

**Ethics in Insolvency:  
Representing Insurers in Texas  
Insolvency Proceedings**

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**I. Introduction**

Many insurance company creditors and insureds are surprised to learn that insurance company insolvencies are administered by state insurance regulators and not by federal bankruptcy courts. And, many attorneys, even those who represent insurers in litigation and commercial transactions, fail to appreciate the complex web of laws and regulations governing insurance insolvencies. Throw in the discretion allotted to state insurance regulators, and it is clear that an attorney should not undertake representation of insurers in insolvency proceeding without sufficient experience and knowledge.

This presentation will provide a summary of the procedures for insurance company insolvencies along with practical tips for attorneys representing insurers in insolvency proceeding. At the most, this paper may provide an initial guide for attorneys who are confronted by insolvency issues for the first time. And, perhaps the description of the Byzantine nature of insurer insolvency proceedings may give the uninitiated cause to consider enlisting the assistance of an experienced insurance regulatory attorney.

**II. Background**

**A. State Regulation of Insurance**

The nature of the business of insurance is one of interstate commerce.<sup>1</sup> The regulation of interstate commerce is generally under the purview of the federal government, with federal law preempting state law on the same subject in accordance with the Commerce Clause in the United States Constitution.<sup>2</sup> In fact, in 1944 the Supreme Court categorized insurance as a business that Congress could regulate and, in some instances, which could not be regulated by States even if the federal regulations were silent.<sup>3</sup>

In the following year, however, Congress passed the McCarran-Ferguson Act<sup>4</sup> which grants to states the jurisdiction to regulate and tax the business of insurance, acting as an inverse preemption with state law preempting federal law. Section 1011 of the McCarran-Ferguson Act further declares that “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.”<sup>5</sup>

Accordingly, the regulation of insurance, including the regulation of insurance company insolvencies, is within the purview of the states. Insurance company insolvencies are administered by state courts and not by federal bankruptcy courts.

If an insurance company is domiciled<sup>6</sup> in the state of Texas, its solvency is regulated by Texas law.<sup>7</sup> Texas insurer

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<sup>1</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>2</sup> *Id.*; see also, Const. Art. 1, §8, cl. 3.

<sup>3</sup> *South-Eastern Underwriters Ass’n*, 322 U.S. 533; see also, *State Board of Ins. v. Todd Shipyards*, 370 U.S. 451 (1962).

<sup>4</sup> 15 U.S.C. §1011 *et seq.*

<sup>5</sup> 15 U.S.C. §1011.

<sup>6</sup> Texas Department of Insurance (“TDI”) license no. 4518.

<sup>7</sup> TEX. INS. CODE ANN. art. 21.28 (Vernon Supp. 2001). See also, McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.*

insolvencies are not administered under the federal bankruptcy code, but are administered by the TDI pursuant to the Texas Insurance Code (the "Code").

## B. Texas Department of Insurance

TDI, and its predecessors, date back to 1876, when an insurance agency was first authorized by the Texas Constitution.<sup>8</sup> The 15<sup>th</sup> Texas Legislature created the Texas Department of Insurance, Statistics and History that year.<sup>9</sup>

The name and structure of the agency has changed through the years, with the last major change in 1993. The 73rd Legislature passed legislation leading to the current single commissioner structure.<sup>10</sup> As a result of this long and storied history, TDI has a variety of statutes, regulations, procedures and policies unique to the agency.

TDI has statewide jurisdiction to enforce all insurance laws, including the Texas Insurance Code and TDI regulations, which are found in Chapter 28, Texas Administrative Code.<sup>11</sup> The Commissioner of Insurance ("the Commissioner") is the Department's chief executive and administrative officer. The Commissioner administers and enforces the Insurance Code, other insurance laws of Texas, and other laws granting jurisdiction or applicable to the Department or the Commissioner.<sup>12</sup> The Governor appoints the Commissioner for two-year terms, subject to confirmation by the Senate.<sup>13</sup>

