

### **304.42-140 Liquidation, rehabilitation or conservation proceedings.**

- (1) Nothing in this subtitle shall be construed to reduce the liability for unpaid assessments of the insureds on an impaired or insolvent insurer operating under a plan with assessment liability.
- (2) Records shall be kept of all meetings of the board of directors to discuss the activities of the association in carrying out its powers and duties under KRS 304.42-080. The records of the association with respect to an impaired or insolvent insurer shall not be disclosed prior to the termination of a liquidation, rehabilitation, or conservation proceeding involving the impaired or insolvent insurer, prior to the termination of the impairment or insolvency of the insurer, or prior to the order of a court of competent jurisdiction. Nothing in this subsection shall limit the duty of the association to render a report of its activities under KRS 304.42-150.
- (3) For the purpose of carrying out its obligations under this subtitle, the association shall be deemed to be a creditor of the impaired or insolvent insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to subsection (8) of KRS 304.42-080. Assets of the impaired or insolvent insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired or insolvent insurer as required by this subtitle. Assets attributable to covered policies, as used in this subsection, is that proportion of the assets which the reserves that should have been established for such policies bear to the reserves that should have been established for all policies of insurance written by the impaired or insolvent insurer.
- (4) As a creditor of the impaired or insolvent insurer as established in subsection (3) of this section and consistent with KRS 304.33-440, the association and other similar associations shall be entitled to receive a disbursement of assets out of the marshaled assets, from time to time as the assets become available to reimburse it, as a credit against contractual obligations under this subtitle. If the liquidator has not, within one hundred twenty (120) days of a final determination of insolvency of an insurer by the receivership court, made an application to the court for the approval of a proposal to disburse assets out of marshaled assets to guaranty associations having obligations because of the insolvency, then the association shall be entitled to make application to the receivership court for approval of its own proposal to disburse these assets.
- (5)
  - (a) Prior to the termination of any liquidation, rehabilitation, or conservation proceeding, the court may take into consideration the contributions of the respective parties, including the association, the shareholders and policyowners of the insolvent insurer, and any other party with a bona fide interest, in making an equitable distribution of the ownership rights of such insolvent insurer. In such a determination, consideration shall be given to the welfare of the policy owners of the continuing or successor insurer;
  - (b) No distribution to stockholders, if any, of an impaired or insolvent insurer shall be made until and unless the total amount of valid claims of the association for funds expended in carrying out its powers and duties under

KRS 304.42-080 with respect to such insurer have been fully recovered by the association.

- (6) (a) If an order for liquidation or rehabilitation of an insurer domiciled in this state has been entered, the receiver appointed under such order shall have a right to recover on behalf of the insurer, from any affiliate that controlled it, the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five (5) years preceding the petition for liquidation or rehabilitation subject to the limitations of paragraphs (b) to (d) of this subsection;
- (b) No such distribution shall be recoverable if the insurer shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations;
- (c) Any person who was an affiliate that controlled the insurer at the time the distributions were paid shall be liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared, shall be liable up to the amount of distributions which would have been received if they had been paid immediately. If two (2) persons are liable with respect to the same distributions, they shall be jointly and severally liable;
- (d) The maximum amount recoverable under this subsection shall be the amount needed in excess of all other available assets of the insolvent insurer to pay the contractual obligations of the insolvent insurer;
- (e) If any person liable under paragraph (c) of this subsection is insolvent, all its affiliates that controlled it at the time the dividend was paid shall be jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

**Effective:** July 15, 1998

**History:** Amended 1998 Ky. Acts ch. 537, sec. 9, effective July 15, 1998. -- Created 1978 Ky. Acts ch. 282, sec. 14, effective June 17, 1978.

**Legislative Research Commission Note** (modified 10/29/96). Subsection (3) of this statute contains the following text, which appears to be incomplete: "Assets of the impaired or insolvent insurer as required by this subtitle." The provisions of KRS 304.42-010 to 304.42-190 were modeled after the Model Act of the National Association of Insurance Commissioners on Life and Health Guaranty Associations, in which the following language appears after the word "insurer" in the text specified above: "attributable to cover losses should be used to continue all covered policies and pay all contractual obligations of the impaired or insolvent insurer."