the rehabilitation process. It is lodged in a seemingly minor part of the statutory structure, but may have far-reaching reverberations. What is important is not the specific powers, but the attitude with which the process is approached.

Once appointed, the special deputy should have great freedom of operation, subject of course to protection of the public by an official bond, and by court and department supervision. But court supervision must be liberal and general, not strict or detailed. The commissioner will be *de jure* rehabilitator; the special deputy *de facto* rehabilitator.

Here the commissioner is merely empowered to consult insurance executives, not obliged to do so. A requirement that he consult them would not mean much if he is not required to follow their advice. It does seem important to urge that he do so, however, and that is the effect of the section. If he ignores sound advice, there is some sanction in loss of prestige with the industry. On the other hand the commissioner is the responsible official and should have the ultimate power to select a special deputy.

(2) GENERAL POWER. Subject to court approval, the rehabilitator may take such action as he deems necessary or expedient to reform and revitalize the insurer. He shall have all the powers of the officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. He shall have full power to direct and manage, to hire and discharge employes subject to any contract rights they may have, and to deal with the property and business of the insurer.

Comment on sub. (2): Under the Uniform Insurers Liquidation Act but not under this chapter, the rehabilitator gets title and so is properly described as having the powers of an "owner." Here, he is merely "manager."

Broad and flexible powers are needed. The rehabilitator can obtain early instruction by the court respecting the range of action he may take without specific approval. Compare Virginia s. 38.1-133, where the state corporation commission, when authorized to rehabilitate a company, is given all the power and authority of a court of record and may proceed without court supervision. That seems unrealistic, but court control of the rehabilitation process should be very liberal. Success may depend on the court's understanding of the imperative need for the rehabilitator to have broad discretion and freedom to act quickly. The rehabilitator, not the court, must make the day-to-day decisions.

(3) ADVICE FROM EXPERTS. The rehabilitator may consult with and obtain formal or informal advice and aid of insurance experts.

(4) PURSUIT OF INSURER'S CLAIMS AGAINST INSIDERS. If the rehabilitator finds that there has been criminal or tortious conduct or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agent, broker, employe or other person, he may pursue all appropriate legal remedies on behalf of the insurer.

Comment on sub. (4): The rehabilitator could do what this provision directs even if it were omitted. However, it seems important to urge him not to be reluctant to pursue such persons as strenuously as he can.

(5) REORGANIZATION PLAN. The rehabilitator may prepare a plan for the reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer. Upon application of the rehabilitator for approval of the plan, and after such notice and hearing as the court prescribes, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. If it is approved, the rehabilitator shall carry out the plan. In the case of a life insurer, the plan proposed may include the imposition of liens upon the equities of policyholders of the company, if all rights of shareholders are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for such period and to such an extent as are necessary.

Comment on sub. (5): Imposition of liens in life insurance may be necessary to make reinsurance of the insurer's portfolio possible, while the moratorium on loans and cash surrender provides a breathing space to give a chance to maneuver, when needed. These provisions are similar to those found in California s. 1044; Illinois s. 804 (2); and Ohio s. 3903.09.

(6) FRAUDULENT TRANSFERS. The rehabilitator shall have the power to avoid fraudulent transfers under ss. 645.52 and 645.53.

Comment on sub. (6): The provisions relating to fraudulent transfer are applicable to rehabilitation, and this subsection informs the rehabilitator of his power and duty.

645.34 Introductory comment: In s. 645.49 similar problems are dealt with for liquidation, and more complete analysis is provided there.

645.34 ACTIONS BY AND AGAINST REHABILITATOR. (1) STAYS IN PENDING LITIGATION. On request of the rehabilitator, any court in this state before which any action or proceeding by or against an insurer is pending when a rehabilitation order against the insurer is entered shall stay the action or proceeding for such time as is necessary for the rehabilitator to obtain proper representation and prepare for further proceedings. The court that entered the rehabilitation order shall order the rehabilitator to take such action respecting the pending litigation as the court deems necessary in the interests of justice and for the protection of creditors, policyholders and the public. The rehabilitator shall immediately consider all litigation pending outside this state and shall petition the courts having jurisdiction over that litigation for stays whenever necessary to protect the estate of the insurer.

Comment on sub. (1): The rehabilitator should not be permitted to escape actions and proceedings instituted against the insurer—if he needs to do that the insurer should be liquidated, not rehabilitated—but he should be given time to reconsider strategy. Of course such stays can be *requested* without such a provision, but this obligates the court to grant stays and further clarifies the situation. The rehabilitator may also seek an injunction under s. 645.05 to stay pending litigation.

This state cannot compel the courts of other states to stay proceedings or actions, but those courts are very likely to be co-operative, inasmuch as failure to co-operate may force the insurer into liquidation, with almost certain loss to all concerned. Responsibly carrying out the insurer's ob-

ligations is a prerequisite to continuance of rehabilitation proceedings, so enlightened foreign courts will best protect their own citizens by staying the proceedings in order to avoid precipitating a liquidation.

(2) STATUTES OF LIMITATIONS ON CLAIMS BY INSURER. The time between the filing of a petition for rehabilitation against an insurer and denial of the petition or an order of rehabilitation shall not be considered to be a part of the time within which any action may be commenced by the insurer. Any action by the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the order of rehabilitation is entered.

Comment on sub. (2): The pendency of a petition for rehabilitation should not be permitted to alter the legal relations of the parties through the running of periods of limitations. It is in the interest of justice to make sure there is time for actions to begin after the dust has cleared away. Beyond the boundaries of the state little can be done by the legislature of this state. However, a careful commissioner, pending a final determination on the petition for rehabilitation, will take steps to see that existing management of the insurer does not waste the insurer's substance by failure to bring timely actions outside the state before the period of limitation runs out. He will not automatically know of such claims, but can use extensive powers to try to find out what they might be.

(3) STATUTES OF LIMITATIONS ON CLAIMS AGAINST INSURER. The time between the filing of a petition for rehabilitation against an insurer and the denial of the petition or an order of rehabilitation shall not be considered to be a part of the time within which any action may be commenced against the insurer. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the order of rehabilitation is entered or the petition is denied.

Comment on sub. (3): The same reasons are applicable to this provision as to sub. (2).

645.35 TERMINATION OF REHABILITATION. (1) TRANSFORMATION TO LIQUIDATION. Whenever he believes that further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders, or the public, or would be futile, the rehabilitator may petition the court for an order of liquidation. A petition under this subsection shall have the same effect as a petition under s. 645.41. The court shall permit the directors to defend against the petition and shall order payment from the estate of the insurer of such costs and other expenses of defense as justice requires.

Comment on sub. (1): The first 2 sentences are similar to New York s. 512 (2) and many other statutes. The last sentence makes it possible for the costs and other expenses of defense to be paid from the insurer's funds in a situation in which the petitioner has a conflict of interest, since he is, as rehabilitator, in control of the purse strings of the insurer. The court should be able to loosen the purse strings to do justice.

(2) ORDER TO RETURN TO COMPANY. The rehabilitator may at any time petition the court for an order terminating rehabilitation of an insurer. If the court finds that rehabilitation has been accomplished and that grounds for rehabilitation under s. 645.31 no longer exist, it shall order that the insurer be restored to possession of its property and the control of its business. The court may also make that finding and issue that order at any time upon its own motion.

Comment on sub. (2): This is adapted from New York s. 512 (3). The last sentence is added to provide some way other than the rehabilitator's initiative to end the receivership.

645.41 GROUNDS FOR LIQUIDATION. The commissioner may apply by verified petition to the circuit court for Dane county or for the

county in which the principal office of the insurer is located for an order directing him to liquidate a domestic insurer or an alien insurer domiciled in this state on any one or more of the following grounds:

(1) Any ground on which he may apply for an order of rehabilitation under s. 645.31, whenever he believes that attempts to rehabilitate the insurer would substantially increase the risk of loss to its creditors, its policyholders or the public, or would be futile, or that rehabilitation would serve no useful purpose;

(2) That the insurer is or is about to become insolvent;

Comment on sub. (2): Insolvency is definied in s. 645.03 (14), with some precision. Some states abandon any effort to define "insolvency" and leave it to the court to determine its presence or absence in individual cases. There is something to be said for that approach to the problem. But it seems better to try to make this ground as precise as possible, for liquidation is, after all, rather drastic action, and clarity of meaning is desirable if it can be achieved. The ambiquity inherent in the words "assets" and "liabilities," among others, in terms of which insolvency must be defined, adds greatly to the difficulty. Then, even if success is achieved in defining insolvency, proof of the fact is not easy because of the complex accounting task that is necessary. Consequently, there is a need to create many other grounds for liquidation that are strongly indicative of existing or approaching insolvency, to use in the many cases in which it is impossible or unduly difficult to establish insolvency. The connection with insolvency is one common thread that runs through most of the grounds in this section.

Former s. 200.08 included as a ground that the insurer "has neglected or refused to obey an order of the commissioner to make good within the time prescribed any deficiency in its capital or its reserve. . ." This chapter does not contain such a ground, and treats an insurer with impaired capital or reserves as insolvent. There is no justification for procedural delays while a shaky insurer attempts to raise funds. Of course, if a commissioner deems it appropriate he can issue a summary order under s. 645.21 to require that an impairment be removed, but he should almost never delay the initiation of formal proceedings where there is impairment of required capital or required surplus and seldom when there is impairment of outstanding capital.

(3) That the insurer is engaging in a systematic practice of reaching settlements with and obtaining releases from policyholders or third party claimants and then unreasonably delaying payment of or failing to pay the agreed upon settlements;

Comment on sub. (3): Companies in difficulty may attempt to settle themselves into solvency, by sharp practices that indicate an aggravated condition of illness. In such cases, the company should be liquidated forthwith. One or a few adjusters may engage in shabby practices for reasons unrelated to solvency. The use of the word "systematic" limits application of the ground to cases where practices are dictated by or should have been controlled by management.

(4) That the insurer is in such condition that the further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors or the public;

Comment on sub. (4): The word "hazardous" is subject to divergent interpretations. It is possible to interpret it broadly to include hazards not financial in nature, if there are any relevant to the insurance business. It is also possible to interpret the word more restrictivly, as applying only to financial hazards. To guard against the narrow interpretation, the phrase "financially or otherwise" was added. Since insurance is concerned with financial protection to insureds, non finacial hazards are difficult to imagine. However, an explicit limitation is undesirable, for a "hazardous" condition may be only indirectly finan-

cial, in which case it clearly should be included. Thus, the *International Workers Order* case, Matter of People (International Workers Order), 113 N.Y.S. 2d 755 (1952), 305 N.Y. 258, 112 N.E. 2d 280 (1953), involved a liquidation proceeding in which the court limited "hazardous" by implying "financial" as its modifier. The commissioner alleged control of the insurer by a political party subject to domination by an alien government. This is only indirectly financial, and another court might easily have held the section inapplicable if the word "financial" had been there. The courts can be better relied on to qualify power granted by this provision than can the statute drafter to foresee the innumerable ways in which the interests of policyholders may be threatened. It is unobjectionable to add the expression "financially or otherwise," because it is difficult to conceive a hazard that is not financial, at least indirectly, and if one should appear, it is hard to see why it should not be included. The word "hazardous" has a limited connotation—only serious dangers are comprehended within its normal meaning.

(5) That the insurer has not transacted the business of insurance during the previous 12 months or has transacted only a token insurance business during that period, although authorized to do so throughout that period, or that more than 12 months after incorporation it has failed to become authorized to do an insurance business;

Comment on sub. (5): Dormant insurers have often become mere instruments to be used and manipulated by financial operators. There is no good reason to permit an inactive company to continue in existence, because of the danger that it may facilitate an unsound or even corrupt scheme, and because it also delays improvement in standards, through application of grandfather clauses. It is in effect a license to operate under rejected and inadequate law, available for sale in the market place. For example, the existence of many dormant companies may frustrate higher capital requirements for a long time. Inactivity alone should be a ground for liquidation. An insurer is licensed to sell insurance, not to lie dormant for speculative purposes.

(6) That within the previous 12 months the insurer has systematically attempted to compromise with its creditors on the ground that it is financially unable to pay its claims in full;

Comment on sub. (6): This ground is based on the insurance laws of Massachusetts, ch. 175, s. 6. It is included because it indicates a financially disabled insurer. Furthermore, this ground would enable the commissioner to prevent a delinquent insurer from "settling" itself back into solvency, and will deter the use of financial instability as leverage for settlement.

(7) That the insurer has commenced, or within the previous year has attempted to commence, voluntary liquidation otherwise than under the insurance laws of this state;

Comment on sub. (7): This ground contemplates the possibility of a voluntary liquidation where the insurer is clearly solvent. Such cases will be rare but should be provided for, since liquidation under this chapter is costly, at best, and voluntary liquidation should be cheaper. But the insurer *must* follow an approved pattern for liquidation.

(8) That the insurer has concealed records or assets from the commissioner or improperly removed them from the jurisdiction;

(9) That the insurer does not satisfy the requirements that would be applicable if it were seeking initial authorization to do an insurance business in this state, except for:

(a) Requirements that are intended to apply only at the time the initial authorization to do business is obtained, and not thereafter; and

(b) Requirements that are expressly made inapplicable by the laws establishing the requirements;

Comment on sub. (9): This ground is similar to California s. 1011 (h).

It ordinarily makes no sense to allow a company that could not now be authorized to begin business to continue in business longer, except for requirements for authorization that are intended only to meet special problems in the initial phases of operation. The best example of the latter is a requirement for initial surplus to be used as working capital and which may be expended in the early years. There may be justification for occasional use of grandfather clauses. This section is *not* intended to abrogate existing grandfather clauses. Such clauses, however, will be found in the sections imposing the requirements. Here only the general principle is stated.

(10) That the holders of two-thirds of the shares entitled to vote, or two-thirds of the members of policyholders entitled to vote in an insurer controlled by its members or policyholders, have consented to a petition.

Comment on sub. (10): Voluntary liquidation should be possible whether the insurer is solvent or insolvent. In case of insolvency or doubtful solvency, the provisions for involuntary liquidation should be followed and consent becomes merely another ground.

645.42 LIQUIDATION ORDERS. (1) ORDER TO LIQUIDATE. An order to liquidate the business of a domestic insurer shall appoint the commissioner and his successors in office liquidator and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the orders of the court. The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the date of the filing of the petition for liquidation. He may recover and reduce the same to possession except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in s. 645.84 (3) for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order with any register of deeds in this state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

(2) FIXING OF RIGHTS. Upon issuance of the order, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate are fixed as of the date of filing of the petition for liquidation, except as provided in ss. 645.43 and 645.63.

Comment on subs. (1) and (2): This section is very much like New Mexico s. 58-6-4 (2), (3). The liquidation order radically alters the legal relations of the insurer, triggering the statutory transfer of title to the liquidator (and thus making him a statutory successor to the insurer), fixing the rights of all parties, except where there are special provisions to the contrary, and terminating many proceedings and actions in which the insurer is engaged. The latter will be true especially if the corporate existence of the insurer is simultaneously terminated, as is possible under s. 645.44 (Dissolution of Insurer). This section thus codifies the legal changes wrought by the statute upon issuance of the liquidation order. Title is transferred as of the date of the petition, not of the order. This corresponds to the Bankruptcy rule, not the Uniform Insurers Liquidation Act rule. This rule gives better protection against preferences and fraudulent transfers. Since the date is earlier than is specified by the Uniform Act in reciprocal states, it is possible that this state's order will not be effective to transfer title to all property as of the date of petition. But it will still do so as of the date of entry of the order.

(3) ALIEN INSURER. An order to liquidate the business of an alien insurer domiciled in this state shall be in the same terms and have the same legal effect as an order to liquidate a domestic insurer, except that

the assets and the business in the United States shall be the only assets and business included under the order.

(4) DECLARATION OF INSOLVENCY. At the time of petitioning for an order of liquidation, or at any time thereafter, the commissioner may petition the court to declare the insurer insolvent, and after such notice and hearing as it deems proper, the court may make the declaration.

Comment on sub. (4): Although a liquidation order may be entered for grounds other than insolvency, there are occasions when it is important to have a court determination of insolvency. It may matter, for example, in the upsetting of preferential transfers. This subsection is patterned after New York s. 543 (1). A declaration of insolvency may have disadvantages, however. For example, it may weaken but not destroy the case for the avoidance of the Federal Insolvency Act. See the annotation of s. 645.68 (5); *United States v. Oklahoma,* 261 U.S. 253 (1923). A liquidator should study the advantages and disadvantages to his particular case of a declaration of insolvency before asking for it. But he should clearly have the power to ask.

