

**Laws Enacted by the Legislature
In Calendar Year 1980**

1979 Senate Bill 23

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**CHAPTER 109, Laws of 1979
(Veto Overruled)**

AN ACT to renumber 628.34 (10) and (11) and 645.72 (2); to amend 611.24 (3) (a), 645.46 (8), 645.47 (1) (b), 645.72 (1), 645.89 (2) and (3) and 645.90; to repeal and recreate 645.63 (5) and chapter 646; and to create 13.91 (1) (c), 628.34 (10), 645.11, 645.60, 645.61 (4) and 645.72 (2) and (3) of the statutes, relating to revision of the insurance security fund law and granting rule-making authority.

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

PRELIMINARY NOTE: The Wisconsin security fund law (ch. 646 of the statutes) was one of the first to be enacted in the United States. The insurance laws revision committee (ILRC) and its staff did not have the benefit of the more extensive discussion that preceded enactment of the later laws. That discussion led to development of two model acts under the auspices of the National Association of Insurance Commissioners (NAIC), on which most of the other acts were based.

There are clear defects in the Wisconsin law, as there are also in the model laws. All were enacted in the absence of experience in the working of such funds, and without experience of any liquidations under a comprehensive law such as ch. 645 of the Wisconsin statutes. It is time, now, to begin to develop a statute based on the fairly extensive experience of the past few years in both, with careful reflection on the problems to be dealt with, in contemporary context.

Development of such a law at this point would have unduly extended the life of a committee that has already had a long life in the comprehensive revision of the Wisconsin statutes. This bill therefore purports only to be an interim solution. It tries to deal with the more serious defects of the Wisconsin law, without creating new problems. *No effort has been made to produce a bill now that can be regarded as a final solution.*

Some of the controverted matters not dealt with by the bill are as follows:

1. There is some sentiment for subjecting ch. 613 insurers to the security fund. They are now excluded by s. 646.01 (1) (a).
2. There is some sentiment for extending the continuation of coverage provisions of this bill to some contracts in the property-liability area. This may be appropriate but requires careful consideration and discussion.
3. The question has been raised whether the commissioner should not always be chairman of the board.

4. It was suggested that the fund should be required to cooperate with the liquidator. As a moral injunction, that is unobjectionable but there is difficulty in practical enforcement of any such duty. Nevertheless, the last sentence of s. 646.13 (1) (b) was added to try to accommodate that view. There is also a belief that the liquidator should have the power to challenge loss claims paid by any security fund, to protect against dissipation of funds. Such a power raises practical problems, once basic responsibility for settling loss claims is shifted from liquidator to security funds. There is substantial built-in protection in the self-interest of the insurers that will dominate the various security funds.
5. Some have suggested that the subrogation provision of s. 646.33 (1) be formulated in a way more favorable to the insured. The provision here continues the rule of the present security fund law.
6. There is great uncertainty about the best definition of the kinds of disability insurance that should be covered. For assessment to be workable, the defined coverage needs to be one for which premiums can be isolated. This draft follows the model act and includes all disability insurance. See s. 646.35 (1) (c).
7. Some feel that the powers given in s. 646.35 after an order of liquidation should also be available, on a basis optional with the board, in rehabilitation cases or even prior to *any* court order. The model life guaranty fund bill so provides. But such powers may raise due process questions and, in any event, the issues thus raised are so complicated that they should only be addressed in a full scale development of a completely new bill.
8. It would be possible to provide for liens and moratoriums in connection with continuation of coverage, as does the model bill. But that is inconsistent with the concept of coverage continuation, and should be provided only as a safety valve in extraordinary circumstances. It does not seem necessary to work out such details in this interim bill.
9. The question was raised whether insurers should be required to reserve up to 2% of premiums in *anticipation* of a subsequent assessment, to prevent the burden on solvent insurers from being overwhelming. But much larger fluctuations in experience are to be expected in the normal course of doing business. Such a provision would add little protection to that already provided by ss. 623.11 and 623.12.

SECTION 1. Statement of purpose; rule-making powers. (1) Article IV of the constitution vests in the legislature the power to make laws, and thereby to establish agencies and to designate agency functions, budgets and purposes. Article V of the constitution charges the executive with the responsibility to expedite all measures which may be resolved upon by the legislature.

(2) The legislature recognizes the need for smooth administration of public policy. In granting to the executive the responsibility to manage agencies created by it, the legislature may deem it necessary to delegate rule-making authority to these agencies to facilitate administration of legislative policy. In so doing, the legislature reserves unto itself the right and responsibility to designate the method of rule review and modification, applicable to any rule adopted under this delegation of authority.

SECTION 1g. 13.91 (1) (c) of the statutes is created to read:

13.91 (1) (c) Perform the functions prescribed in ss. 645.11 and 646.63 for the review of administrative rules.

SECTION 1r. 611.24 (3) (a) of the statutes is amended to read:

611.24 (3) (a) *Capital and surplus.* The commissioner ~~may~~ shall specify in the certificate of authority of a newly organized corporation the minimum capital or the minimum permanent surplus and the initial expendable surplus to be provided for each segregated

account. If a segregated account is established after a certificate of authority has been issued, the commissioner ~~may~~ shall require the corporation to ~~allocate~~ have and maintain an adequate amount of capital and surplus ~~to~~ in the segregated account.