As previously mentioned, the Commissioner of Insurance is TDI's chief

executive and chief administrative officer.<sup>14</sup> Subject to legislative appropriations, the Commissioner is authorized to appoint "deputies, assistants, and other personnel as necessary to carry out the powers and duties of the commissioner and the department under the [Texas Insurance Code], insurance laws of this state, and other laws granting jurisdiction or applicable to the department or the commissioner."<sup>15</sup>

TDI is divided into "programs," each of which is led by an associate commissioner.<sup>16</sup> The associate commissioners, and some deputy commissioners, are authorized to sign orders as designated by the Commissioner.<sup>17</sup> In some instances, the associate commissioner may preside over non-APA matters or matters designated as summary proceedings and, in some cases, over rulemaking proceedings.<sup>18</sup>

One of TDI's programs is Legal and Compliance and the associate commissioner for that program serves as the chief legal officer for the agency.<sup>19</sup> However, TDI established an Enforcement Division several years ago with a deputy commissioner who reports directly to the Commissioner. Within the Enforcement Division is a small group of attorneys and investigators who focus on title industry cases.

Most, but not all, TDI matters requiring resolution of legal or enforcement issues will have involvement by an attorney assigned to the Legal or Enforcement Sections.

Additionally, the agency has a General Counsel and Chief Clerk that report directly to the Commissioner. The General Counsel serves as attorney for the Commissioner and maintains the agency's

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(1945). (delegating the regulation of insurance to the states).

<sup>8</sup> Tex. Dept. of Ins. website at [www.tdi.state.tx.us](http://www.tdi.state.tx.us)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also TEX. INS. CODE ANN. ch. 31(Vernon 2007).

<sup>11</sup> TEX. INS. CODE ANN. § 31.002.

<sup>12</sup> *Id.* § 31.021.

<sup>13</sup> *Id.* § 31.022.

<sup>14</sup> *Id.* § 31.021.

<sup>15</sup> *Id.* § 31.041.

<sup>16</sup> See *id.* §§ 31.003 and 31.041-.042.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 36.102(b).

<sup>19</sup> The Attorney General defends the agency and its staff in certain matters. *Id.* art. 1.09-1 and § 31.005.

official records. The General Counsel and staff review all Commissioner's Orders and official documents prior to execution and, in the capacity of Chief Clerk, maintain the official records of the agency.

## C. Financial Regulation of Insurance Companies

### 1. Background

State insurance regulators will be involved early in the stages of an insurance company insolvency. It is important to note that "insolvency" in the context of state insurance regulation is not limited to financial deficiencies.

Texas insurers are subject to monitoring by the TDI's Early Warning System<sup>20</sup> and by review of annual financial statements.<sup>21</sup> Deficiencies detected in the annual statement may lead to a special examination<sup>22</sup>, and the examination process itself has several steps for appeal.<sup>23</sup> Article 21.28-A § 2(b) contains a non-exclusive list of conditions or triggers that an order of supervision or conservatorship may be based. As mentioned in the paragraph above, many of these triggers are not limited to financial condition.

In any event, insurers are examined triennially<sup>24</sup>, and are also required to file annual financial statements with the TDI.<sup>25</sup>

Below is an introduction to TDI's procedures for financial regulation and for follow-up examinations and investigations, as well as possible consequences from those activities. Counsel should be familiar with these procedures in order to be able to monitor the financial health of their client insurance companies. Additionally, counsel representing creditors should make sure that

the loan documents require debtor insurers to make immediate reports if TDI or another state regulator initiates any of the actions described below.

## 2. Investigations, Audits and Examinations

All entities regulated by TDI are subject to a wide range of inquiries, audits, examinations and investigations by TDI. There is a great deal of regulatory discretion afforded to state insurance regulators, although requests for information must be reasonable.

### a. general inquires

TDI staff members may address a "reasonable inquiry" to regulated person or company concerning the person's business condition; or "any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties."<sup>26</sup> A person receiving such an inquiry must respond within 10 days.<sup>27</sup> The statute does not have a specific provision addressing extensions, but historically TDI's policy is to grant written extension requests received within 10 days if the extension request is in good faith and there is a reasonable basis for the request.