645.43 CONTINUANCE OF COVERAGE. (1) All insurance policies issued by the insurer shall continue in force:

(a) For a period of 15 days from the date of entry of the liquidation order;

(b) Until the normal expiration of the policy coverage;

(c) Until the insured has replaced the insurance coverage with equivalent insurance in another insurer; or

(d) Until the liquidator has effected a transfer of the policy obligation pursuant to s. 645.46 (8); whichever time is less.

(2) If the coverage continued under this section is replaced by insurance that is not equivalent, the coverage continued under this section shall be excess coverage over the replacement policy to the extent of the deficiency. Claims arising during the continuation of coverage shall be treated as if they arose immediately before the petition for liquidation. Coverage under this subsection shall not satisfy any legal obligation of the insured to carry insurance protection, whether the obligation is created by law or by contract.

Comment: It has been traditional, in Wisconsin and elsewhere, to terminate the policy coverage as soon as the order of liquidation is issued. This rule is very unfair to an important class of creditors, who are cut adrift without protection. The person who has a fire the day before liquidation begins has a claim for his full loss and will receive his share in the liquidation; the person who has a fire the day after receives nothing. He may have no opportunity to replace his coverage and for some time will not even know of the liquidation. This treatment is shocking. At least the policyholder is entitled to some protection while he has a chance to be notified and replace his insurance. Termination of coverage 15 days after the order of liquidation at the latest does not depend on notice to the policyholder, however, for there is no practicable way to ensure that he will get notice within that time or even within 6 months or a year. If the records of the company are incomplete or in bad condition, it may be months before notices can be sent out. By s. 645.47 the liquidator is required to notify the policyholders of the impairment of coverage as quickly as possible; by s. 645.48 agents are required to do the same. The latter duty is likely to be quickly and effectively carried out, so that most policyholders should have notice before the 15 days have elapsed. Some may have difficulty obtaining replacement coverage and some may not learn of the liquidation. These will be hardship cases, if a loss should occur, but not all hardship cases can be avoided when there is a liquidation. The dissipation of assets must stop as soon as possible or else no one will have a chance to recover anything. By providing up to 15 days of extended cov-

erage, conflicting values are appropriately balanced. No more should be given even if there is in fact no notice. As it stands now, the provision is not a serious drain on funds, and provides a nice balance of conflicting interests, in doing justice while minimizing costs.

Of course the coverage that is continued is an impaired coverage. If there is a loss, the claimant will only be able to share in the distribution, not get his full claim. But he is not just thrown to the wolves with nothing.

645.44 DISSOLUTION OF INSURER. The commissioner may petition for an order dissolving the corporate existence of a domestic insurer or the U.S. branch of an alien insurer domiciled in this state at the time he applies for a liquidation order. If the court issues a liquidation order, it also shall order dissolution if the commissioner has petitioned for it. The court shall order dissolution of the corporation upon petition by the commissioner at any time after a liquidation order has been granted. If the dissolution has not previously occurred, it shall be effected by operation of law upon the discharge of the liquidator.

Comment: This section is similar in effect to California s. 1017. In requiring the court to grant the order, it goes beyond New York s. 525. Some statutes provide for immediate dissolution upon a liquidation order. That has the advantage of terminating some litigation even in other jurisdictions, in the absence of statutes in the forum states continuing the corporation for the purpose of suit. Termination is not necessarily advantageous, but sometimes it will give better protection to assets. This section permits the commissioner to exercise his discretion in setting the time of dissolution. In some unforeseen case, it may be that the effects of dissolution will be so drastic as to justify delay in dissolving the corporate existence if there is even slight hope that rehabilitation may become a possibility. This should be a matter for decision by the liquidator.

645.45 Introductory comment: The principal advantage a federal receiver has over a state receiver is that 28 U.S.C. s. 754 (Receivers of property in different districts) gives the federal receiver control of all property throughout the United States even though situated in different districts or even different judicial circuits, with the right to have possession thereof, regardless of local law. He must perfect his power by filing as noted in the comment on sub. (2). He has the equivalent of this power in a state receivership in reciprocal states, at least if they cooperate, but not necessarily in nonresiprocal states. A commissioner might wish to seek a federal receivership if much of the insurer's property was located in nonreciprocal states or unco-operative reciprocal states and if he anticipated difficulty in reducing it to possession. The classic case was the *Inland Empire* debacle, where a federal receiver was appointed by the Federal District Court for Utah on petition of a Utah creditor. (*Inland Empire v. Freed,* 239 F. 2d 289 (10th Cir. 1956)). He then handled the liquidation of the company, which was domiciled in Idaho. Both the Utah and Idaho commissioners supported the application for a receivership in view of the difficulties contemplated in the interstate liquidation. Some other interested commissioners opposed the petition. Only rarely would a commissioner desire the appointment of a federal receiver instead of petitioning for a liquidation order from the state court. This section opens up the possibility, however, even if it will rarely be used. The more courses of action are open to the commissioner, the more effectively he can respond to the special needs of individual cases.

The present 28 U.S.C. s. 754 was formerly 28 U.S.C. s. 117 which then read:

> "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different states *in the same judicial circuit,* the receiver so

appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, *lying or being within the same judicial circuit*..." [Emphasis supplied].

In 1948 this section was changed to the present 28 U.S.C. s. 754 which gives the receiver power to sue *in any judicial district* without appointment of an ancillary receiver as provided in 28 U.S.C. s. 959. The very change itself and the different language used would indicate that it was the intent of Congress to give the receiver power on a nationwide basis, regardless of the judicial circuits, if he files a copy of the appointing order in the district court in which he wishes to sue. The historical note to 28 U.S.C. s. 754 reads:

"Words 'property, real, personal or mixed, situated in different districts,' were inserted to broaden the scope of this section to cover all property in different districts without respect to situs within different states within same judicial circuit."

This extension was recognized in the Inland Empire liquidation, in *Continental Bank & Trust Co. v. Gold,* 140 F. Supp. 252 (E.D. N.C. 1956).

Because jurisdiction is based on diversity, common citizenship with the domiciliary company prevents the commissioner from himself petitioning for a receivership, but it is probably not collusive if the commissioner encourages another commissioner or other person to do so. There seems no reason for the commissioner of this state not to be appointed receiver by the federal district court on application of the co-operative petitioner. Diversity is a requirement of jurisdiction only.

Another question is whether a federal receivership may be instituted after proceedings have been started in the domicile, despite the federal no-intervention rule, if the state statutes authorize termination of the state proceedings when the commissioner thinks a federal receivership would be preferable. *Inland Empire v. Freed,* 239 F. 2d 289 (10th Cir. 1956) answers this affirmatively.

645.45 FEDERAL RECEIVERSHIP. (1) PETIEION FOR FEDERAL RECEIVER. Whenever in the commissioner's opinion, liquidation of a domestic insurer or an alien insurer domiciled in this state would be facilitated by a federal receivership, and when any ground exists upon which the commissioner might petition the court for an order of rehabilitation or liquidation under s. 645.31 or 645.41, or if an order of rehabilitation or liquidation has already been entered, the commissioner may request another commissioner or other willing resident of another state to petition any appropriate federal district court for the appointment of a federal receiver. The commissioner may intervene in any such action to support or oppose the petition, and may accept appointment as the receiver if he is so designated. So much of this chapter shall apply to the receivership as can be made applicable and is appropriate. Upon motion of the commissioner, the courts of this state shall relinquish all jurisdiction over the insurer for purposes of rehabilitation or liquidation.

Comment on sub. (1): This section does not imply that the commissioner should seek to induce application for a federal receivership indiscriminately or often. It is an extraordinary remedy in the equity sense, and the state courts should continue to provide the forum for nearly all receiverships.

(2) Filing orders. If the commissioner is appointed receiver under this section, he shall comply with any requirements necessary to give him title to and control over the assets and affairs of the insurer. This extension was recognized in the Inland Empire liquidation, in *Continental Bank & Trust Co. v. Gold,* 140 F. Supp. 252 (E.D. N.C. 1956).

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Another question is whether a federal receivership may be instituted after proceedings have been started in the domicile, despite the federal no-intervention rule, if the state statutes authorize termination of the state proceedings when the commissioner thinks a federal receivership would be preferable. *Inland Empire v. Freed,* 239 F. 2d 289 (10th Cir. 1956) answers this affirmatively.

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(2) FILING ORDERS. If the commissioner is appointed receiver under this section, he shall comply with any requirements necessary to give him title to and control over the assets and affairs of the insurer.

Comment on sub. (2): For example, the receiver must file copies of the complaint and order of appointment in the federal district court for each district in which property is located, or he will lose jurisdiction and control over all property in the district. 28 U.S.C. s. 754. He also will have to see that all orders affecting property are entered of record in the districts where the property is located. 28 U.S.C. s. 1692. The requirement is generalized in this section to cover anything that applicable law may require. This is perhaps not a necessary provision but its existence in the chapter is a precaution, to ensure that the commissioner has the power to act and to make failure to act in the short time allowed under 28 U.S.C. s. 754 somewhat less likely.

645.46 Introductory comment: Among the powers and duties here are included some with counterparts in many different insurance codes, as well as several that do not appear elsewhere in present codes. On the whole there is no exact correspondence with the sources, since the models were rather freely adapted.

This section spells out in detail the powers of the liquidator. It might be argued that such details will have a limiting effect, but that possibility is countered by sub. (23), to the effect that the enumeration shall not limit the commissioner and that failure to enumerate is not an implied denial. Furthermore, excessive generality in the description of powers is likely to be even more limiting in fact, because it is more conducive to timid and restrictive interpretation than is an extensive cataloguing of specific powers coupled with a general power. It is obvious but often forgotten that the insurance law may be addressed to the court for interpretation but also to the commissioner and his staff for execution. The court may interpret the law on demand, but only the insurance commissioner can command most of the regulatory procedures, as well as the resources needed

to use them. Hence, the insurance statutes must successfully deliver their statutory messages on both levels.

645.46 POWERS OF LIQUIDATOR. The liquidator shall report to the court monthly, or at other intervals specified by the court, on the progress of the liquidation in whatever detail the court orders. Subject to the court's control, he may:

(1) Appoint a special deputy to act for him under this chapter, and determine his compensation. The special duputy shall have all powers of the liquidator granted by this section. The special duty shall serve at the pleasure of the liquidator.

Comment on sub. (1): Though power to liquidate is nominally given to the commissioner, he is not usually the active party in handling the liquidation. Liquidation and rehabilitation are usually performed by a special deputy appointed for that purpose. This section is included to make clear that the special deputy has the power of the commissioner for liquidation. To make him a mere agent of the commissioner would raise unnecessary questions about the extent of his delegated powers. Elsewhere it seems common to make him the commissioner's agent. See e.g. California s. 1035, New York s. 532, Illinois s. 814, Indiana s. 39-3411. Cf. Connecticut s. 38-12, which gives the special deputy only those powers the commissioner thinks wise. A fully deputized subordinate is ordinarily necessary to do the job properly. If the commissioner wants a partially deputized subordinate, he can achieve it by delegating what he wishes to an agent, who is not designated a special deputy.

This subsection does not require that the deputy be a lawyer. In fact, slavish adherence to the notion that the special deputy liquidating the insurer must be a lawyer is unsound. Greater managerial capabilities may be found in other kinds of specialists. Even though liquidation may be partially litigation and claims oriented, it is still essentially a managerial and administrative task. Perhaps it would sometimes be better if litigation considerations were de-emphasized in favor of management considerations.

(2) Appoint or engage employes and agents, legal counsel, actuaries, accountants, appraisers, consultants and other personnel he deems necessary to assist in the liquidation. Chapter 16 does not apply to such persons.

(3) Fix the compensation of persons under sub. (2), subject to the control of the court.

(4) Defray all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the liquidator may advance the costs so incurred out of the appropriation under s. 20.460 (1) (a). Any amounts so paid shall be deemed expense of administration and shall be repaid for the credit of the insurance department out of the first available moneys of the insurer.

(5) Hold hearings, subpoena witnesses and compel their attendance, administer oaths, examine any person under oath and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith require the production of any books, papers, records or other documents which he deems relevant to the inquiry.

Comment on sub. (5): This provision is essentially the same as New York s. 24 (1). Similar provisions are found in many states, though the language and specific content vary greatly.

(6) Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; do such other acts as are necessary or expedi-

ent to collect, conserve or protect its assets or property, including sell, compound, compromise or assign for purposes of collection, upon such terms and conditions as he deems best, any bad or doubtful debts; and pursue any creditor's remedies available to enforce his claims.

Comment on sub. (6): This provision is in effect a composite of various laws. See *inter alia,* California s. 1037 (a), (b), (c); Indiana s. 39-3417.

(7) Conduct public and private sales of the property of the insurer in a manner prescribed by the court.

(8) Use assets of the estate to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under s. 645.68.

(9) Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable, except that no transaction involving property the market value of which exceeds $10,000 shall be concluded without express permission of the court. He also may execute, acknowledge and deliver any deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation. In cases where real property sold by the liquidator is located other than in the county where the liquidation is pending, the liquidator shall cause to be filed with the register of deeds for the county in which the property is located a certified copy of the order appointing him.

Comment on sub. (9): This is similar to California s. 1037 (d) where, however, the amount specified is $1,000; the larger amount is more realistic today. All the liquidator's actions are subject to whatever scrutiny the court wishes to give them.

(10) Borrow money on the security of the insurer's assets or without security and execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

Comment on sub. (10): This is similar to New York s. 540.

(11) Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party.

Comment on sub. (11): Of course disavowal of a contract might create a cause of action (and thus a claim) for breach of contract against the liquidator. There is no intention to impair the obligation of contracts.

(12) Continue to prosecute and institute in the name of the insurer or in his own name any suits and other legal proceedings, in this state or elsewhere, and abandon the prosecution of claims he deems unprofitable to pursue further. If the insurer is dissolved under s. 645.44, he may apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

(13) Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person.

Comment on sub. (13): This provision may be necessary to prevent the loss of certain kinds of claims. See e.g. *Kelly v. Overseas Investors, Inc.,* 264 N.Y.S. 2d 586, 594 (1965), 18 N.Y. 2d 622, 219 N.E. 2d 288 (1966), for a case holding the liquidator could not recover on behalf of the creditors, policyholders, etc., when the loss was not one suffered by the corporation. See Indiana s. 39-3421 for a statute similar to this provision.

(14) Remove any records and property of the insurer to the offices of the commissioner or to such other place as is convenient for the purposes of efficient and orderly execution of the liquidation.

(15) Deposit in one or more banks in this state such sums as are

required for meeting current administration expenses and dividend distributions.

(16) Deposit with the state of Wisconsin investment board for investment under s. 25.14 all sums not currently needed, unless the court orders otherwise.

Comment on sub. (16): Elsewhere liquidators have exercised discretion about the temporary investment of available funds. The liquidator may not have the competence to manage an investment program, however, and he will probably not be organized to do it. This relieves him of a burden by utilizing existing state machinery.

(17) File any necessary documents for record in the office of any register of deeds or record office in this state or elsewhere where property of the insurer is located.

(18) Assert all defenses available to the insurer as against third persons, including statutes of limitations, statutes of frauds and the defense of usury. A waiver of any defense by the insurer after a petition for liquidation has been filed shall not bind the liquidator.

(19) Exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member, including any power to avoid any transfer or lien that may be given by law and that is not included within ss. 645.52 to 645.54.

Comment on sub. (19): This is similar to Arizona s. 20-636C. See also Indiana s. 39-3421.

(20) Intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

Comment on sub. (20): Cf. s. 645.31 (9), where such proceedings are ground for a petition for rehabilitation. This provision overlaps s. 645.45 also.

(21) Enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states.

(22) Exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with this chapter.

(23) The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.

645.47 NOTICE TO CREDITORS AND OTHERS. (1) NOTICE REQUIRED. (a) *General requirements.* The liquidator shall give notice of the liquidation order as soon as possible by first class mail and either by telegram or telephone to the insurance commissioner of each jurisdiction in which the insurer is licensed to do business, by first class mail and by telephone to the industrial commission of this state if the insurer is or has been an insurer of workmen's compensation, by first class mail within this state and by airmail outside this state to all insurance agents having a duty under s. 645.48, by first class mail to the persons designated in s. 204.04 (3) if the insurer is a surety company and by first class mail within this state and by airmail outside this state at the last known address to all persons known or reasonably expected to have claims against the insurer, including all policyholders. He also shall publish a class 3 notice, under ch. 985, in a newspaper of general circulation in the county in which the liquidation is pending or in Dane county, the last publication to be not less than 3 months before the earliest deadline specified in the notice under sub. (2).