NOTE: Segregated accounts, by their very nature, are the equivalent of a “company within a company”. Since both assets and liabilities are insulated from the rest of the company’s business, each segregated account must have adequate capital and surplus, or an appropriate substitute. The requirements of s. 611.19 (or its equivalent in other chapters) should be satisfied in order to justify insulation of the account’s business from the rest of the insurer’s business. Moreover, unless adequate capital and surplus is required, there is no justification for having ch. 646 apply to the account, for that chapter requires the entire industry to underwrite the solidity of the account, with recourse to shareholder interests in the insurer under s. 611.24 (3) (e) but with no recourse to any surplus in a mutual insurer. Thus, the requirement is more important for mutual than for stock insurers.

SECTION 2. 628.34 (10) and (11) of the statutes are renumbered 628.34 (11) and (12).

SECTION 3. 628.34 (10) of the statutes is created to read:

628.34 (10) INSURANCE SECURITY FUND. No insurer or insurance intermediary may make use in any manner of the protection given policyholders by ch. 646 as a reason for buying insurance from the insurer or intermediary.

NOTE: This section continues present s. 646.31, putting it in a more appropriate place.

SECTION 3m. 645.11 of the statutes is created to read:

645.11 Review of rules. (1) DEFINITIONS. In this section:

- (a) “Proposed rule” means any rule to be created, amended, renumbered or repealed.
- (b) “Working day” means each day except Saturday, Sunday and those holidays designated in s. 230.35 (4) (a).

(2) SUBMISSION TO LEGISLATIVE COUNCIL STAFF. Prior to any public hearing on a proposed rule under s. 645.61 (4) or if no public hearing is required, prior to notification under s. 227.018 (2), the commissioner shall submit the proposed rule to the legislative council staff for review.

(3) ROLE OF LEGISLATIVE COUNCIL STAFF. The legislative council staff shall act as a clearinghouse for rule drafting under s. 645.61 (4). The council staff shall issue a report on each proposed rule which is referred to it under this section no later than the end of the 20th working day following the day on which the proposed rule is referred, unless an extension is granted by the chairman of the council. The council staff shall cooperate with the commissioner and the revisor of statutes to:

- (a) Review the statutory authority under which the commissioner intends to adopt the rule.
- (b) Ensure that the procedures for the promulgation of a rule required by ch. 227 are followed.
- (c) Review proposed rules for form, style and placement in the administrative code.
- (d) Review proposed rules to avoid conflict with or duplication of existing rules.
- (e) Review proposed rules to provide adequate references to related statutes, related rules and forms.
- (f) Review proposed rules for clarity, grammar and punctuation and to ensure plain language.

(g) Review proposed rules to determine potential conflicts and to make comparisons with related federal regulations.

(h) Streamline and simplify the rule-making process.

(4) ASSISTANCE TO STANDING COMMITTEES. The legislative council staff shall work with and assist the appropriate standing committees throughout the rule-making process under s. 645.61 (4). The legislative council staff may issue recommendations concerning proposed rules which the commissioner shall submit with the notice required under s. 227.018 (2).

(5) NOTIFICATION OF STANDING COMMITTEES. The commissioner shall notify the presiding officer of each house of the legislature when any proposed rule under s. 645.61 (4) is in final draft form by submitting a notice to the presiding officer to this effect. Each presiding officer shall refer the notice to one standing committee by the end of the 2nd working day following the day on which the notice is received. The commissioner may withdraw a proposed rule by notifying the presiding officer of his or her intention not to promulgate the rule. The commissioner shall cause a notice that a proposed rule is referred to the presiding officers to appear in the Wisconsin administrative register. Each presiding officer shall cause a similar notice to appear in the journal of the house.

(6) FORM OF NOTICE. The notice shall include the proposed rule in the form specified in s. 227.024 (1), an analysis, any recommendations of the legislative council staff and a report. The report shall include findings of fact, conclusions and recommendations which demonstrate the need for the proposed rule and its reasonableness.

(7) STANDING COMMITTEE REVIEW. (a) *Standing committee meeting.* A committee may be convened upon the call of its chairperson or a majority of its members to review a proposed rule. A committee may meet separately or jointly with the other committee to which the notice is referred, direct the commissioner to dispatch a representative to attend the meeting and hold a public hearing to review the proposed rule.

(b) *Standing committee review period.* The standing committee review period extends for 30 days after the notice is published under sub. (5) and if within the 30-day period a standing committee directs the commissioner to meet with it to review the draft, the standing committee review period is continued for 30 days from the date of that request.

(c) *Commissioner not to promulgate rule pending standing committee review.* The commissioner may not promulgate a proposed rule under s. 645.61 (4) during the standing committee review period unless both committees waive their authority to disapprove the proposed rule prior to the expiration of that period.

(d) *Standing committee action.* Either standing committee may disapprove the proposed rule or part of the proposed rule by taking action in executive session to disapprove the rule within the standing committee review period. If both committees fail to take this action, the proposed rule is not disapproved and the commissioner may promulgate the rule.

(e) *Rereferral.* If a proposed rule is referred to standing committees and the review period under par. (b) has not expired and the committees have not waived their authority to disapprove the proposed rule under par. (c) at the time of final adjournment of the legislature, the presiding officer of each house may rerefer the proposed rule to a different standing committee. In this case, the presiding officers shall publish a revised notice under sub. (2) and the standing committee review period begins on the date of rereferral.

(8) JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES. (a) *Referral.* If either standing committee disapproves a proposed rule or part of a proposed rule, the committee shall refer the proposed rule or the part disapproved to the joint committee for the review of administrative rules.

(b) *Joint committee review period.* The joint committee review period extends for 30 days after a proposed rule is referred to it. The joint committee shall meet and take action in executive session during that period.