Both TDI's inquiry and the response are subject to the Texas Public Information Act<sup>28</sup> and are "open records" unless the information and documents are "otherwise privileged or confidential by law."<sup>29</sup> The information, however, only remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.<sup>30</sup>

In most instances, respondents to TDI inquiries are concerned with the public

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<sup>20</sup> *Id.*, Chap. 8.

<sup>21</sup> *Id.*, Chap. 7, Sub. A..

<sup>22</sup> *Id.* § 7.84.

<sup>23</sup> *Id.* § 7.83.

<sup>24</sup> *Id.*, art. 1.15.

<sup>25</sup> See generally, 28 Tex. Admin. Code Chap. 7, Sub. A (West Publishing 2002).

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<sup>26</sup> *Id.* § 38.001(b).

<sup>27</sup> *Id.* § 38.001(c).

<sup>28</sup> TEX. GOV'T. CODE §. 552.

<sup>29</sup> TEX. INS. CODE ANN.. § 38.001(d).

<sup>30</sup> *Id.*

release of confidential financial information or trade secrets submitted to TDI. Both of these types of confidential information may be excluded<sup>31</sup> from release as public records, but it is up to the provider of the information to notify TDI that the information is confidential and should not be released.

In order to prove that information is proprietary and confidential, a respondent must show that the information is not made available to the public, and the fact the information is not public is of some value to the company. Customer lists may constitute confidential information.<sup>32</sup> Other information that has been found to be protected as confidential includes pricing information, customer preferences, buyer contacts, market strategies and customer information.<sup>33</sup>

## **b. financial solvency monitoring and analysis**

### **i. TDI examinations**

All Texas licensed insurance companies are subject to Insurance Code Articles 1.15 and 1.16, which relate to examination<sup>34</sup> of insurance companies.<sup>35</sup> Most insurers are examined once every three years, although the Commissioner may modify this requirement.<sup>36</sup>

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<sup>31</sup> TEX. GOV'T CODE ANN. § 552.110.

<sup>32</sup> *American Precision Vibrator Company v. National Air Vibrator Company*, 764 S.W. 2d 274, 278-279 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1988, no writ.)

<sup>33</sup> *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W. 2d 593, 601 (Tex. App. – Amarillo 1995, no writ.) See also *Martin v. Credit Protection Assoc., Inc.*, 793 S.W. 2d 667, 670 n.3 (Tex. 1990).

<sup>34</sup> TDI's Financial Division conducts both financial examinations and market conduct examinations.

<sup>35</sup> TEX. INS. CODE ANN. § 2551.001(c). As a result of Acts 2005, 79th Leg., ch 727, § 18(a)(1), eff. April 1, 2007, Articles 1.15 and 1.16 have moved to Subchapters B and D, respectively, of Chapter 401. Effective April 1, 2009, title insurance companies will be subject to Ch. 401 rather than Articles 1.15 and 1.16.

<sup>36</sup> *Id.* art. 1.15, § 401.052(a).

Although an examination is typically scheduled in advance, the TDI examiner may show up unannounced.

The examiner will often ask questions about irregularities found during the course of the examination or audit. There is also an opportunity for an exit conference. Except in extraordinary instances, such as evidence of criminal acts or financial insolvency, there is generally no need for legal counsel to be involved up to this stage.

The next phase of the examination is a letter from TDI's Examinations Division advising the insurer of the significant findings and requesting a response and information of corrective measures.

The letter from TDI will impose a deadline for a response, but TDI will typically grant an extension for good cause.

In most instances, this letter and the reply are fairly routine. However, if the findings appear to be serious, such as the findings of insolvency or of fraud, then the response should be prepared or reviewed by counsel.

### **ii. insurer financial statements**

Insurers are required to file an annual financial statement by March 1 for the preceding calendar year.<sup>37</sup> The disclosures in the annual statements are reviewed by TDI financial analysts and may trigger an inquiry, audit, examination or investigation. In extreme cases where the financial solvency of a domestic insurer is in question, TDI may initiate rehabilitation proceedings.