(b) *Special requirements.* Notice to agents shall inform them of their

duties under s. 645.48 and inform them what information they must communicate to insureds. Notice to policyholders shall include notice of impairment and termination of coverage under s. 645.43. When it is applicable, notice to policyholders shall include 1) notice of withdrawal of the insurer from the defense of any case in which the insured is interested, 2) notice of the right to file a claim under s. 645.64 (2), and 3) information about the existence of a workmen's compensation security fund under s. 102.65.

(c) *Reports and further notice.* Within 15 days of the date of entry of the order, the liquidator shall report to the court what notice has been given. The court may order such additional notice as it deems appropriate.

Comment on sub. (1): This sets minimum requirements for notice, and also gives the court discretion to require additional notice. New Jersey s. 17:30-2 gives the court complete discretion as to the required notice. The requirement of notice to the industrial commission is already found in s. 102.65 (13) but should be here as well. Notice by publication is virtually a ritual and little more, to ensure that due process is satisfied, thus protecting the liquidator. The publication provision follows the language of s. 268.24. It may not be needed under the more realistic modern notions of due process. No case has gone so far, however. It is better, therefore, to protect the liquidator by directing him to engage in the ritual act, leaving it to someone else to find out whether it is really required any longer. Furthermore, there may conceivably be some benefit from the publication requirement in certain cases.

(2) NOTICE RESPECTING CLAIMS FILING. Notice to potential claimants under sub. (1) shall require claimants to file with the court their claims together with proper proofs thereof under s. 645.62, on or before a date the liquidator specifies in the notice, which shall be no less than 6 months nor more than one year after entry of the order, except that the liquidator need not require persons claiming unearned premium and persons claiming cash surrender values or other investment values in life insurance and annuities to file a claim. The liquidator may specify different dates for the filing of different kinds of claims.

Comment on sub. (2): Several kinds of claimants are exempted from the requirement of filing, because in the normal case the insurer's records should be reliable enough to allow these claims without filing. Preferred ownership claims and proprietary claims under s. 645.68 (9) and (10) need not be filed at all. Unearned premium claims and claims for investment values in life insurance and annuities need to be filed only if the records of the insurer are in bad condition, in which case the section provides that the liquidator may so order. Section 645.61 (2) provides that any individuals of these latter classes who are missed may make late claims, as late as the final distribution of assets. The remote possibility that someone will be missed altogether who would have been paid if everyone were required to file a claim is so slight as to weigh very little in comparison with the complexity and expense saved by reducing the paperwork. A liquidator would not often use his power to vary the filing deadline for various types of claims, but it is reasonable to give him the power.

(3) NOTICE CONCLUSIVE. If notice is given in accordance with this section, the distribution of the assets of the insurer under this chapter shall be conclusive with respect to all claimants, whether or not they received notice.

Comment on sub. (3): Potential claimants need to be bound in order to make conclusive settlement of the estate. The liquidation order itself, which is a public order of a court of record, may be enough notice to bind all potential claimants. The provisions for actual notice and for publication are added for fairness.

645.48 DUTIES OF AGENTS. (1) WRITTEN NOTICE. Every person who receives notice in the form prescribed in s. 645.47 that an insurer which he represents as an independent agent is the subject of a liquidation order shall as soon as practicable give notice of the liquidation order. The notice shall be sent by first class mail to the last address contained in the agent's records to each policyholder or other person named in any policy issued through the agent by the company, if he has a record of the address of the policyholder or other person. A policy shall be deemed issued through an agent if the agent has a property interest in the expiration of the policy; or if the agent has had in his possession a copy of the declarations of the policy at any time during the life of the policy, except where the ownership of the expiration of the policy has been transferred to another. The written notice shall include the name and address of the insurer, the name and address of the agent, identification of the policy impaired and the nature of the impairment under s. 645.43. Notice by a general agent satisfies the notice requirement for any agents under contract to him.

(2) SANCTIONS. Any agent failing to give notice as required in sub. (1) may be fined not more than $100 and may have his license suspended.

(3) ORAL NOTICE. So far as practicable, every insurance agent subject to sub. (1) shall give immediate oral notice, by telephone or otherwise, of the liquidation order to the same persons to whom he is obligated to give written notice. The oral notice shall include substantially the same information as the written notice.

Comment: Agents can serve an invaluable function by rapidly advising policyholders that an insurer is in liquidation. The agents are often able to communicate with their clients long before the liquidator has unraveled the often snarled records of a failing insurer. Further, it is usually in the self-interest of the agent to advise clients of the liquidation promptly and fully. He is clearly under a moral duty to do so, if not a legal one. This section requires the agent who is properly notified of a liquidation to give written notice to his clients under penalty of criminal sanction (subs. (1) and (2)). By virtue of sub. (3), the agent is also required to advise the insured by telephone or in person of the liquidation, but no criminal penalty is attached for failure to do so. The law merely calls for what good business practice and fairness would dictate, both written and oral notice, the latter quite expeditiously even at considerable inconvenience or cost to the agent.

The section is intended to apply only to insurance agents who act as independent businessmen, and not to employes under control of the insurer. Independent agents operating under the so-called American Agency System as well as exclusive agents who are not employes are subject to the requirement. Insurance agents who are employes may be directly controlled by the liquidator operating through the framework of the insurer's remaining corporate structure. Further, if they are ordinary employes on salary, they should not be given affirmative duties they may not be in a position to carry out and which could unreasonably burden them.

Under s. 645.47, notice of the liquidation must be given by the liquidator to insurance agents. Though the agent should advise his client of a liquidation order whether he learns of the liquidation by formal notice or through any other channel, it is preferable not to impose sanctions where proof of the receipt of knowledge may be difficult.

645.49 ACTIONS BY AND AGAINST LIQUIDATOR. (1) TERMINATION OF ACTIONS AGAINST INSURER BY ORDER APPOINTING LIQUIDATOR. Upon issuance of any order appointing the commissioner liquidator of a domestic insurer or of an alien insurer domiciled in this state, all actions and all proceedings against the insurer whether in this state or elsewhere shall be abated and the liquidator shall not intervene in them, except as

provided in this subsection. Whenever in the liquidator's judgment an action in this state has proceeded to a point where fairness or convenience would be served by its continuation to judgment, he may apply to the court for leave to defend or to be substituted for the insurer, and if the court gives him leave, the action shall not be abated. Whenever in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this state, with approval of the court he may intervene in the action. The liquidator may defend any action in which he intervenes under this section at the expense of the estate of the insurer.

Comment on sub. (1): Normally it is preferable that actions against an insurer be terminated when the liquidation begins, to be succeeded by the statutory claims procedure. Fairness requires this in order that all claimants shall have their claims evaluated as equitably as possible. If a pending case is complex, however, and has proceeded far down the road to its conclusion, it may be fairer, cheaper and not prejudicial to other claimants to continue and complete the court action. This the liquidator is empowered, though not compelled, to do. Action outside the state may require defense when abatement of the action seems unlikely. In such case, protection of the estate against having to give full faith and credit to an undefended judgment may demand that the liquidator intervene. *Morris v. Jones,* 329 U.S. 545 (1947) provides an example. The entire subject of the effect of liquidation upon actions brought elsewhere is very complex. What the statute does is to give the liquidator all possible tools and leave it to him to decide, in a concrete context, which ones to use and how to use them. This is the reason for empowering the commissioner to intervene in foreign lawsuits, and to petition for immediate dissolution, among other powers. The latter may sometimes abate lawsuits elsewhere when they would not be abated by the initiation of liquidation alone. But it will not always be successful in the face of legislation elsewhere. For example, see Nebraska s. 44-136 for an illustration of the kind of statute the liquidator may face.

The 2 words "or elsewhere" in the first sentence may not always be effective. If the liquidation order is accompanied by dissolution of the insurer, however, the death of the insurer may abate the actions elsewhere. Moreover, the terms of statutes elsewhere may give extraterritorial effect to this provision. The words "or elsewhere" are included for whatever effect they may have. At worst they will be ineffective; they do not endanger the remainer of the section or the chapter as a whole. Moreover, they give the liquidator a lever in negotiation that he would not have without them.

(2) STATUTES OF LIMITATIONS ON CLAIMS BY INSURER. The liquidator may, within 2 years subsequent to the entry of an order for liquidation or within such further time as applicable law permits, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim or for filing any claim, proof of claim, proof of loss, demand, notice or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by applicable law, for taking any action, filing any claim or pleading or doing any act, and where in any such case the period had not expired at the date of the filing of the petition, the liquidator may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the insurer, within a period of 60 days subsequent to the entry of an order for liquidation, or within such further period as is permitted by the agreement, or in the proceeding or by applicable

law, or within such further period as is shown to the satisfaction of the court not to be unfairly prejudicial to the other party.

Comment on sub. (2): This subsection is modeled in form and purpose after Federal Bankruptcy Act s. 11e. If a statute of limitations has not expired at the time of the petition, the commissioner is allowed 2 years (or more if special rules permit) to bring an action. Where a special agreement governs, or the limit is incidental to a proceeding, at least 60 days is allowed, with such further period as the agreement permits, or as will not be prejudicial to the other party. Without such a provision, the confusion and disruption attendant upon the institution of formal delinquency proceedings might result unfairly in the insurer's loss of rights, and consequent damage to the public, policyholders, other creditors or shareholders.

(3) STATUTES OF LIMITATIONS ON CLAIMS AGAINST INSURER. The time between the filing of a petition for liquidation against an insurer and the denial of the petition shall not be considered to be a part of the time within which any action may be commenced against the insurer. Any action against the insurer that might have been commenced when the petition was filed may be commenced for at least 60 days after the petition is denied.

Comment on sub. (3): This provision is similar in effect to Federal Bankruptcy Act s. 11f, which was designed to prevent the statute of limitations from running against a creditor of the bankrupt while suits are stayed or impracticable. MacLachlan, *Bankruptcy* 90 (1956). This subsection protects the creditors of the insurer in somewhat the same way that sub. (2) protects the insurer. It is parallel to s. 645.34 (3), except that if the petition results in an order of liquidation, a claim may be filed instead of an action brought.

645.51 COLLECTION AND LIST OF ASSETS. (1) LIST OF ASSETS REQUIRED. As soon as practicable after the liquidation order, the liquidator shall prepare in duplicate a list of the insurer's assets. The list shall be amended or supplemented as the court requires. One copy shall be filed in the office of the clerk of the court having jurisdiction over the liquidation proceedings and one copy shall be retained for the liquidator's files. All amendments and supplements shall be similarly filed.

Comment on sub. (1): This is based upon Texas s. 21.28 (2) (f).

(2) LIQUIDATION OF ASSETS. The liquidator shall reduce the assets to a degree of liquidity that is consistent with the effective execution of the liquidation as rapidly and economically as he can.

645.52 Introductory comment: There has long been a general body of law restricting fraudulent transfers by debtors. A regulated insurer is justifiably subject to even more stringent control than other debtors when it attempts to make a transfer of property without fair consideration, or enters into any other type of transaction traditionally considered fraudulent by the law. Consequently, this section goes even further than ch. 242 (the Uniform Fraudulent Conveyance Act).

The law generally requires insolvency at the time of the transfer for a conveyance to be fraudulent. This section, however, does not require insolvency—any transfer without fair consideration made within one year of the petition may be invalidated. Whatever may be the rule for ordinary private corporations, it is not justified for an insurer to make transfers without fair consideration. This section thus expands the traditional rights of the commissioner to avoid such transfers. Of course, he may also resort to any remedies accorded other creditors by the general law.

This section is modeled after Federal Bankruptcy Act s. 67d, with the extension described above, and applied also to rehabilitation. Sub. (2) is also modified to parallel exactly the corresponding provision of s. 645.54.

Fraudulent transfers may be the reason for an insurer's difficulties

and undoing such transfers may sometimes be the main task of the rehabilitator, and the main hope of the liquidator.

645.52 FRAUDULENT TRANSFERS PRIOR TO PETITION. (1) DEFINITION AND EFFECT. Every transfer made or suffered and every obligation incurred by an insurer within one year prior to the filing of a successful petition for rehabilitation or liquidation under this chapter is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay or defraud either existing or future creditors. A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under this chapter, which is fraudulent under this section, may be avoided by the receiver, except as to a person who in good faith is a purchaser, lienor or obligee for a present fair equivalent value, and except that any purchaser, lienor or obligee, who in good faith has given a consideration less than fair for such transfer, lien or obligation, may retain the property, lien or obligation as security for repayment. The court may, on due notice, order any such transfer or obligation to be preserved for the benefit of the estate, and in that event the receiver shall succeed to and may enforce the rights of the purchaser, lienor or obligee.

(2) PERFECTION OF TRANSFERS. (a) *Personal property.* A transfer of property other than real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee under s. 645.54 (3).

(b) *Real property.* A transfer of real property shall be deemed to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurerer could obtain rights superior to the rights of the transferee.

(c) *Equitable liens.* A transfer which creates an equitable lien shall not be deemed to be perfected if there are available means by which a legal lien could be created.

(d) *Transfer not perfected prior to petition.* Any transfer not perfected prior to the filing of a petition for liquidation shall be deemed to be made immediately before the filing of the successful petition.

(e) *Actual creditors unnecessary.* This subsection applies whether or not there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers.

Comment on sub. (2): This subsection is essentially the same as Federal Bankruptcy Act s. 60a (2), (3), and (6). It fixes the time a transfer is perfected and this determines the period during which it is vulnerable. The rule is the present bankruptcy rule reflecting a series of recent amendments aimed at secret transfers. See Collier, *Bankruptcy* ss. 60.36 *et seq.* Of course some transfers are perfected when made. Examples are cash payments and deliveries of tangible personal property. Others require additional steps. This provision is parallel to that in s. 645.54 (2).

(3) FRAUDULENT REINSURANCE TRANSACTIONS. Any transaction of the insurer with a reinsurer shall be deemed fraudulent and may be avoided by the receiver under sub. (1) if:

(a) The transaction consists of the termination, adjustment or settlement of a reinsurance contract in which the reinsurer is released from any part of its duty to pay the originally specified share of losses that had occurred prior to the time of the transaction, unless the reinsurer gives a present fair equivalent value for the release; and

(b) Any part of the transaction took place within one year prior to the date of filing of the petition through which the receivership was commenced.

Comment on sub. (3): Fraudulent reinsurance arrangements are fre-

quently found among ailing insurance companies. In fact this is among the more important ways in which companies can be exploited by venal controlling interests. Avoiding such transactions is highly desirable but extremely difficult because of the immense variety of possible arrangements, which defies all attempts at an inclusive definition. One way to exploit a primary insurer and divert its funds is to adjust the reinsurance contract retroactively to drain off as much money from the ceding company as possible. This subsection is directed at such retroactive adjustments. It will not take care of all of the problems of fraudulent reinsurance, but it will help. It is supplemented by s. 645.56 (2) (e). This subsection may be unnecessary because the transaction would already be fraudulent under sub. (1), but this kind of fraudulent transaction is frequent enough and important enough for special treatment.

645.53 Introductory comment: This section qualifies the 2nd sentence of s. 645.42 (1), which is the basic provision on title, vesting it in the liquidator as of the date of the petition for liquidation. That vesting is limited by the validity of certain transfers made under this section.

645.53 FRAUDULENT TRANSFERS AFTER PETITION. (1) EFFECT OF PETITION: REAL PROPERTY. After a petition for rehabilitation or liquidation, a transfer of any of the real property of the insurer made to a person acting in good faith shall be valid against the receiver if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien on the property so transferred. The recording of a copy of the petition for order of rehabilitation or liquidation with the register of deeds in the county where any real property in question is located is constructive notice of the commencement of a proceeding in rehabilitation or liquidation. The exercise by a court of the United States or any state of jurisdiction to authorize or effect a judicial sale of real property of the insurer within any county in any state shall not be impaired by the pendency of such a proceeding unless the copy is recorded in the county prior to the consummation of the judicial sale.

Comment on sub. (1): This is adapted from Federal Bankruptcy Act ss. 70d and 21g.

(2) EFFECT OF PETITION: PERSONAL PROPERTY. After a petition for rehabilitation or liquidation and before either the receiver takes possession of the property of the insurer or an order of rehabilitation or liquidation is granted:

(a) A transfer of any of the property of the insurer, other than real property, made to a person acting in good faith shall be valid against the receiver if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien on the property so transferred.