(c) *Commissioner not to promulgate rule pending joint committee review.* The commissioner may not promulgate a proposed rule or any part thereof which is disapproved by a standing committee under s. 645.61 (4) unless the action of the standing committee is reversed by the joint committee for the review of administrative rules under par. (d) or until the bill introduced under par. (e) fails of enactment. The commissioner may promulgate any portion of a rule which is not disapproved.

(d) *Joint committee action.* The joint committee for the review of administrative rules may reverse the disapproval of a proposed rule or portion thereof by a standing committee by taking action to authorize adoption of the rule or portion thereof within the joint committee review period. The joint committee may uphold the disapproval of a proposed rule or portion thereof by a standing committee by taking action to disapprove the rule or portion thereof within the joint committee review period. The joint committee may remand the proposed rule or disapproved portion to the commissioner for further consideration or a public hearing, or both. If the joint committee disapproves a proposed rule or portion of a rule, the commissioner may not promulgate the proposed rule or portion thereof until the bill introduced under par. (e) fails of enactment.

(e) *Bill to support disapproval.* When the joint committee for the review of administrative rules disapproves a proposed rule or portion of a proposed rule under s. 645.61 (4) the committee shall as soon as possible place before the legislature a bill to support the disapproval. If the bill is defeated, or fails of enactment in any other manner, the proposed rule or disapproved portion thereof may be promulgated. If the bill becomes law, the proposed rule or disapproved portion thereof may not be promulgated unless a properly enacted law specifically authorizes the adoption of that rule or disapproved portion.

(9) **NONAPPLICATION.** This section does not apply to emergency rules adopted under s. 227.027.

SECTION 4. 645.46 (8) of the statutes is amended to read:

645.46 (8) Use Cooperate with the fund created under ch. 646 in using assets of the estate to transfer policy obligations to a solvent solid assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under s. 645.68.

COMMENT: Under certain circumstances, it is a primary duty of the fund under ch. 646 to seek to place all or part of the book of insurance business with a solid insurer. If the fund does that, it is subrogated to rights of policyholders and claimants against the liquidator. Under some circumstances, it may be possible for the liquidator and the fund to cooperate in arranging the transaction and it should be the duty of both to try.

SECTION 5. 645.47 (1) (b) of the statutes is amended to read:

645.47 (1) (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 ~~worker's compensation~~ security fund under ch. 646.

SECTION 6. 645.60 of the statutes is created to read:

645.60 Applicability of claims settlement provisions to loss claims. Sections 645.46 (18), 645.61 to 645.65, 645.71, 645.83 (3), 645.86 and 645.87 do not apply to those loss claims that are subject to ch. 646 or to corresponding laws of other states that conform to s. 646.60 (1).

SECTION 7. 645.61 (4) of the statutes is created to read:

645.61 (4) FILING OF CLAIMS BY FUNDS. Claims by funds under s. 646.33 and corresponding provisions of funds of other jurisdictions that satisfy s. 646.60 (1) (b) shall be filed periodically by the funds pursuant to rules promulgated by the commissioner.

SECTION 8. 645.63 (5) of the statutes is repealed and recreated to read:

645.63 (5) CLAIMS UNDER SECURITY FUND. The board of the insurance security fund shall file a claim with the liquidator for all claims to which the fund has been subrogated under s. 646.33 (1).

SECTION 9. 645.72 (1) of the statutes is amended to read:

645.72 (1) PAYMENTS TO CREDITORS. ~~Under~~ Subject to ch. 646 and under the direction of the court, the liquidator shall pay dividends as promptly as possible to security funds under sub. (2) and to other creditors 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~~ 3rd 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.

SECTION 10. 645.72 (2) of the statutes is renumbered 645.72 (4).

SECTION 11. 645.72 (2) and (3) of the statutes are created to read:

645.72 (2) PAYMENT OF DIVIDENDS TO SECURITY FUNDS. The liquidator shall pay dividends to security funds under sub. (1) to satisfy their subrogation claims under s. 646.33 or similar laws of other states, if the claims have been filed pursuant to rules established under s. 645.61 (4). The total dividends to security funds paid under this subsection may not exceed the total of the claims properly made by the funds under s. 645.61 (4). The liquidator shall pay dividends as frequently as practicable and in sums as large as possible without sacrificing of asset values by untimely disposition or inequitable allocation of available assets among the subrogated funds. The liquidator may protect against inequitable allocations by making payments to funds subject to binding agreements by the funds to repay any portions of the dividends found later to be in excess of an equitable allocation. If assets are available, the liquidator may also lend to security funds, subject to court approval.

(3) REPORTS TO THE COURT. The liquidator shall report to the court within 120 days after the issuance of the liquidation order under s. 645.42, and every 3 months thereafter, on the status of the assets and the payment of dividends and loans under sub. (2). The court may order the liquidator to pay dividends to security funds under sub. (2) more expeditiously to minimize the need for assessments under s. 646.51.

NOTE: This section seeks to make assets of the defunct insurer available for the payment of loss claims as quickly as possible to minimize the need for assessments by security funds. Subsection (3) provides a mechanism for enforcing the duty.

SECTION 12. 645.89 (2) and (3) of the statutes are amended to read:

645.89 (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 claim against a security fund or share in the general assets, but the sharing shall be deferred until general creditors having the same priority, and also claimants against other special deposits having the same priority 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.

(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~~ the security for the claim and file ~~his~~ the 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 or the appropriate security fund on the same basis as claims of unsecured creditors having the same priority.

SECTION 13. 645.90 of the statutes is amended to read:

645.90 Subordination of claims for noncooperation. 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 or her control other than special deposits, diminished only by the expenses of the ancillary receivership, if any, the claims filed in the ancillary receivership or with a security fund in that jurisdiction, other than special deposit claims or secured claims, shall be placed in the class of claims under s. 645.68 (8).