## **c. investigations**

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<sup>37</sup> *Id.* § 2551.152(a).

If complaints or regulatory issues resulting from TDI inquiries, examinations or audits can not be resolved informally, then TDI staff may start an investigation in the matter. The investigation, which is typically handled by TDI Enforcement Division attorneys and investigators, may begin with another informal ("Section 38.001") inquiry but with much more information requested. It is not unusual for inquiries at the investigation to request e-mails and other electronic files which are expensive and time consuming to assemble. Additionally, TDI's investigators and attorneys may request financial data and other operational information that may be similarly difficult and expensive to assemble. In a couple of recent TDI investigations, TDI requested "all" financial and operational information related to marketing for the subject insurers and all of their affiliates.

#### **i. investigatory subpoenas**

In cases that TDI staff deem more serious, especially those relating to unauthorized insurance, the Commissioner may issue investigatory subpoenas. The Commissioner may issue investigatory subpoenas "in any matter that the commissioner has authority to consider or investigate,"

The investigatory subpoena may require:

- (1) the attendance and testimony of a witness; and
- (2) the production of records.<sup>38</sup>

The Commissioner may designate the place, including Austin, Texas, for the testimony to be provided and the documents to be produced and must personally sign the subpoena. The witness may be compelled to provide the testimony under oath.<sup>39</sup>

Failure to comply with the investigatory subpoena may result in a citation for contempt of court and payment of the state's attorneys fees and costs.<sup>40</sup>

If the investigation relates to allegations of unauthorized insurance, testimony taken or records produced pursuant to an investigatory subpoena is admissible in court or in a hearing without "prior proof of correctness and without further proof, other than the Commissioner's certification, that the testimony or records were received from the person testifying or producing the records. The certified records, or certified copies of the records, are prima facie evidence of the facts disclosed by the records."<sup>41</sup>

A record subpoenaed and produced under this subchapter that is otherwise privileged or confidential by law remains privileged or confidential until admitted into evidence in an administrative hearing or a court.<sup>42</sup>

#### **ii. litigation hold**

Once a particular case reaches the investigation stage, the respondent should anticipate either administrative or civil litigation. In severe instances, criminal charges may also be filed.

Accordingly, the respondent should consider issuing a "litigation hold" for relevant records and information, especially electronic files. The spoliation or destruction of records, even by mistake, could result in sanctions against the respondent.

#### **d. civil investigative demands**

TDI staff will sometimes refer to Section 38.001 inquiries as "civil investigative demands." However, a true civil investigative demand ("CID") is issued by

<sup>38</sup> TEX. INS. CODE ANN. § 36.152.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 36.154.

<sup>41</sup> *Id.* § 36.1547

<sup>42</sup> *Id.* § 36.1549.

the Texas Attorney General and is much more serious both in the nature of the proceeding and in the sanctions for non-compliance.

The Attorney General has several statutes which grant authority to issue CID's.

An example is the Texas Free Enterprise and Antitrust Act of 1983<sup>43</sup>, which grants the Attorney General the authority to issue a CID" whenever the Attorney General has *reason to believe* that any person may be in possession of documentary material relevant to a civil antitrust investigation.

The Attorney General must have "reason to believe" that the person is in possession of documents or has "information relevant to a civil antitrust investigation . . ." <sup>44</sup> No attempt is made to define what basis is sufficient to constitute "reason to believe," and if the Attorney General's investigatory authority is challenged, the TFEAA provides that the court "shall presume absent evidence to the contrary that the Attorney General issued the demand in good faith and within the scope of his or her authority."<sup>45</sup>

Section 15.10(b) authorizes the Texas Attorney General – *prior to the institution of a civil proceeding* – to issue a demand to a person requiring the person to produce documentary material, to answer written interrogatories and to give oral testimony (deposition) relevant to a civil antitrust investigation.<sup>46</sup>

The Texas Deceptive Trade Practices Act<sup>47</sup> has similar section providing for the Attorney General to issue CID's.

### 3. Sanctions for Regulatory Violations

<sup>43</sup> TEX. BUS. & COM. CODE ANN. §15.10

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, §15.10(f) (emphasis added).