(b) A person indebted to the insurer or holding property of the insurer may, if acting in good faith, pay the indebtedness or deliver the property or any part thereof to the insurer or upon his order, with the same effect as if the petition were not pending.

(c) A person having actual knowledge of the pending rehabilitation or liquidation shall be deemed not to act in good faith unless he has reasonable cause to believe that the petition is not well founded.

(d) A person asserting the validity of a transfer under this section shall have the burden of proof. Except as elsewhere provided in this section, no transfer by or in behalf of the insurer after the date of the petition for liquidation by any person other than the liquidator shall be valid against the liquidator.

Comment on sub. (2): This is adapted from Federal Bankruptcy Act s. 70d.

(3) NEGOTIABILITY. Nothing in this chapter shall impair the negotiability of currency or negotiable instruments.

Comment on sub. (3): This comes from Federal Bankruptcy Act s. 70d.

645.54 Introductory comment: This entire section and s. 645.52 are closely related and are both adapted from the Federal Bankruptcy Act. This section combines the subject matter of Federal Bankruptcy Act s. 60, dealing with Preferred Creditors (or Voidable Preferences), and that portion of s. 67 relating to Liens (which are included within the meaning of "transfer" and "preference"). Material relating to Fraudulent Transfers, covered by s. 67d of the Federal Bankruptcy Act, is treated in this chapter in s. 645.52, in a way that closely follows the bankruptcy pattern. In the Federal Bankruptcy Act, there is a sharp distinction between the rules for invalidation of liens and those dealing with other preferences, necessitating separate sections. The approach of this chapter places them on the same basis, thus making it possible to integrate ss. 60 and 67a.

Where possible, the language of the Federal Bankruptcy Act has been simplified. The reach of this section to upset transactions is extended beyond that of the Federal Bankruptcy Act. This enlargement seems justified because of the great difference between the insurance business and ordinary businesses.

The subjects of these sections are traditionally treated in skeletal form in most insurance codes. For example, see New York s. 536, which has been copied widely. The Uniform Insurers Liquidation Act, which does treat them in somewhat more detail, was promulgated in 1939 and therefore could not take advantage of recent developments in the Federal Bankruptcy Act.

This section treats the material in considerably more detail, in the tradition of the Federal Bankruptcy Act. The more detailed approach attempts to eliminate many of the questions that might generate lawsuits, and simultaneously gives more precise guidance to the liquidator. Though many of the transactions so carefully provided for by the Federal Bankruptcy Act seldom occur in the insurance context, it seems pointless not to provide in advance for them when they do occur, especially when there is a time-tested model to follow, and where such provisions may have deterrent as well as remedial effect. In addition, more precise guidance is given the commissioner if the law is detailed than if he is left to guess. Where it is clear, however, that these questions will seldom arise in insurance, the law is left in simpler form.

The section enlarges greatly the usual power to set aside preferences. The main changes are:

(1) The preference period is enlarged from 4 months to one year, in view of the special needs of insurance. Stalling a commissioner for 4 months to protect preferences may not be hard. The initiation of delinquency proceedings is often long delayed.

(2) Preferences may be avoided within the traditional 4-month period without regard to solvency. Thus the difficult and sometimes impossible proof of insolvency at the time of the transfer is elminated for very recent transfers.

(3) The transferee is not required to be aware of the insolvency, thus eliminating another difficult problem of proof.

(4) Special provisions are made for preferences to insiders.

645.54 VOIDABLE PREFERENCES AND LIENS. (1) PREFERENCES. (a) *Preference defined.* A preference is a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the insurer within one year before the filing of a successful petition for liquidation under this

chapter the effect of which transfer may be to enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, transfers otherwise qualifying shall be deemed preferences if made or suffered within one year before the filing of the successful petition for rehabilitation or within 2 years before the filing of the successful petition for liquidation, whichever time is shorter.

Comment on par. (a): The first sentence of this paragraph is based upon Federal Bankruptcy Act s. 60a (1). "Transfer" is defined very broadly in s. 645.03 (17), as in the Federal Bankruptcy Act, to include even the fixing of a lien on property, by judicial proceedings. This paragraph then defines "preference" as a kind of "transfer." Then par. (b) becomes the operative portion of the section and specifies which preferences shall be voidable. The remainder of the section is important but ancillary.

Not all preferences can be upset. Reference must be made to par. (b) to determine which are voidable. Only preferences within 4 months are easy to overturn.

The 2nd sentence of this paragraph has no counterpart in American insurance legislation. The fact that an effort is made to rehabilitate an insurer should not act as a protection to preferred creditors. If the rehabilitation is successful they are safe, but if it is not, then they are not in any stronger position than if the initial petition were for liquidation. This rule only applies if there is one continuous receivership, i.e., if there is no hiatus between rehabilitation and liquidation. Moreover, in the highly unlikely event that a rehabilitation effort should last a long time, there is a limit to the antedating. One year seems a reasonable limit.

It seems inequitable and uneconomical to try to upset small and ordinary completed transactions on the basis that there has been a preference. There is nothing morally wrong with seeking a preference—it is only that given the circumstances of liquidation it results in inequity among competing creditors. Although the commissioner has broad powers, he does not have an obligation to undo all such transactions. He must consider cost and gain to the estate as well as the equities of the transferee. The operative subsection says he "may" avoid the preference, not that he *must* do so.

(b) *Invalidation of preferences.* Any preference may be avoided by the liquidator, if 1) the insurer was insolvent at the time of the transfer, or 2) the transfer was made within 4 months before the filing of the petition, or 3) the creditor receiving it or to be benefited thereby or his agent acting with reference thereto had reasonable cause to believe at the time when the transfer was made that the insurer was insolvent or was about to become insolvent, or 4) the creditor receiving it was an officer, employe, attorney or other person who was in fact in a position of comparable influence in the insurer to an officer whether or not he held such position, or any shareholder holding directly or indirectly more than 5% of any class of any equity security issued by the insurer, or any other person with whom the insurer did not deal at arm's length. Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property, except a bona fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value. Where the bona fide purchaser or lienor has given less than fair equivalent value, he shall have a lien upon the property to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order the lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator.

Comment on par. (b): This is the principal operative portion of the section. It is adapted from Federal Bankruptcy Act s. 60b, but goes a good deal further. In doing so, it comprehends also the field covered by Federal Bankruptcy Act s. 67a. The extended reach of the provisions is justified because of the peculiarities of the insurance business. In a significant percentage of insurance insolvencies, improper transactions seem to occur. Moreover, the burden of proof of insolvency and of reasonable cause to believe the company was insolvent, imposed by the Federal Bankruptcy Act, is a heavy one. Insolvency is such a difficult and expensive thing to establish in insurance that any case that requires proof of it at any moment other than the initiation of the liquidation proceedings is likely to fail. A simple snapshot of an insurer's financial position may be taken but a moving picture would be prohibitively expensive. Reasonable cause to believe presents similar difficulties of proof.

The paragraph retains insolvency and reasonable cause to believe as alternative, and not conjunctive, criteria of voidable transfers, but adds some others, also as alternative criteria. In particular, the paragraph treats nearness of the transfer in time as alone sufficient. Four months is a reasonable period since the probability of both insolvency and knowledge of insolvency is very high during that time. The section greatly extends the reach of the Federal Act, though not unreasonably in view of (1) the special nature of insurance, (2) the high probability of sharp practices in the last days of an ailing insurer, and (3) the fact that an insurance company is enough akin to a public utility that favoritism, even by a sound insurer, seems improper. After all, "equity" as an objective of insurance regulation pervades the system.

(2) PERFECTION OF TRANSFERS. (a) *Personal property.* A transfer of property other than real property is deemed to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

(b) *Real property.* A transfer of real property is deemed to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(c) *Equitable liens.* A transfer which creates an equitable lien is not deemed to be perfected if there are available means by which a legal lien could be created.

(d) *Transfers not perfected prior to petition.* A transfer not perfected prior to the filing of a petition for liquidation shall be deemed to be made immediately before the filing of the successful petition.

(e) *Actual creditors unnecessary.* This subsection applies whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers.

Comment on sub. (2): This subsection is essentially the same as Federal Bankruptcy Act s. 60a (2), (3), and (6). It fixes the time a transfer is perfected and this determines the period during which it is vulnerable. The rule is the present bankruptcy rule and comprehends a series of recent amendments aimed at secret transfers. See Collier, *Bankruptcy* ss. 60.36 *et seq.* Of course some transfers are perfected when made. Examples are cash payments and deliveries of tangible personal property. Others require additional steps. The provision is parallel to s. 645.52 (2).

(3) LIENS BY LEGAL OR EQUITABLE PROCEEDINGS. (a) *Definition.* A lien obtainable by legal or equitable proceedings upon a simple contract is one arising in the ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution or like process, whether before, upon or after judgment or decree and whether before or upon levy. It does not include liens which

under applicable law are given a special priority over other liens which are prior in time.

(b) *When liens are superior.* A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of sub. (2), if such consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. Such a lien could not, however, become superior and such a purchase could not create superior rights for the purpose of sub. (2) through any acts subsequent to the obtaining of such a lien or subsequent to such a purchase which require the agreement or concurrence of any third party or which require any further judicial action, or ruling.

Comment on sub. (3): This is essentially Federal Bankruptcy Act s. 60a (4) and (5).

(4) TWENTY-ONE DAY RULE. A transfer of property for or on account of a new and contemporaneous consideration which is deemed under sub. (2) to be made or suffered after the transfer because of delay in perfecting it does not thereby become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or bona fide purchasers' rights are performed within 21 days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.

Comment on sub. (4): This short provision includes the substance of Federal Bankruptcy Act s. 60a (7) and (8).

(5) INDEMNIFYING TRANSFERS ALSO VOIDABLE. If any lien deemed voidable under sub. (1) (b) has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the filing of a petition under this chapter which results in a liquidation order, the indemnifying transfer or lien shall also be deemed voidable.

Comment on sub. (5): This is essentially Federal Bankruptcy Act s. 67a (2).

(6) AVOIDANCE OF LIEN. The property affected by any lien deemed voidable under subs. (1) (b) and (5) is discharged from the lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the liquidator, except that the court may on due notice order the lien to be preserved for the benefit of the estate and the court may direct that a conveyance be executed which is adequate to evidence the title of the liquidator.

Comment on sub. (6): This is essentially the same as Federal Bankruptcy Act s. 67a (3).

(7) HEARINGS TO DETERMINE RIGHTS. The court shall have summary jurisdiction of any proceeding by the liquidator to hear and determine the rights of any parties under this section. Reasonable notice of any hearing in the proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien, and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value,

as ascertained by the court, to the liquidator within such reasonable times as the court fixes.

Comment on sub. (7): This is essentially the same as Federal Bankruptcy Act s. 67a (4).

(8) SURETY'S LIABILITY DISCHARGED. The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided or, where the property is retained under sub. (7) to the extent of the amount paid to the liquidator.

Comment on sub. (8): This is essentially the same as Federal Bankruptcy Act s. 67a (5).

(9) SET OFF OF NEW ADVANCES. If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind, for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recovererable from him.

Comment on sub. (9): This is essentially Federal Bankruptcy Act s. 60c. In effect, it treats the creditor who advances money without security after receiving a preference as if he were repaying the preference. This seems eminently fair. Contrary treatment would be excessively harsh.

(10) RE-EXAMINATION OF ATTORNEY'S FEES. If an insurer, directly or indirectly, within 4 months before the filing of a successful petition for liquidation under this chapter or at any time in contemplation of a proceeding to liquidate it, pays money or transfers property to an attorney at law for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the liquidator and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the liquidator for the benefit of the estate.

Comment on sub. (10): This is essentially the same as Federal Bankruptcy Act s. 60d except that it extends the reach of the section to include any legal services within 4 months even if there is no contemplation of liquidation. Such transfers are invalidated only to the extent that the amounts paid are excessive. It seems quite appropriate to permit recent payments for legal fees to be scrutinized by the court and to hold lawyers to a high standard of probity. After all, lawyers are officers of the court.

(11) PERSONAL LIABILITY. (a) Every officer, manager, employe, shareholder, member, subscriber, attorney or any other person acting on behalf of the insurer who knowingly participates in giving any preference when he has reasonable cause to believe the insurer to be or about to become insolvent at the time of the preference shall be personally liable to the liquidator for the amount of the preference. It is permissible to infer that there is reasonable cause to so believe if the transfer was made within 4 months before the date of filing of the successful petition for liquidation.

(b) Every person receiving any property from the insurer or the benefit thereof as a preference voidable under sub. (1) (b) shall be personally liable therefor and shall be bound to account to the liquidator.

(c) Nothing in this subsection shall prejudice any other claim by the liquidator against any person.

Comment on sub. (11): This subsection does not have a close counterpart in the Federal Bankruptcy Act but seems a highly desirable addition. It is modeled after Illinois s. 816 (3). Par. (a) applies to all preferences (limited to transfers within one year), and not merely to voidable preferences. Even when the preferred creditor should be protected, the knowledgeable insider should not. There may even be ground for extending to transfers at any date the liability of such insiders for depleting the assets of the company. The subsection does not go that far, however. It will be

noted that the liability is carefully qualified. Compare Louisiana s. 745 (c) where a similar provision extends the reach of the remedy to 2 years.

645.55 CLAIMS OF HOLDERS OF VOID OR VOIDABLE RIGHTS. (1) DISALLOWANCE FOR FAILURE TO SURRENDER PROPERTY. No claims of a creditor who has received or acquired a preference, lien, conveyance, transfer, assignment or encumbrance, voidable under this chapter, shall be allowed unless he surrenders the preference, lien, conveyance, transfer, assignment or encumbrance. If the avoidance is effected by a proceeding in which a final judgment has been entered, the claim shall not be allowed unless the money is paid or the property is delivered to the liquidator within 30 days from the date of the entering of the final judgment, except that the court having jurisdiction over the liquidation may allow further time if there is an appeal or other continuation of the proceeding.

Comment on sub. (1): The first sentence of this subsection is the same as Federal Bankruptcy Act s. 57g and similar to Illinois s. 821 (6). The 2nd sentence is modeled after Federal Bankruptcy Act s. 57n. The holder of an allegedly voidable transfer, who refuses to turn over the subject of the transfer to the liquidator, is entitled to a determination of the merits of his title. If unsuccessful, he must comply with the judgment within 30 days, however, or his claim will not be allowed. If he is entitled to an appeal or a rehearing and exercises his right, the court may extend the deadline for complying with the judgment.

(2) TIME FOR FILING. A claim allowable under sub. (1) by reason of the avoidance, whether voluntary or involuntary, of a preference, lien, conveyance, transfer, assignment or encumbrance may be filed as an excused late filing under s. 645.61 if filed within 30 days from the date of the avoidance or within the further time allowed by the court under sub. (1).

Comment on sub. (2): This subsection adapts sub. (1) to the s. 645.61 provision on late filing. After avoidance, whether or not under compulsion, the creditor may submit his claim and will be treated as an excused late filer if he files after the deadline but within 30 days of the avoidance.

645.56 SET-OFFS AND COUNTERCLAIMS. (1) SET-OFFS ALLOWED IN GENERAL. Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and the balance only shall be allowed or paid, except as provided in sub. (2).

(2) EXCEPTIONS. No set-off or counterclaim shall be allowed in favor of any person where:

(a) The obligation of the insurer to the person would not at the date of the filing of a petition for liquidation entitle him to share as a claimant in the assets of the insurer;

(b) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a set-off;

(c) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(d) The obligation of the person is to pay premiums, whether earned or unearned, to the insurer.

645.57 Introductory comment: This section is very close to New York s. 541, with the incorporation in sub. (3) of part of New York s. 542. There are many substantially similar provisions elsewhere.

645.57 ASSESSMENTS. (1) REPORT TO COURT. As soon as practicable but not more than 2 years from the date of an order of liquidation under s. 645.42 of an insurer issuing assessable policies, including an in-

surer organized under ch. 202, the liquidator shall make a report to the court setting forth:

(a) The reasonable value of the assets of the insurer;

(b) The insurer's probable total liabilities; and

(c) The probable aggregate amount of the assessment necessary to pay all claims of creditors and expenses in full, including expenses of administration and costs of collecting the assessment.

(2) LEVY OF ASSESSMENT. (a) Upon the basis of the report provided in sub. (1), including any supplements and amendments thereto, the court may levy ex parte one or more assessments against all members of the insurer who are subject to assessment.