SECTION 14. Chapter 646 of the statutes is repealed and recreated to read:

CHAPTER 646

INSURANCE SECURITY FUND

INTRODUCTORY NOTE: This bill makes major changes in the security fund law, and also makes necessary correlative changes in ch. 645, the rehabilitation and liquidation law. It draws heavily on the model security fund laws of the National Association of Insurance Commissioners (NAIC). Some parts of those laws, however, are not consistent with Wisconsin law or are unnecessary because of provisions already existing in the Wisconsin statutes as a result of the insurance revision. The following paragraphs note the more important changes made, as well as some that are not made.

1. *The task of adjusting loss claims is transferred in full from the liquidator to the security fund.* Settlement of loss claims is routine business for the insurance industry but not routine for a liquidator. It can be carried out more efficiently by the security fund, which partakes of the nature of an insurance operation. The self-interest of the insurers that dominate the fund probably can be relied on to ensure that the settlements are not profligate, but are consistent with normal insurance practice.
2. *Provisions are made to enable the security fund to have access as quickly as practicable to the assets in the hands of the liquidator,* subject to the needs for orderly reduction of assets to cash and for equitable distribution of the proceeds among various security funds interested in them.
3. *It is made possible for the security fund to borrow money so that it can begin to dispose of claims* without waiting either for the collection of assessments or the receipt of funds from the liquidator. Timely settlement of claims may cost less than a protracted process. The value of this borrowing power is uncertain, but that is no good reason for denying the power.
4. *It is provided that certain accounts within the fund shall continue policies in effect because termination of coverage would do injustice.* Whenever policies are by their terms noncancellable, as in the case of annuities and most life insurance, an important part of what the policyholder has bought is continued insurability, and to throw him or her back into the marketplace is often an extreme hardship. The preferable way to continue coverage in such cases is to arrange for assumption by a solid insurer of all or a portion of the portfolio in question. Under these circumstances, the security fund should have, however, the power and the necessary tools to operate all or a portion of the outstanding business of the defunct insurer until it runs off the books, however long that may take.

Again, self-interest of the insurers involved will prevent an unnecessary continuation of a going enterprise through the security fund. It will be to the interest of all concerned to unload the portfolio on a solid insurer at the most favorable terms that can be negotiated and as soon as possible.

5. Much of the model NAIC life insurance security fund law is devoted to an effort to enlist the industry in the support of the regulatory enterprise. Quite apart from the question whether that will work at all, in a world where all insurance executives are preoccupied with their own problems, the rehabilitation provisions in ch. 645 provide, in sweeping terms, the necessary powers to achieve the same thing within the rehabilitation process. Advisory councils and committees authorized under s. 601.20 can also be used for the same purposes, even without a rehabilitation proceeding. For that reason, *much of the model law is merely a duplication in unnecessarily specific terms of machinery the Wisconsin commissioner has had available for years* to the extent that he, in cooperation with the industry, wishes to use it. The commissioner could promulgate rules to achieve any specific regulatory or advisory purpose of the model law thought to be important.
6. *Provision is not made for declaring an insurer "impaired,"* in accordance with the model life and health insurance guaranty association act. That notion is foreign to the underlying basis of the Wisconsin revision. If an insurer is "impaired", as that term is used in the model act, it should at least be in rehabilitation, if not in liquidation, under the theory of the Wisconsin revision. Anything less is temporizing with a dangerous situation.
7. *The creation of a separate association, with its complex relationship with the commissioner, is unnecessary.* This entire process is an integral part of the regulatory scheme.

SUBCHAPTER I

GENERAL ORGANIZATION

646.01 (1) SCOPE. (a) *General.* This chapter applies to:

1. All kinds and lines of direct insurance, except variable annuities and variable value life insurance contracts.
2. All insurers authorized to do business in this state except:
 - a. Fraternal.
 - b. Assessable mutuals, including town mutuals.
 - c. Mutual municipal insurers under s. 611.11 (4).
 - d. Issuers of gift annuities under ch. 615.
 - e. Service insurance corporations under ch. 613.
 - f. Miscellaneous insurers and motor clubs under ch. 616.
 - g. State insurance funds under chs. 604 to 608.

(b) *Exceptions.* This chapter does not apply to the nonguaranteed portions of variable annuities and variable value life insurance contracts, to title insurance, to surety bonds, to bail bonds, to mortgage guaranty insurance, to ocean marine insurance or to credit insurance.

NOTE: Former s. 646.01 (1) is amended to reflect recent or pending changes. Mutual municipal insurance corporations (ch. 346, laws of 1977) are exempt. So also are cooperative insurers under proposed subch. II of ch. 185, and school benefit plans under proposed subch. I of ch. 616, and motor clubs under subch. II of ch. 616.

Reference to "lines" has been eliminated. "Kinds", a nontechnical word, has been used to note the breadth of the coverage intended.

Paragraph (b) takes out of the coverage of the chapter many kinds of insurance that protect mainly large business enterprises and highly specialized lines that are difficult to deal with in the same way as other insurance. In doing so, it follows more closely general practice in other states. "Credit insurance" as used in sub. (1) (b) does not refer to credit life or credit disability insurance, but to what is sometimes referred to as "accounts receivable" insurance. That is, the excluded coverage is insurance on the credit itself.

(2) **PURPOSES.** The purposes of this chapter are:

(a) To maintain public confidence in the promises of insurers by providing a mechanism for protecting insureds from excessive delay and loss in the event of liquidation of insurers and by assessing the cost of such protection among insurers; and

(b) To provide where appropriate for the continuation of protection under policies and supplemental contracts of life insurance, disability insurance and annuities.