<sup>46</sup> *Id.*, §15.10(b) (emphasis added).

<sup>47</sup> *Id.* § 17.61.

If the matter can not be resolved informally at any of the stages above, TDI may seek sanctions against the respondent. These sanctions most often result from consent orders, and other times after an administrative hearing and following Commissioner's order.

After notice and opportunity for a hearing, the Commissioner may cancel or revoke a license for a violation of the Insurance Code or a regulation promulgated by the Commissioner.<sup>48</sup> The Commissioner may also impose the following sanctions "in addition to"<sup>49</sup> license revocation:

- (1) suspend the authorization for a specified time not to exceed one year;
- (2) order the holder of the authorization to cease and desist from:
  - (A) the activity determined to be in violation of this code or a rule of the commissioner; or
  - (B) the failure to comply with this code or a rule of the commissioner;
- (3) direct the holder of the authorization to pay an administrative penalty under Chapter 84;
- (4) direct the holder of the authorization to make restitution under Section 82.053; or
- (5) take any combination of those actions.<sup>50</sup>

If an order imposing the sanctions above is entered and the respondent license

<sup>48</sup> TEX. INS. CODE ANN. § 82.051.

<sup>49</sup> *Id.* § 82.052. While TDI typically seeks a fine in lieu of revocation of license, the Commissioner may order cumulative penalties in cases of egregious facts. For example, in Commissioner's Order # 07-0876, the title agent misappropriated and illegally withheld escrow funds for agent's own use. As a result, the Commissioner ordered that the title agent's license be revoked, and that the title agent pay restitution and an administrative penalty.

<sup>50</sup> *Id.* § 82.052.



holder does not comply with the order, the Commissioner may cancel the license after hearing.<sup>51</sup>

Additionally, the Commissioner may require a license holder to make "complete restitution to each Texas resident, each Texas insured, and each entity operating in this state that is harmed by a violation of, or failure to comply with, this code or a rule of the commissioner."<sup>52</sup>

#### 4. Statute of Limitations

Insurance Code Section 81.001 contains a statute of limitations for TDI enforcement actions, but apparently this statute of limitations does not apply to title companies.<sup>53</sup>

In any event, except for allegations of fraud, the Department or Commissioner may not begin an action to impose a sanction, penalty, or fine against a license holder after the earlier of (i) five years from the date of the act; or (ii) two years from the date the Department became aware of or was notified of the act.<sup>54</sup> The limitations period is five years for fraudulent acts.<sup>55</sup>

The limitations period does not apply to ongoing acts or to violations of Subchapter A, Chapter 544 (anti-discrimination) or of Section 541.057 and involving discrimination.<sup>56</sup>

#### 5. Informal Dispositions

Most TDI Enforcement cases, especially in the title insurance area, are resolved informally, either through consent

order or by dismissal.<sup>57</sup> However, some cases do end up in contested case proceedings. Both informal resolutions, such as consent orders, and contested cases require some form of notice.

Upon reading the section of this paper on contested cases, it is easy to see why most TDI enforcement actions are resolved informally. Contested cases are not for the faint-hearted or unprepared.

The reader should also note that the informal disposition or resolution of cases run the gamut from the truly informal, such as outright dismissals or warning letters, to the entry of official Commissioner's orders. In this sense, the use of the term "informal resolution" may be somewhat misleading.

Additionally TDI performs some statutory procedures in a summary fashion and without notice.

Except as specifically excluded by statute, TDI is subject to the Administrative Procedure Act, Chapter 2001, Government Code.<sup>58</sup>

However, the Commissioner has promulgated rules<sup>59</sup> creating summary procedure for routine matters and designating department activities otherwise subject to the APA as routine matters to be handled as summary procedures.<sup>60</sup> These

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<sup>51</sup> *Id.* § 82.054.

<sup>52</sup> *Id.* § 82.053(a).

<sup>53</sup> *Id.* § 2551.001, stating a law enacted after September 7, 1951 does not apply to Texas title insurance companies and title insurance business in Texas unless the law expressly states that it applies.