(b) Subject to any applicable legal limits on assessability, the aggregate assessment shall be for the amount that the sum of the probable liabilities, the expenses of administration and the estimated cost of collection of the assessment exceeds the value of existing assets, with due regard being given to assessments that cannot be collected economically.

Comment on sub. (2): This subsection merely incorporates the law respecting assessment liability of mutuals as that law is found elsewhere in the insurance laws and in the decided cases.

(3) ORDER TO SHOW CAUSE. After levy of assessment under sub. (2), the court shall issue an order directing each member who has not paid the assessment pursuant to the order to show cause why the liquidator shall not have a judgment therefor. If a member of the insurer also appears to be indebted to the insurer apart from the assessment, the court, upon application of the liquidator, may also direct the member to show cause why he should not pay the other indebtedness. Liability for such indebtedness shall be determined in the same manner and at the same time as the liability to pay the assessment.

Comment on sub. (3): The first sentence is standard assessment collection procedure, when considered together with sub. (4) and (5). The 2nd sentence is adapted from New York s. 542 and has the purpose of saving litigation by consolidating all potential actions against the member with the assessment procedure.

(4) NOTICE. The liquidator shall give notice of the order to show cause by publication if so directed by the court and by first class mail to each member liable thereunder mailed at least 20 days before the return day of the order to show cause to his last known address as it appears on the records of the insurer.

(5) ORDERS AND HEARINGS. (a) If a member does not appear and serve duly verified objections upon the liquidator upon the return day of the order to show cause under sub. (3), the court shall make an order adjudging the member liable for the amount of the assessment against him and other indebtedness, pursuant to sub. (3), together with costs, and the liquidator shall have a judgment against the member therefor.

(b) If on such return day, the member appears and serves duly verified objections upon the liquidator, the court may hear and determine the matter or may appoint a referee to hear it and make such order as the facts warrant. Any order made by a referee under this paragraph shall have the same force and effect as if it were a judgment of the court, subject to review by the court upon application within 30 days.

(6) COLLECTION. The liquidator may enforce any order or collect any judgment under sub. (5) by any lawful means.

645.58 REINSURER'S LIABILITY. The amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate

except when the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in discharge of that obligation.

Comment: This section in effect makes the standard insolvency clause a rule of law. The standard insolvency clause should also be required in every reinsurance agreement subject to the jurisdiction of this state, but such requirement belongs elsewhere in the statutes. An insolvency clause, and this section, prevent use of insolvency as a defense in an action or a reinsurance agreement. The last sentence is intended to prevent what might in effect be a preferential transfer. Only if the reinsurance contract is for the direct coverage of named insureds should the reinsurer be able to make direct payment without going through the liquidator.

645.61 FILING OF CLAIMS. (1) DEADLINE FOR FILING. Proof of all claims must be filed with the court in the form required by s. 645.62 on or before the last day for filing specified in the notice required under s. 645.47, except that proof of preferred ownership claims and proprietary claims under s. 645.68 (9) and (10) need not be filed at all, and proof of claims for unearned premiums and claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

(2) EXCUSED LATE FILINGS. For a good cause shown, the liquidator shall recommend and the court shall permit a claimant making a late filing to share in dividends, whether past or future, as if he were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation. Good cause includes but is not limited to the following:

(a) That existence of a claim was not known to the claimant and that he filed within 30 days after he learned of it;

(b) That a claim for unearned premiums or for cash surrender values or other investment values in life insurance or annuities which was not required to be filed was omitted from the liquidator's recommendations to the court under s. 645.71, and that it was filed within 30 days after the claimant learned of the omission;

(c) That a transfer to a creditor was avoided under ss. 645.52 to 645.54 or was voluntarily surrendered under s. 645.55, and that the filing satisfies the conditions of s. 645.55;

(d) That valuation under s. 645.67 of security held by a secured creditor shows a deficiency, which is filed within 30 days after the valuation; and

(e) That a claim was contingent and became absolute, and was filed within 30 days after it became absolute.

Comment on sub. (2): Still other good causes for late filing might be established. Another example would be a serious physical disability that precluded the timely presentation of a claim. On the other hand, prejudice to the orderly administration of the liquidation might exist, for example, if inclusion of an excused late filing in a dividend declared but not yet paid would require recomputation of all claims.

(3) UNEXCUSED LATE FILINGS. The liquidator may consider any claim filed late which is not covered by sub. (2), and permit it to receive dividends, other than the first dividend, which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late-filing claimant shall receive, at each distribution, the same percentage of the amount allowed on his claim as is then being paid to other claimants of the same priority plus the same percentage of the amount allowed on his claim as is then being paid to claimants of any lower priority. This shall continue until his claim has been paid in full.

Comment on subs. (2) and (3): These subsections deal with the problems

of late filing. The section sets (subject to minor discretion in the liquidator) the time within which claims must be filed (ss. 645.47 (2) and 645.61 (3)). Subs. (2) and (3) prescribe the treatment for late filers.

The whole liquidation process is faced with the difficulty of striking a balance between a reasonably expeditious settlement—so as not to deny justice by delay—and enough deliberate consideration to give all parties an opportunity to assert and establish their rights. This formulation penalizes late filing, but the penalty is or may be relatively mild. Still the pressure for timely filing is strong. Since there may not be more than one dividend, and the unexcused late filer is excluded from that, there is a powerful sanction against unexcused delay. There is no sound reason for imposing severe penalties on late filers. The procedure provided here will not delay the liquidation, which moves on its measured course, not halting for late filers. It simply picks up those who appear while the liquidation is still in process. Illinois s. 822 (3) permits distribution to late filers when the insurer is solvent.

Under this rule unexcused late filers receive all future dividends except the first dividend, until they are paid in full. Each dividend is calculated on the basis of the total claim. For example, assume that the first dividend involved 100% payment of 1st and 2nd class claims and 50% payment of 3rd class claims pursuant to s. 645.68. Assume a 3rd class claimant then files late, and the claim is allowed for $1,000. The next dividend is 50% on class 3 and 30% on class 4. The late filer will receive 50% of $1,000 and 30% of $1,000, as the result of the 2nd dividend. If the 3rd dividend is 70% of class 4 claims, the late filer will receive the remaining 20% of $1,000, which will now have been paid in full. Each calculation, as expressly provided in the statute, is made on the total amount of the claim, rather than on the balance remaining after any payment.

645.62 PROOF OF CLAIM. (1) CONTENTS OF PROOF OF CLAIM. (a) Proof of claim shall consist of a verified statement that includes all of the following that are applicable:

1. The particulars of the claim, including the consideration given for it.

2. The identity and amount of the security on the claim.

3. The payments made on the debt, if any.

4. That the sum claimed is justly owing and that there is no set-off, counterclaim or defense to the claim.

5. Any right of priority of payment or other specific right asserted by the claimant.

6. A copy of any written instrument which is the foundation of the claim.

7. In the case of any 3rd party claim based on a liability policy issued by the insurer, a conditional release of the insured pursuant to s. 645.64 (1).

8. The name and address of the claimant and the attorney who represents him, if any.

(b) No claim need be considered or allowed if it does not contain all the information under par. (a) which may be applicable. The liquidator may require that a prescribed form be used and may require that other information and documents be included.

Comment on sub. (1): As far as par. (a) 5, this subsection is modeled after California s. 1023. Par. (a) 6 comes from New York s. 544. The remainder is new.

The commissioner is permitted but not required to consider a technically defective claim. In case of inadequate evidence he may choose to reject the claim while considering it when the defect is merely technical.

(2) SUPPLEMENTARY INFORMATION. At any time the liquidator may

request the claimant to present information or evidence supplementary to that required under sub. (1), and may take testimony under oath, require production of affidavits or depositions or otherwise obtain additional information or evidence.

Comment on sub. (2): This power may exist in the absence of statute but its codification serves to clarify the law and inform the liquidator, claimants and insureds as to their powers and duties. If claims are either unliquidated as to amount or uncertain as to liability, the liquidator will need to obtain supplementary information enabling him to determine quantum and liability.

(3) CONCLUSIVENESS OF JUDGMENTS. No judgment or order against an insured or the insurer entered after the filing of a successful petition for liquidation and no judgment or order against an insured or the insurer entered at any time by default or by collusion need be considered as evidence of liability or of quantum of damages. No judgment or order against an insured or the insurer entered within 4 months before the filing of the petition need be considered as evidence of liability or of the quantum of damages.

Comment on sub. (3): When an insurer is in difficulty, there is an unfortunate tendency for it to cease to defend adequately against claims, inflated or otherwise. This may be partly because management is otherwise occupied, and partly because the company's organization is beginning to collapse. It is undesirable to give conclusive effect to judgments obtained without adequate and proper defense, because it is quite unfair to other claimants. Many statutes, notably New York s. 544 (4) and Florida s. 631.291 (3), provide for something of this sort. This subsection is modeled on them, but expands their application.

The last clause is directed against judgments obtained very recently before the liquidation. These are the ones most likely to have been inadequately defended. The 4-month limitation keeps the scope of the provision within reasonable bounds. Of course such lawsuits may have been adequately and even skillfully defended. Moreover, the question could be raised whether a plaintiff should be required to establish his damages all over again simply because the liquidator disagrees with the jury. The arguments run both ways. But liquidation is an unfortunate process in which many people suffer. There is no way to eliminate suffering altogether and the problem is to distribute the hardship equitably. This has been done so far as possible. For a case note illuminating the problem created when judgments are given conclusive effect, see *Commonwealth* ex rel. *Woodside v. Seaboard Mut. Cas. Co.*, 415 Pa. 72, 202 A. 2d 42 (1964), noted in 63 *Michigan Law Review* 1293 (1965).

645.63 Introductory Comment: This section handles the traditionally difficult and mishandled problem of contingent claims, as well as other special problems.

The word "contingent" is often misused in the statutes. A true "contingent" claim is one where the event on which liability would arise has not yet occurred. An illustration is a possible future claim on a fire policy where there has not yet been a fire. See Clark, "Contingent and Immature Claims in Receivership Proceedings," 29 *Yale Law Journal* 481, 482, note 3 (1920). Many states bar all contingent claims. There is little justification for excluding them altogether, though there is reason to give them less favorable treatment, since they are not even claims at the time the rights of the parties are fixed. However, such claims rest on promises made by the insurer or its agents and should rank ahead of ownership claims, if the insurer has a surplus.

Several categories of claims occasionally referred to as contingent deserve even better treatment. First, the claim of a third party who has not reduced his claim against the policyholder to judgment is only technic-

ally and superficially contingent, if contingent at all, and should be treated as if it were an ordinary claim. This technical contingency conceals the underlying reality of present insurer liability. Wisconsin, with its direct action statute, has already recognized that reality for automobile liability insurance. That notion is further implemented in this provision. Second, unliquidated or undetermined claims are often miscalled "contingent" claims in the statutes, and either denied or relegated to an inferior place in the hierarchy of claims. This is unjustified, and perhaps has its historical origin in the misnaming of such claims as contingent. Unliquidated and undetermined claims should be regarded as absolute and unqualified claims.

645.63 SPECIAL CLAIMS. (1) CLAIMS CONTINGENT ON JUDGMENTS. The claim of a third party which is contingent only on his first obtaining a judgment against the insured shall be considered and allowed as if there were no such contingency.

(2) CLAIMS UNDER TERMINATED POLICIES. Any claim that would have become absolute if there had been no termination of coverage under s. 645.43, and which was not covered by insurance acquired to replace the terminated coverage, shall be allowed as if the coverage had remained in effect, unless at least 10 days before the insured event occurred either the claimant had actual notice of the termination or notice was mailed to him as prescribed by s. 645.47 (1) or 645.48 (1). If allowed the claim shall share in distributions under s. 645.68 (8).

(3) OTHER CONTINGENT CLAIMS. A claim may be allowed even if contingent, if it is filed in accordance with s. 645.61 (2). It may be allowed and may participate in all dividends declared after it is filed, to the extent that it does not prejudice the orderly administration of the liquidation.

(4) IMMATURE CLAIMS. Claims that are due except for the passage of time shall be treated as absolute claims are treated, except that where justice requires the court may order them discounted at the legal rate of interest.

(5) CLAIM UNDER SECURITY FUNDS. The state treasurer in his capacity as custodian of the workmen's compensation security funds under s. 102.65 may file a claim with the liquidator for all sums paid or to be paid from those funds.

645.64 Introductory comment: Third party claims raise tortuous and difficult problems, and this section has surely not completely solved them. The goal was to devise a more subtle and discriminating method of handling third party claims than now exists, which would both do greater equity and also encourage quick termination of the liquidation. This section enacts a system that goes a long way in that direction.

This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation. If the insured is judgment proof or of doubtful solvency, the claimant can claim in the liquidation. So long as the choice is made before the deadline for filing, the claimant will participate in the liquidation at the appropriate level of priority. He may wait longer to elect if he wishes, but will then be a late filer. He would still have the possibility of participating, though on a lower priority level. See comment on s. 645.61 (2) and (3).

645.64 SPECIAL PROVISIONS FOR THIRD PARTY CLAIMS. (1) THIRD PARTY'S CLAIM. Whenever any third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file

a claim with the liquidator. The filing of the claim shall release the insured's liability to the third party on that cause of action in the amount of the applicable policy limit, but the liquidator shall also insert in any form used for the filing of third party claims appropriate language to constitute such a release. The release shall be void if the insurance coverage is avoided by the liquidator.

Comment on sub. (1): By putting pressure on the third party to release the insured to the extent of the applicable policy limit if he wishes to make a claim in the proceeding, the liquidation can at least help make the insurance fund do the job of protecting the policyholder. It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. The notion that the election is valid only if there is effective insurance does elementary justice.

(2) INSURED'S CLAIM. Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation or within 60 days after mailing of the notice required by s. 645.47 (1) (b), whichever is later, he is an unexcused late filer.

Comment on sub. (2): It is entirely fair to the third party claimant to compel him to elect whether to share in the liquidation or exercise rights against the insured. This is a burden upon him, but is a reasonable allocation to him of part of the total burden imposed by an insolvency. If he claims in the liquidation, he must release the insured. If he does not claim, but pursues the insured instead, then of course the insured will have to pay any judgment in full if he is not judgment proof. The insured, if he has filed a timely claim, is entitled to payment from the liquidation proceeding the appropriate percentage of the amount allowed on his claim, though the judgment against him will not be conclusive as to the value of his claim in the liquidation. See sub. (3). If the insured turns out to be judgment proof, the third party claimant could still claim in the liquidation, but then would ordinarily be a late filer and would suffer disadvantage as a result. Thus, without actually forcing the third party to elect in a formal sense, these provisions strongly encourage him to make an early decision, and preferably one to come into the liquidation. Ordinarily a third party will stay out of the liquidation only if he has a clearly solvent defendent. If the third party elects to pursue this insured, the liquidator will not ordinarily need to defend the suit, though he has the power to defend, when necessary to protect the estate. That power is given by s. 645.49 (1). The liquidator can and often should allow reasonable attorney's fees as a part of the insured's claim.

(3) PROCEDURE FOR INSURED'S CLAIM. The liquidator shall make his recommendations to the court under s. 645.71 for the allowance of an insured's claim under sub. (2) after consideration of the probable outcome of any pending action against the insured on which the claim is based, the probable damages recoverable in the action and the probable costs and expenses of defense. After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, he shall reconsider the claim on the basis of additional information and amend his recommendations to the court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial determination. The court may amend its allowance as it thinks appropriate. As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like priority, based on the lesser of a) the amount actually recovered from the insured by action

or paid by agreement plus the reasonable costs and expenses of defense, or b) the amount allowed on the claims by the court. After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this subsection shall not be a reason for unreasonable delay of final distribution and discharge of the liquidator.

Comment on sub. (3): The fact that a third party claim often remains unsettled for a long time should not prevent the insured from getting such protection from his policy as others have received from theirs, so long as it does not unreasonably delay the liquidation. Each claim should be evaluated at the latest possible time and a dividend apportioned to it. In such case, however, the amount should not be paid to the insured but withheld for future payment to him, after completion of the litigation and payment of the judgment. If he wins the litigation, the fund would fall back into the unallocated funds of the liquidator except for the allowable defense costs. If it comes back at a time in an amount that would make it uneconomic to distribute it, it will go to the state, as is provided later.

(4) MULTIPLE CLAIMS. If several claims founded upon one policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as in sub. (3). If any insured's claim is subsequently reduced under sub. (3), the amount thus freed shall be apportioned ratably among the claims which have been reduced under this subsection.