NOTE: Paragraph (a) continues present s. 646.01 (2); par. (b) incorporates a concept new to Wisconsin's ch. 646, of continuing so far as possible the protection provided by those contracts where serious harm to individuals would be done by compelling insureds to go back into the market for new coverage.

646.03 Definitions. In this chapter, unless the context indicates otherwise:

(1) "Board" means the board of directors of the insurance security fund created by s. 646.12.

(2) "Fund" means the insurance security fund created by s. 646.11.

(3) "Liquidator" includes receiver or conservator.

646.11 Organization and administration of fund. (1) **ORGANIZATION.** There is created a fund to be known as the "insurance security fund". All insurers subject to this chapter are contributors to the fund as a result of their authority to transact business in this state. The fund shall consist of all payments made by insurers under s. 646.51, of all transfers made under s. 646.71 (2), of the earnings resulting from investments under s. 646.21 (2) and of the amounts recovered under s. 645.72 (2).

(2) **ACCOUNTS.** (a) The fund shall be composed of 4 segregated accounts, one for life insurance, one for annuities, one for disability insurance and one for all other kinds of insurance subject to this chapter.

(b) There shall also be a segregated temporary workers' compensation insurance security fund under s. 646.71 which shall terminate when its assets have been distributed under s. 646.71 (2). Until terminated under this paragraph, the temporary workers' compensation insurance fund is subject to all provisions relating to the insurance security fund to the extent appropriate, unless expressly exempted.

(3) **EXPENSES OF FUND.** Necessary expenses of administration of the fund incurred in connection with actual liquidations or with continuation of contracts under s. 646.35 shall be charged to the appropriate account of the fund. All other expenses, but not including any portion of the compensation of employes under s. 646.12 (2) (d), shall be charged to the budget of the office of the commissioner.

(4) **LIABILITY.** No contributor to the fund or person acting on its behalf is personally liable for any obligations of the fund. The rights of creditors are solely against the assets of the fund.

(5) **IMMUNITY.** The fund, its contributor insurers, its agents, employes or directors and the commissioner are not liable in tort for any action taken in good faith performance of duties under this chapter.

COMMENT: Subsection (1) replaces s. 646.02 (1) with necessary modifications; sub. (2) does the same for s. 646.02 (2); sub. (3) for s. 646.02 (4); and sub. (4) for s. 646.02 (5). Subsection (5) is new, but appropriate, protection to persons engaged in a public service. The principal modification of sub. (3) is to make sure that the department's budget is not chargeable with compensation of employees not selected in accordance with normal state employment procedures.

646.12 Administration of the fund. (1) COMPOSITION OF BOARD. (a) *Members.* The fund shall be administered by a board of directors which shall consist of not fewer than 7 nor more than 11 members. The attorney general, the state treasurer and the commissioner are ex officio members with full voting rights. Other members shall be chosen from representatives of insurers subject to this chapter under procedures specified by the commissioner by rule. The rule may provide that, instead of natural persons, specific insurers or associations of insurers may be selected as members of the board and may act through any duly authorized representative.

(b) *Chairperson.* The person to chair the board shall be elected by the members of the board under a rule promulgated by the commissioner.

COMMENT: Subsection (1) replaces ss. 646.02 (3) and 646.03 (1).

(2) GENERAL POWERS AND DUTIES. The board shall:

(a) Subject to the commissioner's power to promulgate rules under sub. (1), adopt rules for the administration of this chapter, including delegation of any part of its powers and its own procedures.

(b) Create separate standing management committees for each of the accounts, and other standing or special committees as needed. A minority of the members of any committee may be persons not members of the board.

(c) Delegate to the committees any of its powers and duties under this chapter, subject to review and reconsideration by the board.

(d) Employ or retain the personnel necessary to carry out its duties and set compensation for the personnel, sue or be sued, make contracts and borrow money necessary to carry out its duties in the most efficient way, including money with which to pay claims under s. 646.31 or to continue coverage under s. 646.35. The board may offer as security for such loans its claims against the liquidator or its power to levy assessments under this chapter. Personnel employed under this paragraph are not employees of the state and are not subject to s. 20.922 or ch. 230.

(e) Advise and make recommendations to the commissioner on any matter related to the possible insolvency of an insurer covered by this chapter, and respond to any reasonable questions presented by the commissioner. Information, recommendations and advice under this subsection are not open to public inspection under s. 601.46 (4).

(f) Negotiate and contract with any liquidator to achieve the purposes of this chapter.

(g) Perform other acts necessary to achieve the purposes of this chapter.

COMMENT: Subsection (2) replaces s. 646.03 (2). Some powers are new and reflect the changed thrust of the chapter, to entrust the administration of the fund with loss claim settlement and with continuance of some kinds of coverage. The power to borrow may be useful. Although lenders may not be readily available on suitable terms, that is not reason to deny the power to borrow in the event a suitable lender can be found.

(3) COMPENSATION. Members of the board and other committee members shall receive no compensation for services but may receive reimbursement for all reasonable and necessary expenses incurred in the performance of their respective duties as directors or as committee members.

COMMENT: Subsection (3) continues s. 646.03 (3).

646.13 Special duties and powers of the board related to loss claims. (1) DUTIES. The board shall:

(a) Establish procedures and acceptable forms of proof for eligible claims, which shall correspond as closely as practicable with the corresponding rules under ch. 645.

(b) Stand in the position of the insurer in the investigation, compromise, settlement, denial and payment of claims under s. 646.31 and the defense of 3rd party claims against insureds, subject to the limitations of s. 645.43. The board shall consult and cooperate with the liquidator in carrying out these duties.