645.65 DISPUTED CLAIMS. (1) NOTICE OF REJECTION AND REQUEST FOR HEARING. When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant and his attorney by first class mail at the address shown in the proof of claim. Within 60 days from the mailing of the notice, the claimant may file his objections with the court. If no such filing is made, the claimant may not further object to the determination.

Comment on sub. (1): This subsection describes the procedure by which a dissatisfied claimant may request review. Sixty days is a realistic time limit within which to permit objections to the liquidator's determination. Liquidations are rather deliberate and 60 days is not serious delay. In fact, it may not slow the process down at all if hearings are scheduled promptly.

(2) NOTICE OF HEARING. Whenever objections are filed with the court, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than 10 nor more than 20 days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee.

645.66 CLAIMS OF SURETY. Whenever a creditor whose claim against an insurer is secured in whole or in part by the undertaking of another person fails to prove and file that claim, the other person may do so in the creditor's name, and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name, to the extent that he discharges the undertaking. In the absence of an agreement with the creditor to the contrary, the other person shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid on the claim from the insurer's estate to the creditor equals the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such other person.

Comment: This is based on Federal Bankruptcy Act s. 57i. It has nothing to do with the business of suretyship when done by the insurer, but with cases where another person acts as surety for the insurer as principal debtor. In the insurance business, there may only be occasional transactions of this sort.

645.67 SECURED CREDITORS' CLAIMS. (1) The value of any security held by a secured creditor shall be determined in one of the following ways, as the court directs:

(a) By converting the same into money according to the terms of the agreement pursuant to which the security was delivered to such creditor;

(b) By agreement, arbitration, compromise or litigation between the creditor and the liquidator;

(2) The determination shall be under the supervision and control of the court. The amount so determined shall be credited upon the secured claim, and any deficiency shall be treated as an unsecured claim. If the claimant surrenders his security to the liquidator, the entire claim shall be allowed as if unsecured.

Comment: The section is similar to Federal Bankruptcy Act s. 57h, and has a counterpart in many insurance codes, including New York s. 522 (4). See also Georgia s. 56-1430 (4). Without this special provision for secured claims, a creditor might possibly be able to prove his claim in full, and at the same time obtain the benefits of his security, obtaining full payment on even the unsecured portion of the debt while other unsecured debtors were being forced to settle for fractional payments. For example, assume a creditor holding a $10,000 claim, with security valued at $5,000, and a 50% dividend payable. In the absence of special provision, the creditor might obtain a dividend of $5,000 and also realize $5,000 on the security. This section requires him to realize the $5,000 and then claim for $5,000, receiving a $2,500 dividend.

At least 2 states, Alabama, s. 28.343 and Tennessee, s. 56-1331, do not allow any dividend to secured creditors until unsecured creditors have received a dividend equal to the security. Such provisions deny the advantages sought by security devices. Generally it is thought quite proper in our society for lenders to protect themselves against insolvency of borrowers by taking security; the Alabama and Tennessee provisions qualify that right of self-protection.

Interstate aspects of this problem are treated in s. 645.89 (3).

645.68 Introductory comment: When an insurer must be liquidated, the outcome is often tragic. While many of the losers will merely be inconvenienced, others may suffer losses or delays in receiving payment that will subject them at least to hardship and may even deprive them of the necessities of life. It becomes apparent that claims that are socially more important need to be paid ahead of those that are less important. Recognition of such social equities is commonplace in the law relating to insolvency and bankruptcy.

In an effort to minimize the harm done by liquidation, and especially to lessen it for those persons least able to bear it, much thought and consultation went into the structuring of the priority system. The outcome is the classification that follows. Because of the novelty of certain parts of the system, a full explanation for the placement of each category is provided. The basic nature of the system is explained briefly in the following outline, however, to provide an overview.

The order of distribution is:

(1) *Cost of administration.* Without this, the liquidation could not proceed and no distribution could be made. These costs generally come first in all priority systems.

(2) *Wages, in limited amounts.* This is traditionally a high priority

and seems obviously meritorious in a society where the majority of people are dependent for a livelihood upon regular receipt of wages.

(3) *Loss claims.* This is limited to large claims, the cases where the most hardship will result if full payment is not made reasonably promptly.

(4) *Unearned premium reserve and small loss claims.* If this priority can be reached and these claims paid in full, the enterprise will have carried out the social function of insurance in a reasonably adequate way.

(5) *Residual classification.* This includes ordinary commercial debts and debts owing to governments, such as taxes. It is likely to be small in amount relative to the total of all claims.

(6) *Claims based solely on judgments.* Those judgments that cannot otherwise be avoided for constitutional reasons are postponed to this class to protect other claimants against inflated claims that are not property defended because of the deterioration of the company in its last days. If the claim is meritorious, the judgment creditor can elevate his claim to the priority it would otherwise have by proving it in the liquidation on its merits and not on the basis of the judgment. The judgment may, of course, be a very persuasive fact.

(7) *Interest* on claims paid in the classes of higher priority.

(8) *Miscellaneous subordinated claims.* These are left to the last because of their minimal social importance or because of the necessities of administration. The category includes late claims and claims where the claimant is compensated in other ways, among others.

(9) and (10) *Proprietary claims.* These claims will be paid in full only if the insurer in liquidation is actually solvent, or nearly so. This could happen if a mistake were made originally, in starting the liquidation, or if an insurer is liquidated for reasons other than insolvency because capital is impaired.

This section is designed to establish a complete system of priorities among unsecured creditors, based on the relative social and economic importance of the claims likely to be asserted against an insurer. The system is more intricate than any list of priorities provided elsewhere. It would be possible to simplify the system by having fewer categories. This is what the traditional priority system does, for it generally gives priority only to a few kinds of claims—indeed, the traditional pattern is no system at all. Its crude simplicity does crude injustice and fails to carry out sound public policy by minimizing the damage done to the insured community when an insurer fails. The insurance enterprise should be made to do its proper job in the social organism, so far as that is possible with the limited assets that remain in a liquidation.

645.68 ORDER OF DISTRIBUTION. The order of distribution of claims from the insurer's estate shall be as stated in this section. The first $50 of the amount allowed on each claim in the classes under subs. (2) to (6) shall be deducted from the claim and included in the class under sub. (8). Claims may not be cumulated by assignment to avoid application of the $50 deductible provision. Subject to the $50 deductible provision, every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.

(1) ADMINISTRATION COSTS. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.
Comment on sub. (1): This is freely adapted from the first priority provision in Federal Bankruptcy Act s. 64a. See also s. 645.06, on defense costs, for a special provision for payment of certain litigation expenses.

(2) WAGES. (a) Debts due to employes for services performed, not to exceed $1,000 to each employe which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

Comment on sub. (2) (a): The usual wage priority is $600 (see e.g. Federal Bankruptcy Act s. 64a). It seems unrealistically low. The $1,000 provided here may still be low but is more realistic and equitable. The period covered is extended from the 3 months of the traditional statute to one year. Obviously the $1,000 limit would be reached much earlier than a year, if a full salary for even the lowliest employe were in question. The one year limit will be relevant only in unusual cases. Priority is denied to officers (which term includes directors), on the grounds that they are in a position to protect their own interests, and that those directly involved in what is likely to have been mismanagement leading to liquidation should not be accorded special privileges in a financial debacle of their own making.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employes.

Comment on sub. (2) (b): This is necessary to supersede such provisions as ss. 180.40 (6) and 268.17. For analogous legislation to this paragraph, see Arizona s. 20-637B; Hawaii s. 181-678 (b); Kentucky s. 304.978 (2); North Carolina s. 558-155.27 (b); Washington s. 48.31.280 (2).

(3) LOSS CLAIMS. All claims under policies for losses incurred including third party claims, and all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, except the first $200 of losses otherwise payable to any claimant under this subsection. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. Claims may not be cumulated by assignment to avoid application of the $200 deductible provision. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to his employe shall be treated as a gratuity.

Comment on sub. (3): This class contains the claims central to the social role of insurance. The typical policy is not an ordinary mercantile contract, but one of great public importance. In the usual case, if a policyholder loses a premium, he is not seriously harmed, but if a loss goes unpaid, or even unpaid in substantial measure, great harm is likely to be done. Large claims deserve a higher priority than unearned premiums, and this system has so provided.

Small loss claims are subordinated to large claims and put on a par with unearned premiums, in order to increase the likelihood of full payment of disaster-type claims. This is the point of the $200 deduction. In the usual case, a small loss may be absorbed by the claimant without serious hardship, and therefore does not deserve or need priority above unearned premiums. The larger the claim the more likely it is that substantial payment to the claimant is urgently needed.

The investment element of life insurance and annuity contracts is here treated as a loss claim. Life insurance and annuity policies present a complex array of investment and insurance mixtures which would often be difficult to classify as either loss claims or claims for investment values. Furthermore, the economic function and social importance of these investment values closely parallel those of loss claims in general. To avoid administrative difficulty and to give proper recognition to the social values in question, all claims under life and annuity policies are placed in this priority and are given loss claim status.

The 2nd group of claims against the insurer, for "liability for bodily injury or for injury to or destruction of tangible property which are not under policies," avoids the anomaly of giving insured liability claimants a high priority while subordinating other identically situated claimants who are unprotected by the benefits of liability insurance. This might happen, for example, if the insurer were self-insured (or *not* insured) for its own public liability. The words "bodily injury" rather than "personal injury" are used in the definition of this group to elminate from this priority uninsured claims for libel, slander, invasion of privacy, false imprisonment, etc., which are less likely to generate actual out-of-pocket economic losses. The words "injury to or destruction of tangible property" are used in order to eliminate from this priority uninsured claims for intangible property losses (e.g. invasion of copyright) which are also less likely to generate out-of-pocket economic losses. These excluded claims would fall into the residual classification in sub. (5).

Under prior practice, it was possible for a claimant to be compensated legitimately more than once for certain kinds of losses. Because of their lesser social importance, this section subordinates any portion of a claim, the payment of which would result in double compensation.

(4) UNEARNED PREMIUMS AND SMALL LOSS CLAIMS. Claims under non-assessable policies for unearned premiums or other premium refunds and the first $200 of loss excepted by the deductible provision in sub. (3).

Comment on sub. (4): Unearned premium claimants are placed in line after loss claimants, to help ensure the continuity of insurance protection, and the performance of insurer functions. The holders of assessable policies are not granted any such priority since traditionally their payments are regarded as partially in the nature of capital contributions. With unearned premiums is included the "deductible" portion of loss claims from sub. (3).

(5) RESIDUAL CLASSIFICATION. All other claims including claims of the federal or any state or local government, not falling within other classes under this section. Claims, including those of any governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under sub. (8).

Comment on sub. (5): This is the residual classification, and includes a great variety of claims, though in aggregate amount, it will usually be unimportant. This priority and all below it are of relatively lesser social importance. They are just debts, having no significant relationship to the important role insurance plays in our society.

The last 2 sentences are similar to Federal Bankruptcy Act s. 57j. It is sound policy to disallow or subordinate such claims. The Bankruptcy Act provision does for governmental claims what general contract law does for similar claims of private parties. See MacLachlan, *Bankruptcy* 140 (1956). Here, as a precaution, the rule is made clearly applicable to private penalties and forfeitures as well. Whether the claims of the federal government can be placed this far down on the priority list depends on the following analysis justifying subordination of other governmental claims to this class.

In this residual classification fall most of the claims by government that are traditionally given a high priority. There is no justification for giving a high priority to the sovereign because it is sovereign. On the merits, indeed, there seems an unanswerable case for declining to prefer government claims, including claims on taxes, and giving priority to claims of greater social importance, such as the unearned premium reserve and, *a fortiori,* loss claims. The sovereign, and in particular the United States,

will be able to survive without hardship even if relegated to the priority accorded ordinary creditors. Of course, governments as insureds stand on a different footing.

An insurer in liquidation is failing to perform its social role and is casting heavy burdens on segments of society that cannot afford to bear them. In such a case, the modest contribution made to the handling of a difficult situation by the government, if its taxes are subordinated, may have social utility vastly in excess of its costs to the public. Moreover, by undertaking to regulate insurance, government should be regarded as assuming at least to this limited extent an obligation of underwriting solvency. This is as true of the federal government as of the states, for the federal government has delegated the field to the states on the theory that the states can do it better. When they fail to do it at all, such government can not then fairly depend on sovereign powers to get a preference over other creditors. Instead they should take a subordinate position in the priority hierarchy.

A problem is created by the Federal Insolvency Act, 31 U.S.C. s. 191, which provides in part: "Whenever any person indebted to the United States is insolvent...the debts due to the United States shall be first satisfied..." If in a case that Act were held to override a priority system for insurance liquidation that subordinates government claims, it would then be possible and desirable to seek Congressional amendment of that act.

There is considerable reason to think that the Federal Act would not override this priority system. There are 2 alternative and independent arguments, either of which is enough, if successful, to subordinate the federal government claim.

The first is based on restrictive interpretations of the section by the United States Supreme Court that may prevent its application to insurance. This argument is simple. The Federal Insolvency Act has been held by the United States Supreme Court to apply, despite its broad language, in only 4 cases: the decedent's estate, voluntary assignment for benefit of creditors, attachment of the estate of an absent debtor, and the commission of an act of bankruptcy. Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 *Yale Law Journal* 905, 906, n. 6 (1954). None of these 4 cases seem to comprehend an insurance liquidation. Moreover, it applies only on insolvency of the insurer, which may not have been shown. *United States v. Oklahoma*, 261 U.S. 253 (1923). See comment on s. 645.42 (4).

The 2nd argument is based on Public Law 15, s. 2 (b), which provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance..." This precludes application of 31 U.S.C. s. 191, which does not specifically relate to the business of insurance and therefore can not "invalidate, impair, or supersede" any state law regulating insurance. The priority system created by this section is a state law regulating insurance for it is part of a complex statute all of which regulates insurance. In fact, Congress exempted insurance companies from the operation of the Federal Bankruptcy Act in recognition of the fact that they are subject to a complete system of state regulation, which extends to the rules governing insolvency. A federal court *(In Re Supreme Lodge of the Masons Annuity,* 285 Fed. 180 (N.D. Ga. 1923)) in discussing the bankruptcy exemption of insurance, notes that:

"No reasons for making these exceptions were assigned by the committees of Congress, but they may be surmised to lie in the public or quasi-public nature of the business, involving other interests than those of creditors, in the desirability of unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of bankruptcy machinery to their affairs."

The rationale of the bankruptcy exemption, as stated by the federal court, is affirmed in s. 645.01 (4) (f). That paragraph indicates that the purposes of this chapter include "Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business." The statement of purpose is not a mere assertion, for it is clear that insurance regulation in general, and this chapter in particular, including the section on priorities, is part and parcel of the regulatory structure, and has a real impact on the ongoing insurance operation. It follows, therefore, that the Federal Insolvency Act cannot "invalidate, impair, or supersede" the priority system of this section.

It is true that *Langdeau v. United States*, 363 S.W. 2d 327 (Tex. Civ. App. 1962), which on its facts is on all fours with the situation contemplated in this subsection, holds that the state may not subordinate federal tax claims even to wage claims. The case is thus a clear—but not high—authority. At best it would be only persuasive authority, but it is not in the least persuasive. The court seems to rest its position on 2 points, neither of which is clearly articulated or persuasively put. First, the court seems to rely heavily on *United States v. Emory*, 314 U.S. 423 (1941) as making clear that 31 U.S.C. s. 191 applies to the case and establishes the federal tax priority. But unfortunately for that argument, the *Emory* case was not an insurance case and it was one in which an act of bankruptcy had been committed, thus bringing it within one of the classes of cases to which s. 191 has been held to apply. The court's 2nd point was that the Texas statute subordinating the federal tax was not a regulatory statute, but merely a priority established for creditors. The Texas court seems simply wrong on this point. *A fortiori* it would be wrong under this subsection, which is designed to have a regulatory impact. This chapter as a whole, and even this single subsection, is an integral part of the regulatory pattern. In fact, the supervision of the ailing insurance enterprise is not only regulation, but regulation of the greatest intensity. The obvious regulatory impact of this chapter is not limited to sick and dying insurers, either, but influences the entire operation of the industry.