(2) POWERS. The board may:

(a) Review settlements, releases and judgments to which the insurer or its insureds were parties to determine the extent to which they may be properly contested.

(b) Exercise with respect to loss claims the powers that the liquidator has with respect to other claims under s. 645.46 (18).

NOTE: This section is mainly new and reflects the new role of the board of the fund in loss settlement.

646.21 Custody and investment of assets. (1) CUSTODY. Except as provided in sub. (2), the board controls the assets of the fund. The board shall select regulated financial institutions in this state which receive deposits in which to establish and maintain accounts for assets needed on a current basis. If practicable, the accounts shall earn interest.

(2) INVESTMENT OF ASSETS. All assets of the fund not needed currently shall be invested by the investment board under s. 25.17, unless the court orders otherwise. Investments shall be in securities with maturities and liquidity appropriate to the probable needs of the fund for money to perform its duties. All income attributable to the investments shall be credited to the fund, and both income and principal shall be transferred to it on request of the board of the fund.

COMMENT: Subsection (1) replaces s. 646.04; sub. (2) replaces s. 646.05.

SUBCHAPTER II

CLAIMS PROCEDURES

646.31 Eligible claims. (1) CONDITIONS OF ELIGIBILITY. A claim is not eligible for payment from the fund unless it is a claim for a loss insured under the policy or annuity and:

(a) *Issued by authorized insurer.* Arises out of an insurance policy or annuity issued by an insurer which is in liquidation and which was authorized to do business in this state either at the time the policy or annuity was issued or when the insured event occurred;

(b) *Assessability of insurer.* Arises out of business not exempt from assessment under s. 646.01 (1); and

(c) *Contact with state.* Is a member of one of the classes of claims under sub. (2).

COMMENT: Subsection (1) is essentially the same as present s. 646.11 (1), except that former par. (c) is omitted. The claim may arise out of a liquidation in another state as well as one in this state.

(2) CLASSES OF CLAIMS TO BE PAID. No claim may be paid under this chapter unless the claim is in one of the following classes:

(a) *Residents.* The claim of a policyholder, including a ceding domestic insurer which is not subject to this chapter, or an insured under a policy or annuity who at the time of the insured event or of the liquidation order was a resident of this state; or

(b) *Certain NonResidents.* The claim is made under a life or disability insurance policy or annuity contract subject to this section, whether or not the claimant is a resident of this state.

(c) *Owners of property interests.* The claim of a person having an insurable interest in or related to property which was situated in this state at the time of the insured event.

(d) *3rd party claimants.* A claim under a liability or workers' compensation insurance policy, if:

1. Either the insured or the 3rd party claimant was a resident of this state at the time of the insured event;

2. The claim is for bodily or other personal injuries suffered in this state or by a person who suffered the injuries while a resident of this state; or

3. The claim is for damage to property situated in this state at the time the damage occurred.

(e) *Assignees.* The claim of a direct or indirect assignee, other than an insurer, of a person who except for the assignment could have claimed under par. (a), (b) or (c).

COMMENT: Subsection (2) continues s. 646.11 (2). Paragraph (a) is extended to include some ceding insurers such as a town or municipal mutual reinsuring with a commercial insurer.

(3) **DEDUCTIBLE.** Payment under this chapter is limited to the amount by which the claim exceeds \$200. Claims may not be aggregated by assignment or otherwise for application of this deductible.

COMMENT: Subsection (3) continues most of s. 646.11 (3).

(4) **MAXIMUM CLAIM.** The maximum obligation of the fund on a single claim is \$300,000.

(5) **PUNITIVE DAMAGES.** No punitive damages may be paid out of the fund.

(6) **COLLECTION FROM COLLATERAL SOURCES.** The portion of a loss claim for which indemnification is provided by other benefits or advantages, which may not be included in the class of claims defined by s. 645.68 (3), may not be claimed from the fund under this chapter.

COMMENT: Subsections (4), (5) and (6) put some reasonable limits on the burdens imposed on the whole industry by the difficulties of a single insurer. The classification is based essentially on the magnitude of the burden imposed on the system by these classes of claims.

(7) **SETOFFS AND COUNTERCLAIMS.** Section 645.56 applies to the settlement of loss claims. The board shall give the liquidator a reasonable opportunity to inform the board of possible setoffs and counterclaims before paying loss claims.

(8) **NOTICE TO CLAIMANTS.** The board shall provide notice under s. 645.47 (2) to those potential loss claimants to whom the fund is liable under the section, if the liquidator has not done so.

(9) **COLLECTION FROM OTHER FUNDS.** A claim recoverable from more than one security fund shall be paid in the following order:

- (a) By any security fund with an obligation to pay all loss claims of the insurer;
- (b) If it is a first party claim for damage to property with a permanent location, by the fund of the location of the property;
- (c) If it is a workers' compensation claim, by the fund of the residence of the claimant;
- (d) In any other case, by the fund of the residence of the insured; and
- (e) Any other funds liable to pay.

COMMENT: Subsection (9) provides rules for ascertaining in what order funds are liable, if 2 or more overlap in coverage.

646.32 Appeal and review. (1) **APPEAL.** A claimant whose claim is reduced or declared ineligible shall promptly be given notice of the determination and of the right to object under this section. The claimant may appeal to the board within 30 days after the mailing of the notice.

(2) **REVIEW.** Decisions of the board under sub. (1) are subject to judicial review.

COMMENT: This section is similar to former s. 646.13.

646.33 Subrogation and cooperation. (1) **SUBROGATION.** Upon payment to any loss claimant the fund is subrogated to the claimant's full right of recovery against the insurer, and to the same extent the insurer would have been subrogated, against any liquidator and any 3rd person. On recovery under this section, the fund may retain both the amount it has paid to the claimant and the amount it has expended to obtain the recovery and shall pay any balance to the claimant.

(2) **COOPERATION.** The claimant shall cooperate with the board in pursuing the fund's rights under sub. (1), including executing any necessary documents. If cooperation is withheld unreasonably, the fund may recover from the claimant any amount it has paid the claimant.

(3) **CLAIMS AGAINST LIQUIDATOR.** The board shall report periodically and whenever a reasonable request is made to any liquidator against whom subrogation rights exist under sub. (1) the claims paid and rejected together with estimates of unsettled claims made or anticipated against the fund.

COMMENT: Subsections (1) and (2) continue the thrust of s. 646.14 (1) and (2), with a clarification so far as it concerns subrogation against a 3rd person; sub. (3) is new.

646.35 Continuation of coverage. (1) **SCOPE.** This section applies to the following contracts when subject to this chapter:

- (a) Annuities.
- (b) Life insurance.
- (c) Disability insurance.

(2) **DOMESTIC INSURER IN LIQUIDATION.** If a domestic insurer is in liquidation, the board shall, subject to the approval of the commissioner:

(a) Guarantee, assume or reinsure or cause to be guaranteed, assumed or reinsured all policies of the insurer within the scope of this section;

(b) Assure performance of the contractual obligations of the insurer on such policies; and

(c) Provide the necessary money or other means necessary to discharge the duties under pars. (a) and (b).

(3) **NONDOMESTIC INSURER IN LIQUIDATION.** If a nondomestic insurer is in liquidation, the board shall, subject to the approval of the commissioner and on a determination by the commissioner that the insurer's domiciliary jurisdiction or state of entry does not provide by statute for protection to residents of this state substantially similar to that provided by this section:

(a) Guarantee, assume or reinsure or cause to be guaranteed, assumed or reinsured the policies of residents within the scope of this section;

(b) Assure performance of the contractual obligations of the insurer on such policies; and

(c) Provide the necessary money or other means necessary to discharge the duties under pars. (a) and (b).

(4) **CLAIMS AGAINST LIQUIDATOR.** The fund has a claim against the liquidator for reasonable payments made to discharge its duties under this section. If the board and the liquidator disagree regarding the reasonableness of such payments, either may apply to the court to determine the question. Such payments shall have the same priority as the class of claims under s. 645.68 (3).

646.41 Tax exemption. The fund is exempt from payment of all fees and taxes levied by this state or any of its subdivisions or instrumentalities, except for fees and taxes levied by virtue of employment under s. 646.12 (2) (d).

646.51 Assessments. (1) **DUTY TO ASSESS.** As soon as practicable after a liquidation order has been issued, the board shall estimate separately for each of the accounts of s. 646.11 (2), the amounts necessary to make the payments provided by this chapter and shall order assessments separately for each account.

(2) **EXEMPTIONS FROM ASSESSMENTS.** If the commissioner finds that a nondomestic insurer is subject to another security fund law providing substantially the same protection to claimants as would be provided by s. 646.31 or 646.35 and that under the law of the other jurisdiction would have a prior obligation to pay those claims or assume those obligations, the commissioner shall exempt the insurer from the assessments on the classes of business to which the other law applies.

(3) **CALCULATION.** (a) *General.* Except as provided in par. (b), assessments shall be calculated as a percentage of premiums written in this state in the classes protected by the account, as reported in the most recent annual statement of each insurer. Premiums for the purpose of this section means gross premiums and other considerations received for direct insurance and annuities less return premiums and other considerations and dividends paid or credited to policyholders or applied in part payment of premiums.

(b) *Continuation of life coverage.* Assessments to provide protection under s. 646.35 (2) shall for each account be made separately for each state in which the domestic insurer in liquidation was authorized to transact business at any time. The assessment attributable to each state shall be in the proportion that the premiums the insurer received on business in that state on policies covered by the account bears to the premiums it received in all such states. Assessments against insurers shall be in the proportion that the premiums received on business in each such state by each assessed insurer on policies covered by each account bears to such premiums received on business in each state by all assessed insurers.

(4) **LIMITS.** The maximum assessment under this section in any calendar year is 2% of the premiums of the previous year. If the maximum assessment does not enable the fund to meet its obligations, an additional assessment shall be made in each succeeding year until the amounts available enable the fund to meet its obligations. No assessment may be levied if the assets held in the appropriate account of the fund are sufficient to cover all estimated payments for liquidations in progress.

(5) **COLLECTION.** After the rate of assessment has been fixed, the board shall send to each insurer a statement of the amount it is to pay. The board shall designate whether the assessments shall be made payable in one sum or in instalments. Assessments shall be collected by the same procedures as premium taxes or license fees under ch. 76.

(6) **APPEAL AND REVIEW.** Within 10 days after receipt of the statement under sub. (5), an insurer may appeal the amount of the assessment to the board or a committee thereof. The decision of the board on the appeal is subject to judicial review, after payment has been made under protest.

COMMENT: The initial assessment will be made, normally by a ministerial act of an employe of the board. This subsection provides for one stage of internal appeal, to the board itself or a designated committee of the board.