For example, it seems very clear that the preference of loss claims to unearned premium claims will have a bearing on the way the business is conducted, and particularly on the way premiums are financed. Premium financing agencies would avoid financing premiums for shaky companies, thus changing their operating patterns. This is important and fruitful regulation. Every part of the priorities section has regulatory impact, and is designed to make the insurance institution work better. This priorities section thus gives the liquidator the statutory basis for contesting the federal priority. If despite the case outlined here, the U.S. Supreme Court decided otherwise, the federal statute should then be amended if possible. But there is little point in proposing amendment until its meaning as applied to this situation is tested in an authoritative tribunal. Designing the subsection as it is designed is in effect inviting a test case the first time enough money is involved to justify it.

This comment does not purport to be a brief for the test case, if one develops. But the chances of achieving the goal are excellent and it should be tried. Acquiescence in an unfair federal priority in liquidation cases would be anticipatory capitulation. Acquiescence by the federal government in this reasonable state priority system is possible, though perhaps not to be relied upon; it would eliminate the need for a test case.

(6) JUDGMENTS. Claims based solely on judgments. If a claimant files a claim and bases it both on the judgment and on the underlying facts, the claim shall be considered by the liquidator who shall give the judgment such weight as he deems appropriate. The claim as allowed shall receive the priority it would receive in the absence of the judgment. If the judgment is larger than the allowance on the underlying claim, the remaining

portion of the judgment shall be treated as if it were a claim based solely on a judgment.

Comment on sub. (6): Whether or not recent judgments can be rendered invalid under other provisions of this chapter, they should always be suspect because of the likelihood of inadequate defense in the last days of the insurer. This priority is an effort to provide additional protection to the estate of the insurer against unwarranted depletion by such inadequately defended suits. Such judgments are questionable enough that they should not be given parity of treatment with better proved claims. If the claimant proves his claim in the statutory way he gets his normal priority.

(7) INTEREST ON CLAIMS ALREADY PAID. Interest at the legal rate compounded annually on all claims in the classes under subs. (1) to (6) from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared. The liquidator, with the approval of the court, may make reasonable classifications of claims for purposes of computing interest, may make approximate computations and may ignore certain classifications and time periods as de minimis.

Comment on sub. (7): Interest might well receive the priority given the underlying claim. Practical considerations urge postponement. At some point, however, interest should be allowed before paying the remaining funds to ownership claimants. Interest should also rank ahead of the very low priority claims that fall in the next class. Interest does present special problems unless the liquidator is using automated equipment. These problems necessitate separate treatment. Moreover, the liquidator has wide discretion, controlled by the court, to pay or ignore interest, or to estimate it.

(8) MISCELLANEOUS SUBORDINATED CLAIMS. The remaining claims or portions of claims not already paid, with interest as in sub. (7):

(a) The first $50 of each claim in the classes under subs. (2) to (6) subordinated under this section;

(b) Claims under s. 645.63 (2);

(c) Claims subordinated by s. 645.90;

(d) Claims filed late;

(e) Portions of claims subordinated under sub. (5); and

(f) Claims or portions of claims payment of which is provided by other benefits or advantages recovered or recoverable by the claimant.

Comment on sub. (8): It will be a rare liquidation that will pay anything to the last few priorities, but only claims of little merit have been relegated to this class. Still they should rank above ownership claims.

(9) PREFERRED OWNERSHIP CLAIMS. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with s. 201.13. Interest at the legal rate shall be added to each claim, as in subs. (7) and (8).

Comment on sub. (9): These claims are quasi-ownership claims, and rank close to the bottom by their own terms.

(10) PROPRIETARY CLAIMS. The claims of shareholders or other owners.

645.71 Introductory comment: This section prescribes a procedure to assure proper court records and the submission of lists of recommended claims to the court. Special treatment is accorded to claimants of investment values under life and annuity contracts, and to unearned premium claimants, since the insurer's records should make their submission of claims unnecessary.

The former Wisconsin insurance liquidation law, s. 200.08, prescribed no appropriate procedures. Especially in view of the fact that liquidation is not frequent enough to generate detailed case law, it is useful to spell out

basic procedures in the statute rather than rely on sketchy and inadequate tradition.

645.71 LIQUIDATOR'S RECOMMENDATIONS TO THE COURT. (1) RECOMMENDED CLAIMS. The liquidator shall review all claims duly filed in the liquidation and shall make such further investigation as he deems necessary. He may compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court. Unresolved disputes shall be determined under s. 645.65. As often as practicable, he shall present to the court reports of claims against the insurer with his recommendations. The reports shall include the name and address of each claimant, the particulars of the claim and the amount of the claim finally recommended, if any. As soon as reasonably possible after the last day for filing claims, he shall present a list of all claims not already reported. If the insurer has issued annuities or life insurance policies, the liquidator shall report the persons to whom, according to the records of the insurer, amounts are owed as cash surrender values or other investment values and the amounts owed. If the insurer has issued policies on the advance premium plan, the liquidator shall report the persons to whom, according to the records of the insurer, unearned premiums are owed and the amounts owed.

(2) ALLOWANCE OF CLAIMS. The court may approve, disapprove or modify any report on claims by the liquidator, except that the liquidator's agreements with other parties shall be final and binding on the court on claims settled for $500 or less. No claim under a policy of insurance shall be allowed for an amount in excess of the applicable policy limits.

Comment on sub. (2): Giving the liquidator final authority up to $500 follows New York s. 539. It seems a reasonable way to simplify and expedite the proceedings. The 2nd sentence should preclude any dispute over the question whether a claimant may prove his claim and have it allowed at its full value, and then collect his prorata share of the assets up to the policy limits. The contention is unmeritorious but has been made in some liquidations and there is justification for removing all doubt.

645.72 DISTRIBUTION OF ASSETS. (1) PAYMENTS TO CREDITORS. Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims. Distribution of assets in kind may be made at valuations set by agreement between the liquidator and the creditor and approved by the court.

Comment on sub. (1): This is based on Texas s. 21.28 (8a), but is more complete. The last sentence is adapted from New York s. 539.

(2) EXCESS ASSETS. (a) Upon liquidation of a domestic mutual insurance company, any assets held in excess of its liabilities and the amounts which may be paid to its members as provided under par. (b) shall be paid into the state treasury to the credit of the common school fund.

(b) The maximum amount payable upon liquidation to any member for and on account of his membership in a domestic mutual insurance company, in addition to the insurance benefits promised in the policy, shall be the total of all premium payments made by the member with interest at the legal rate compounded annually.

Comment on sub. (2): This is based on former s. 201.13 (1) and (2) and is intended to have the same effect.

645.73 UNCLAIMED AND WITHHELD FUNDS. (1) UNCLAIMED FUNDS. All unclaimed funds subject to distribution remaining in the liquidator's hands when he is ready to apply to the court for discharge, including the amount distributable to any creditor, shareholder, member or

other person who is unknown or cannot be found or who is under disability with no person legally competent to receive his distributive share, shall be deposited with the state treasurer, and shall be paid over without interest except in accordance with s. 645.68 to the person entitled thereto or his legal representative upon proof satisfactory to the state treasurer of his right thereto. Any amount on deposit not claimed within 6 years from the discharge of the liquidator is deemed abandoned and shall become the property of the state. The state treasurer shall at the end of each fiscal year transfer these amounts to the common school fund.

Comment on sub. (1): This subsection is similar to Wisconsin corporation and banking law. See ss. 180.785 and 220.08 (14a). It is also similar to Texas s. 21.28 (8) (e-h).

(2) WITHHELD FUNDS. All funds withheld under s. 645.64 and not distributed shall upon discharge of the liquidator be deposited with the state treasurer and paid by him in accordance with s. 645.64. Any sums remaining which under s. 645.64 would revert to the undistributed assets of the insurer shall be transferred to the state treasurer and become the property of the state under sub. (1), unless the commissioner petitions the court to reopen the liquidation under s. 645.75.

Comment on sub. (2): This provision is necessitated by s. 645.64.

645.74 TERMINATION OF PROCEEDINGS. (1) LIQUIDATOR'S APPLICATION. When all assets justifying the expense of collection and distribution have been collected and distributed under this chapter, the liquidator shall apply to the court for discharge. The court may grant the discharge and make any other orders deemed appropriate, including an order to transfer to the state treasury for the common school fund any remaining funds that are uneconomic to distribute.

(2) APPLICATION BY OTHERS. Any other person may apply to the court at any time for an order under sub. (1). If the application is denied, the applicant shall pay the costs and expenses of the liquidator in resisting the application, including a reasonable attorney's fee.

Comment on sub. (2): This provision is designed to deter ill-considered applications. But it is useful for someone other than the liquidator to be able to stop a pointless liquidation proceeding.

645.75 REOPENING LIQUIDATION. After the liquidation proceeding has been terminated and the liquidator discharged, the commissioner or other interested party may at any time petition the court to reopen the proceedings for good cause, including the discovery of additional assets. If the court is satisfied that there is justification for reopening, it shall so order.

645.76 DISPOSITION OF RECORDS DURING AND AFTER TERMINATION OF LIQUIDATION. Whenever it appears to the commissioner that the records of any insurer in process of liquidation or completely liquidated are no longer useful, he may recommend to the court what records should be retained for future reference and what should be disposed of. The court shall enter an order thereon. The commissioner shall immediately submit to the state historical society a copy of the court order, and on written application of the historical society, within 3 months after receipt from the commissioner of the copy of the court order, the commissioner shall deliver to the society such records which are to be disposed of as the society deems of historical significance and shall destroy the remainder, whether or not the records have been photographed or otherwise reproduced. Until further order of the court, the commissioner shall keep all records the court orders preserved.

Comment: This was adapted from s. 220.08 (17). The procedure followed for this purpose needs to be simple and convenient both to the commissioner and the state historical society. New methods of copying may make

it practicable to preserve records that formerly would have had to be destroyed. Changing fashions and interests in historical research urge keeping as much as can practicably be kept, but the decision should be made by a professional organization, the historical society.

645.77 EXTERNAL AUDIT OF RECEIVER'S BOOKS. The court in which the proceeding is pending may, as it deems desirable, cause audits to be made of the books of the commissioner relating to any receivership established under this chapter, and a report of each audit shall be filed with the commissioner and with the court. The books, records and other documents of the receivership shall be made available to the auditor at any time without notice. The expense of each audit shall be considered a cost of administration of the receivership.

Comment: This section provides for an external audit and control over the activities of the commissioner as receiver. The idea is that insurance companies are regulated and watched by the commissioner, but that when he "becomes" the insurance company, there is no longer anyone with supervisory powers over the company. Sound business and governmental practice require some better check. California s. 1061 provides for audit of the commissioner's books (in his capacity as liquidator) at least once every 2 years or more often if the commissioner requests it. Since the commissioner may be dealing with very large sums of money with a jerry-built organization, it is advantageous for him to have such a check for his own protection.

SUBCHAPTER IV.
INTERSTATE RELATIONS.

General comment: The interstate problems of liquidation are the most difficult problems of all to solve, because much of the relevant law cannot be changed by the statutes of a single state. Some of it is in the control of Congress rather than of the state legislatures, some is imbedded in the Constitution of the United States, and some is in the control of other states in which property is to be found.

The Uniform Insurers Liquidation Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1939, was an effort to solve some of the interstate problems of liquidation by providing for reciprocity among the adopting states in the handling of receiverships. Unfortunately it created some new problems in the process. It is not a complete system, as has often been erroneously assumed. In fact, it is not a system at all. It is difficult to integrate with a state system, because it has tried to settle certain matters that could properly have been left for individual state determination, while it has not set up a more complete system of rehabilitation and liquidation. The Uniform Act might have restricted itself to facilitating a single uniform proceeding for an insurer in rehabilitation or liquidation, prescribing no more than necessary about the content of the state procedure, or might have set up a complete system. It did neither.

In order to be able to claim the benefits of the Uniform Act, certain features need to be adopted. They are listed in the Commissioner's Prefatory Note to the Act:

"1. In some states the statutes provide that the Insurance Commissioner shall serve as receiver; in others, the courts appoint receivers as their discretion dictates. In the latter states experience has shown that efficient administration is less likely to ensue.

"2. Very frequently the domiciliary receivers, whether or not deemed statutory successors to the defunct companies, have but little authority in nondomicilary states, and in some states they receive no recognition whatsoever. As a consequence, company assets located outside the home states are likely to be dissipated, and, unless ancillary proceedings are started,

debtors living in such states are all too frequently able to avoid meeting their just obligations.

"3. There is much confusion in the law concerning the title and right to possession of the property of a defunct nonresident insurance company. In some states the title and the right to possession are recognized as reposing in the domiciliary receiver; in others, they are in the ancillary receiver. The absence of clear definition of the law as to these matters hampers effective administration.

"4. Serious inconvenience in making proof of claims is experienced by creditors who are so unfortunate as to live outside the state of the defunct insurer's domicile. It frequently happens that ancillary receivership proceedings are not commenced, or, if commenced, the property in the hands of the ancillary receiver is insufficient to meet the obligations of local creditors. As a consequence, such creditors are forced to bear the expense, annoyance, and hardship of proceeding in the courts of the domicile of the insurance company to prove their claims. Statutory provisions which would make possible the proof of claims in the states of creditors' residence would be a great boon.

"5. Another difficulty arises from the diversity of state laws concerning preferences, such as wage claims, compensation claims, tax claims and the like. Administration would be simplified and greater equity would be obtained if the laws of a single state, preferably the state of domicile of the insurance company, were made to govern all such preferences.

"6. Finally, inequity often results from the fact that creditors in nondomiciliary states may, if they are sufficiently well informed and diligent, obtain preferences for themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. Such proceedings can easily be commenced by properly informed creditors before ancillary proceedings are started, and as a result other less well-informed creditors suffer accordingly. There is no just reason for permitting such preferences to prevail.

"All of the foregoing difficulties may easily be eliminated if the several states will adopt a properly formulated uniform act containing appropriate reciprocal provisions. The Uniform Insurers Liquidation Act is designed to accomplish this end."

Despite some disadvantages resulting from adoption of the Uniform Act, the gains seem worth the costs. It was enacted in Wisconsin by Chapter 426, Laws of 1965, and became ss. 616.01 to 616.13, now repealed by this chapter. This chapter has incorporated the Uniform Act, with some changes. It is still proper to say that Wisconsin has the Uniform Act, in substance and effect, and that Wisconsin is, therefore, a reciprocal state, entitled to the resulting benefits. The definition of "reciprocal state" in s. 645.03 (9) in effect defines the Uniform Act for the purpose of reciprocity. The sections referred to in that definition contain the crucial portions of the Uniform Act.

Only about half the states have enacted the Uniform Act. Since the main objective of the law is to do justice in administering particular liquidations and not to score points in interstate conflicts, it is appropriate to extend the benefits of reciprocity, at least in some respects, to nonreciprocal states. Examples are ss. 645.83 (2), 645.85 and 645.88. There are occasional instances, however, where leverage should be exerted to encourage other states to enact the Uniform Act. This can be done by denying benefits unless there is reciprocity. An example is s. 645.86 (1).

645.81 Introductory comment: This section is not part of the Uniform Insurers Liquidation Act. It can be used to preserve and protect the property of a nondomestic insurer, pending rehabilitation or liquidation in the insurer's domicile or elsewhere. It does not spell out the procedure in detail. It will be infrequently used and should be easy enough to adapt from the corresponding sections for rehabilitation of domestic companies.

The court will not need explicit instructions to make suitable adaptation but will be able to do it more easily if it has substantial freedom.

645.81 CONSERVATION OF PROPERTY OF FOREIGN OR ALIEN INSURERS FOUND IN THIS STATE. (1) GROUNDS FOR PETITION. If a domiciliary liquidator has not been appointed, the commissioner may apply to the circuit court for Dane county by verified petition for an order directing him to conserve the property of an alien insurer not domiciled in this state or a foreign insurer on any one or more of the following grounds:

(a) Any of the grounds in s. 645.31;

(b) Any of the grounds in s. 645.41;

(c) That any of its property has been sequestered by official action in its domiciliary state, or in any other state;

(d) That enough of its property has been sequestered in a foreign country to give reasonable cause to fear that the insurer is or may become insolvent;

(e) That 1) its certificate of authority to do business in this state has been revoked or that none was ever issued, and 2) there are residents of this state with outstanding claims or outstanding policies.

Comment on sub. (1): If a domiciliary liquidator has been appointed, s. 645.84 is applicable. The standards of par. (c) and par. (d) are quite different. Official seizure of property in another American state is given credence as an indication that all is not well with the company and that preventive action is justified; official seizure by another country may indicate the same thing or it may result from political instability or from expropriation. Hence alien sequestration only triggers action in this state if it endangers solvency, or if independent grounds appear. A corresponding ground for a domiciliary insurer is s. 645.31 (9).