(7) **RECOUPMENT OR TAX CREDIT.** An insurer's premium rates are not excessive because they contain an amount reasonably calculated to recoup assessments made under this chapter. If the premium rates on a class of business are fixed, so that it is not possible for the insurer to recoup its assessments by increasing premium rates on the class of business, the insurer may offset 20% of the amount of the assessment against its tax liabilities to this state, other than real property taxes, in each of the 5 calendar years following the year in which the assessment was paid. If the insurer ceases doing business in this state, all assessments not yet offset may be offset against its tax liabilities to this state for the year it ceases doing business. If the offset exceeds the tax liabilities, no refund will be made and there will be no carry-forward of the deficit to later years. Any amount available for credit against future tax liabilities under this subsection may be regarded as an asset of the insurer under rules promulgated by the commissioner.

COMMENT: Subsection (2) recognizes the occasional primacy of other funds under s. 646.31 (7) (a), and exempts insurers from assessment in those cases. It continues the thrust of former s. 646.21 (2). Subsections (3) to (7) continue in essence the remainder of former s. 646.21, except that sub. (7) adds the tax credit provision, borrowed from the model law.

646.60 Claims by security funds. (1) **RECOGNITION.** (a) *Settlements by the fund.* The liquidator is bound by settlements of covered loss claims made by the board under this chapter.

(b) *Settlements by comparable funds.* The liquidator is bound by settlements of covered loss claims by funds or organizations of other states that are comparable to the fund under this chapter provided:

1. That the laws of the other states give equivalent recognition to the settlements of loss claims by the fund; and
2. That if the same claim is reported as paid by 2 or more funds, payment shall be to the fund with a prior obligation under s. 646.31 (7).

(2) **PRIORITIES.** The subrogation claims of funds under sub. (1) for settlements of claims, including expenses in settling them, have the priority the claims would have under s. 645.68.

COMMENT: Subsection (1) is new and reflects the assignment of the loss settlement function to the fund under this new version of the law.

646.61 Disposal of unused assets. After termination of all liquidations under any account of s. 646.11 (2), remaining assets in that account shall be redistributed among those who paid assessments under rules promulgated to ensure treatment that is as equitable to the contributing insurers as is practicable. Partial distributions may be made to insurers who were assessed after all claims against the fund arising from such liquidations have been paid.

COMMENT: This section replaces s. 646.22

646.71 Transition provisions for workers' compensation security funds. (1) **CONSOLIDATION AND TRANSFORMATION.** The stock workers' compensation security fund established under s. 102.65 (2), 1967 stats., the mutual workers' compensation security fund established under s. 102.65 (4), 1967 stats., and the reciprocal workers' compensation security fund established under s. 102.65 (6), 1967 stats., are consolidated and transformed into the temporary workers' compensation insurance security fund.

(2) **PAYMENTS FROM TEMPORARY WORKERS' COMPENSATION INSURANCE SECURITY FUND.** After August 22, 1969, whenever an assessment is levied against insurers under s. 646.51, that portion of any assessment attributable under s. 646.51 (4) to workers' compensation insurance shall be transferred from the temporary fund under sub. (1) to the account for all other covered insurance under s. 646.11 (2). On January 1, 1980, the interests of insurers in the temporary workers' compensation insurance security fund shall

be calculated as follows: The aggregate amount ever paid by each insurer still doing business in this state to any of the constituent funds of which the temporary fund was composed shall be ascertained. The ratio of the aggregate amount paid by each such insurer to the aggregate amount paid by all such insurers is the percentage interest of the insurer in the fund. After January 1, 1980, the interest of each insurer in the temporary fund may be drawn upon by that insurer to pay any assessments levied against it under s. 646.51, until its interest is exhausted. When all interests in the temporary fund are exhausted, it shall cease to exist.

NOTE: This section continues former s. 646.23, except for the part of sub. (2) after the first sentence. The temporary fund has been growing faster than it has been drawn upon. When the security fund is operating on a post hoc assessment basis, it makes little sense to continue a funded *portion* of one account. This method of distributing the fund is as equitable as is practicable. It takes account of the different contributions of insurers to the fund, but ignores differences in entitlement to interest earned on the fund, to simplify administration.

646.73 Liquidations to which the chapter is applicable. This chapter applies in full to all liquidations commenced after the effective date of this act (1979). For each liquidation in process on the effective date of this act (1979) the board shall apply to the court which issued the liquidation order for an order specifying the extent to which this chapter, 1979 stats., applies to that liquidation. The court shall apply this chapter, 1979 stats., to the maximum extent possible without affecting vested rights or creating serious administrative difficulties.

NOTE: The purpose of this chapter is to solve some problems in the existing law. For that purpose it should be given effect as quickly as possible. It should be applicable to liquidations in process to the extent practicable, which should be determined by a court order. Once the claim settlement process is well under way, it will probably be too late, but the board can make such a case as it wishes in its application to the court.

SECTION 15. Program responsibilities. (1) In the list of program responsibilities specified for the office of the state treasurer in section 14.561 of the statutes, the reference to section "646.12" is deleted.

SECTION 16. Cross reference changes. In the sections of the statutes listed in Column A, the cross references shown in Column B are changed to the cross references shown in Column C:

Statute Sections	A	B	C
14.561		646.03	646.12
14.561		646.04	646.21
15.761		646.05	646.21 (2)
20.145 (6)(u)		646.23	646.71
20.145 (6)(v)		646.23	646.71
25.17 (1)(j)		646.05	646.21 (2)
611.74 (4)		645.72 (2)	645.72 (4)
636.10 (3)		646.11 (2)	646.31 (2)
645.72 (2)(a)		645.72 (2)(b)	645.72 (4)(b)

SECTION 17. Reconciliation. If both this act and chapter (LRB 0124/2), laws of 1979, take effect, the treatment of chapter 646 by this act shall prevail.