(2) TERMS OF ORDER. The court may issue the order in whatever terms it deems appropriate. The filing or recording of the order with any register of deeds in this state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

Comment on sub. (2): The order should be worked out to apply the principles developed for rehabilitation earlier in this chapter, to the extent that they can serve as a guide to the court. The recording provision is adapted from former s. 616.02 (2).

(3) TRANSFORMATION TO LIQUIDATION OR ANCILLARY RECEIVERSHIP. The conservator may at any time petition for and the court may grant an order under s. 645.82 to liquidate the assets of a foreign or alien insurer under conservation or, if appropriate, for an order under s. 645.84 to be appointed ancillary receiver.

(4) ORDER TO RETURN TO COMPANY. The conservator may at any time petition the court for an order terminating conservation of an insurer. If the court finds that the conservation is no longer necessary, it shall order that the insurer be restored to possession of its property and the control of its business. The court may also make such finding and issue such order at any time upon its own motion.

Comment on subs. (3) and (4): These provisions are like s. 645.35 (1) and (2) and perform the same function.

645.82 Introductory comment: This section authorizes the commissioner to liquidate local assets of nondomestic insurers, when the domiciliary jurisdiction has failed to meet its responsibilities by instituting liquidation proceedings. Under this section he is not acting as receiver in a purely ancillary capacity but is a principal receiver for the assets located in this state. It is like the ancillary receivership in dealing only with the assets located here, but unlike the ancillary receivership in being independent of

any other receivership. The federal receivership under sub. (4) has even wider-ranging application.

645.82 LIQUDATION OF PROPERTY OF FOREIGN OR ALIEN INSURERS FOUND IN THIS STATE. (1) GROUNDS FOR PETITION. If no domiciliary receiver has been appointed, the commissioner may apply to the circuit court for Dane county by verified petition for an order directing him to liquidate the assets found in this state of a foreign insurer or an alien insurer not domiciled in this state, on any of the following grounds:

(a) Any of the grounds in s. 645.31.
(b) Any of the grounds in s. 645.41.
(c) Any of the grounds in s. 645.81.

Comment on sub. (1): If a domiciliary receiver has been appointed, application should be made under s. 645.84 rather than under this section.

(2) TERMS OF ORDER. If it appears to the court that the best interests of creditors, policyholders and the public so require, the court may issue an order to liquidate in whatever terms it deems appropriate. The filing or recording of the order with any register of deeds in this state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

Comment on sub. (2): The order should be worked out to apply the principles developed in the liquidation proceedings earlier in this chapter, to the extent that they can serve as a guide to the court. Wide discretion will enable the court to do better justice than undue restriction, in view of the possible variety of circumstances under which this section may be used.

(3) CONVERSION TO ANCILLARY PROCEEDING. If a domiciliary liquidator is appointed in a reciprocal state while a liquidation is proceeding under this section, the liquidator under this section shall thereafter act as ancillary receiver under s. 645.84. If a domiciliary liquidator is appointed in a nonreciprocal state while a liquidation is proceeding under this section, the liquidator under this section may petition the court for permission to act as ancillary receiver under s. 645.84.

(4) FEDERAL RECEIVERSHIP. On the same grounds as are specified in sub. (1), the commissioner may petition any appropriate federal district court to be appointed receiver to liquidate that portion of the insurer's assets and business over which the court will exercise jurisdiction, or any lesser part thereof that the commissioner deems desirable for the protection of the policyholders and creditors in this state. The commissioner may accept appointment as federal receiver if another person files a petition.

Comment on sub. (4): This authorizes the commissioner to act as the principal receiver in a federal receivership of an insurer domiciled elsewhere. It is no doubt true that for him to take such action may strain his relationship with the domiciliary commissioner, and it should not be undertaken lightly. However, full protection of local policyholders may require action when a domiciliary commissioner is reluctant to act for any of a variety of reasons. This chapter provides the commissioner with the necessary tools to deal with such problems, when inaction might breed disaster.

See also s. 645.45 on federal receivership for a domestic company. Neither provision proposes any federal legislation, but only the use in this state of *existing* federal machinery where it is appropriate.

645.83 FOREIGN DOMICILARY RECEIVERS IN OTHER STATES. (1) PROPERTY RIGHTS AND TITLE: RECIPROCAL STATE. The domiciliary liquidator of an insurer domiciled in a reciprocal state shall be vested by operation of law with the title to all the property, contracts and rights of action, and all of the books, accounts and other records of the insurer located in

this state. The date of vesting shall be the date of the filing of the petition, if that date is specified by the domiciliary law for the vesting of property in the domiciliary state; otherwise, the date of vesting shall be the date of entry of the order directing possession to be taken. The domiciliary liquidator shall have the immediate right to recover balances due from agents and to obtain possession of the books, accounts and other records of the insurer located in this state. He also shall have the right to recover the other assets of the insurer located in this state, subject to s. 645.84 (2).

Comment on sub. (1): This is adapted from that part of the Uniform Insurers Liquidation Act which was s. 616.03 (2). Title is transferred as of the date of filing of the petition if that is the vesting date used by the reciprocal state, otherwise as of the date of entry of the order. Thus this state transfers title as early as the other state does, whether it follows the former act or this chapter. Unlike the former law, this rule on title vesting does not apply to rehabilitation, for reasons stated in the comment on s. 645.32 (1).

(2) PROPERTY RIGHTS AND TITLE: STATE NOT A RECIPROCAL STATE. If a domiciliary liquidator is appointed for an insurer not domiciled in a reciprocal state, the commissioner of this state shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books, accounts and other records of the insurer located in this state, at the same time that the domiciliary liquidator is vested with title in the domicile. The commissioner of this state may petition for a conservation or liquidation order under s. 645.81 or 645.82, or for an ancillary receivership under s. 645.84, or after approval by the circuit court for Dane county may transfer title to the domiciliary liquidator, as the interests of justice and the equitable distribution of the assets require.

Comment on sub. (2): If a state not a reciprocal state institutes a receivership, more flexibility is required. Sometimes co-operation and reciprocity will rule, sometimes each commissioner must protect the interests of citizens of his own state. An interesting illustration of partial reciprocity exists between New York, which has adopted the Uniform Insurers Liquidation Act, and Pennsylvania, which has not. See *Kelly v. Overseas Investors, Inc.*, 264 N.Y.S. 2d 586 (1965); 18 N.Y. 2d 622, 219 N.E. 2d 288 (1966). The Appellate Division opinion in the New York Supplement is the important one.

(3) FILING CLAIMS. Claimants residing in this state may file claims with the liquidator or ancillary receiver, if any, in this state or with the domiciliary liquidator, if the domiciliary law permits. The claims must be filed on or before the last date fixed for the filing of claims in the domiciliary liquidation proceedings.

Comment on sub. (3): This is adapted from former s. 616.05 (1).

645.84 ANCILLARY FORMAL PROCEEDINGS. (1) APPOINTMENT OF ANCILLARY RECEIVER IN THIS STATE. If a domiciliary liquidator has been appointed for an insurer not domiciled in this state, the commissioner shall file a petition with the circuit court for Dane county requesting appointment as ancillary receiver in this state:

(a) If he finds that there are sufficient assets of the insurer located in this state to justify the appointment of an ancillary receiver;

(b) If 10 or more persons resident in this state having claims against the insurer file a petition with the commissioner requesting appointment of an ancillary receiver; or

(c) If the protection of creditors or policyholders in this state so requires.

Comment on sub. (1): This is part of the Uniform Insurers Liquidation Act, modified as necessary. It was s. 616.03 (1).

(2) TERMS OF ORDER. The court may issue an order appointing an ancillary receiver in whatever terms it deems appropriate. The filing or recording of the order with any register of deeds in this state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

Comment on sub. (2): The court should adapt to the peculiar circumstances of the particular ancillary receivership the provisions developed at more length for liquidation of a domiciled insurer. Flexibility in this provision is important. Cf. the comment on s. 645.82 (2), which is parallel to this one. The recording provision is adapted from former s. 616.02 (2).

(3) PROPERTY RIGHTS AND TITLE: ANCILLARY RECEIVERS IN THIS STATE. When a domiciliary liquidator has been appointed in a reciprocal state, the ancillary receiver appointed in this state under sub. (1) shall have the sole right to recover all the assets of the insurer in this state not already recovered by the domiciliary liquidator, except that the domiciliary liquidator shall be entitled to and have the sole right to recover balances due from agents and the books, accounts and other records of the insurer. The ancillary receiver shall have the right to recover balances due from agents and books, accounts and other records of the insurer, if such action is necessary to protect the assets because of inaction by the domiciliary liquidator. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. He shall promptly transfer all remaining assets to the domiciliary liquidator. Subject to this section, the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of assets as a liquidator of an insurer domiciled in this state.

Comment on sub. (3): This is part of former s. 616.03 (2), with minor changes. The second sentence was added to provide additional protection to the assets in cases where the domiciliary receiver is ineffective. This is not an effort to control the domiciliary receiver but to permit effective action to preserve assets that might otherwise disappear.

(4) PROPERTY RIGHTS AND TITLE: FOREIGN ANCILLARY RECEIVERS. When a domiciliary liquidator has been appointed in this state, ancillary receivers appointed in reciprocal states shall have, as to assets and books, accounts and other records located in their respective states, corresponding rights and powers to those prescribed in sub. (3) for ancillary receivers appointed in this state.

Comment on sub. (4): This was part of s. 616.02 (1) and (2). The basic sentences of those subsections, which were part of the Uniform Insurers Liquidation Act, are to be found in ss. 645.32 (1) and 645.42 (1). This provision contains what is left—the provision for foreign ancillary receivers. It is limited, however, to cases of *liquidation.* For the reasons, see the comment on s. 645.32 (1).

645.85 ANCILLARY SUMMARY PROCEEDINGS. The commissioner in his sole discretion may insitute proceedings under ss. 645.21 to 645.23 at the request of the commissioner or other appropriate official of the domiciliary state of any foreign or alien insurer having property located in this state.

Comment: This section is intended to aid foreign and alien delinquency proceedings in the same way that ss. 645.21 to 645.23 would aid domestic proceedings, by summary action preliminary or supplementary to formal action. This aid could be made conditional upon formal reciprocity, but the demands of justice should not be subordinated to a petty bargaining process; the Wisconsin courts and administrative agencies should help do

justice in problem cases even if foreign states act less generously. The discretion of the commissioner can prevent abuse of the privilege.

645.86 CLAIMS OF NONRESIDENTS AGAINST INSURERS DOMICILED IN THIS STATE. (1) FILING CLAIMS. In a liquidation proceeding begun in this state against an insurer domiciled in this state, claimants residing in foreign countries or in states not reciprocal states must file claims in this state, and claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary liquidator. Claims must be filed on or before the last dates fixed for the filing of claims in the domiciliary liquidation proceeding.

(2) PROVING CLAIMS. Claims belonging to claimants residing in reciprocal states may be proved either in the liquidation proceeding in this state as provided in this chapter, or in ancillary proceedings, if any, in the reciprocal states. If notice of the claim and opportunity to appear and be heard is afforded the domiciliary liquidator of this state as provided in s. 645.87 with respect to ancillary proceedings in this state, the final allowance of claims by the courts in ancillary proceedings in reciprocal states shall be conclusive as to amount and as to priority against special deposits or other security located in the ancillary states, but shall not be conclusive with respect to priorities against general assets under s. 645.68.

Comment: In substance and effect this is the former s. 616.04. A clause is added in sub. (1), to take care of nonreciprocal states, and "date" has been changed to "dates".

Proof of a claim in ancillary proceedings elsewhere presents a problem if the section is interpreted to permit the ancillary proceedings to delay the early termination of the domiciliary liquidation, which is one of the objectives of this chapter. But the domiciliary receiver can call the shots on timing, so far as assets under his control are concerned, distributing them when he is ready.

The section does not give the ancillary state any power of decision as to the order of priority in which claims shall be paid, except for special deposits or secured transactions in the ancillary state.

645.87 CLAIMS OF RESIDENTS AGAINST INSURERS DOMICILED IN RECIPROCAL STATES. (1) FILING CLAIMS. In a liquidation proceeding in a reciprocal state against an insurer domiciled in that state, claimants against the insurer who reside within this state may file claims either with the ancillary receiver, if any, in this state, or with the domiciliary liquidator. Claims must be filed on or before the last dates fixed for the filing of claims in the domiciliary liquidation proceeding.

(2) PROVING CLAIMS. Claims belonging to claimants residing in this state may be proved either in the domiciliary state under the law of that state or in ancillary proceedings, if any, in this state. If a claimant elects to prove his claim in this state, he shall file his claim with the court in the manner provided in ss. 645.61 and 645.62. The ancillary receiver shall make his recommendation to the court as under s. 645.71. He also shall arrange a date for hearing if necessary under s. 645.65 and shall give notice to the liquidator in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. If the domiciliary liquidator, within 30 days after the giving of such notice, gives notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest the claim, he shall be entitled to appear or to be represented in any proceeding in this state involving the adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to amount and as to priority against special deposits or other security located in this state.

Comment: This was s. 616.05, somewhat altered.

645.88 ATTACHMENT, GARNISHMENT AND LEVY OF EXECUTION. During the pendency in this or any other state of a liquidation proceeding, whether called by that name or not, no action or proceeding in the nature of an attachment, garnishment or levy of execution shall be commenced or maintained in this state or elsewhere against the delinquent insurer or its assets.

Comment: This was adapted from the first sentence of former s. 616.09, but it is extended to nonreciprocal states. The 2nd sentence of former s. 616.09 was omitted because s. 645.53 deals with the subject more effectively. This section is limited to liquidation, since there is no reason creditors should not pursue any normal remedies against an insurer in rehabilitation. The words "or elsewhere" are inserted for whatever effect they may have. The choice of law rules of other states may occasionally give them some effect. If they have no effect, no harm will have been done.

645.89 INTERSTATE PRIORITIES. (1) PRIORITIES. In a liquidation proceeding in this state involving one or more reciprocal states, the order of distribution of the domiciliary state shall control as to all claims of residents of this and reciprocal states. All claims of residents of reciprocal states shall be given equal priority of payment from general assets regardless of where such assets are located.

Comment on sub. (1): This is based on former s. 616.06, but with the 2 subsections of the latter combined in view of the symmetry of the provisions.

(2) PRIORITY OF SPECIAL DEPOSIT CLAIMS. The owners of special deposit claims against an insurer for which a liquidator is appointed in this or any other state shall be given priority against the special deposits in accordance with the statutes governing the creation and maintenance of the deposits. If there is a deficiency in any deposit so that the claims secured by it are not fully discharged from it, the claimants may share in the general assets, but the sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

Comment on sub. (2): This is based on former s. 616.07.

(3) PRIORITY OF SECURED CLAIMS. The owner of a secured claim against an insurer for which a liquidator has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security in accordance with s. 645.67, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors.

Comment on sub. (3): This is adapted from former s. 616.08.

645.90 SUBORDINATION OF CLAIMS FOR NON-CO-OPERATION. If an ancillary receiver in another state or foreign country, whether called by that name or not, fails to transfer to the domiciliary liquidator in this state any assets within his control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, the claims filed in the ancillary receivership, other than special deposit claims or secured claims, shall be placed in the class of claims under s. 645.68 (8).

Comment: Failure to obtain the co-operation of other jurisdictions has been one of the difficult problems of insurance liquidation. This section attempts to apply leverage to foreign jurisdictions that might not otherwise co-operate with the domestic liquidation. If the other jurisdiction fails to co-operate with the Wisconsin liquidation, it has in effect subordinated Wisconsin claimants. Hence, it is only fair that reciprocal treatment should be denied the claimants in the non-co-operating states. This

problem is especially to be anticipated with nonreciprocal jurisdictions but may exist with reciprocal states as well. Liquidators report occasional trouble even with the latter.

SECTION 18. Wherever the reference to section 200.08 appears in sections 201.03 (9), 206.49 (4) and 208.33 (2) of the statutes, the reference to chapter 645 is substituted.

SECTION 19. The insurance laws revision committee of the legislative council shall study the question of whether a paragraph (e) should be added to section 645.56 (2) of the statutes, to read: "The obligation of the insurer is to a reinsurer." The committee shall request the insurance industry to co-operate in the study by supplying detailed information as needed by the committee to resolve the question. Upon the conclusion of its study, the committee shall make its recommendations to the legislative council.

Approved July 20, 1967.