<sup>54</sup> *Id.* § 81.001(a).

<sup>55</sup> *Id.* § 81.001(b).

<sup>56</sup> *Id.* § 81.001(c).

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<sup>57</sup> See Appendix A. Almost 80% of the title enforcement cases in the last five years were handled informally. The remaining 20% were docketed for a contested case, but most were later resolved informally.

<sup>58</sup> 36.101.

<sup>59</sup> 28 TEX. ADMIN. CODE §§ 1.701-1.705.

<sup>60</sup> *Id.*, TEX. INS. CODE ANN. § 36.102. An activity may be designated as a routine matter only if the activity is:

- (1) voluminous;
- (2) repetitive;
- (3) believed to be noncontroversial; and
- (4) of limited interest to anyone other than persons immediately involved in or affected by the proposed department action. *Id.* § 36.102(b).

rules allow for and establish procedures different from those contained in APA.<sup>61</sup>

The procedures require, for each party directly involved, notice of a proposed negative action not later than the fifth day before the date of the proposed action.<sup>62</sup> The rules also provide for the delegation of authority to take action on a routine matter to a salaried employee of the Department designated by the Commissioner.<sup>63</sup>

## 6. Appeals

The Administrative Procedure Act states:

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review.<sup>64</sup>

The Insurance Code also provides for judicial review, the standard of review for which is substantial evidence.<sup>65</sup>

Before a party may challenge a final decision issued by the Commissioner, the party must first file a motion for rehearing with the Commissioner.<sup>66</sup> The party has 20 days from the date of notification or the date the final order is mailed to the parties to file a motion for rehearing.<sup>67</sup> TDI must mail to each party, and the party's attorney of record, by certified mail, return receipt requested, a copy of the official written decision or order in that case.<sup>68</sup>

A party or attorney of record notified by mail of the agency's final action is presumed to have been notified on the third day after the date on which the notice is mailed.<sup>69</sup> - Unless acted on by the agency, the motion for rehearing is overruled by operation of law 45 days after the date the party is notified of the final order.<sup>70</sup>

It is important to note that TDI will not be required to notify a respondent that the motion for rehearing has been overruled by operation of law. This failure to notify does not toll the deadline for filing an appeal.<sup>71</sup>

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<sup>61</sup> A person adversely affected by a decision in a summary proceeding must petition for APA review within 60 days of the decision in order to stay the action. *Id.* § 36.103.

<sup>62</sup> 28 TEX. ADMIN. CODE § 1.704.

<sup>63</sup> *Id.* § 1.703.

<sup>64</sup> TEX. GOV'T CODE ANN. § 2001.171.

<sup>65</sup> In a substantial evidence appeal, the reviewing court may affirm the final order in whole or in part, and shall reverse or remand the case to the administrative agency if:

... substantial rights of the [plaintiff] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or

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clearly unwarranted exercise of discretion. *Id.* § 2001.174(2).

The appealing party has the burden of proof to demonstrate invalidity of the final order or an absence of substantial evidence. *Id.* § 2001.060. The court, therefore, must presume that the agency's final order is valid and supported by substantial evidence. *Id.* § 2001.175(d); *Tex. Health Enter., Inc. v. Tex. Dep't of Health*, 949 S.W.2d 313, 314 (Tex. 1997); *Nueces Canyon Consol. ISD v. Cent. Educ. Agency*, 917 S.W.2d 773 (Tex. 1996).

<sup>66</sup> TEX. GOV'T CODE ANN. § 2001.145; *Simmons v. Tex. State Bd. of Dental Exam'rs*, 925 S.W.2d 652 (Tex. 1996).

<sup>67</sup> TEX. GOV'T CODE ANN. §§ 2001.145(a) and 2001.146. Also, under some circumstances, by motion of any party or the District Court, the judicial review of a case may be transferred to the Court of Appeals for a more accelerated review. *Id.* § 2001.176(c).

<sup>68</sup> TEX. INS. CODE ANN. § 81.002.

<sup>69</sup> TEX. GOV'T CODE ANN. §2001.142(c).

<sup>70</sup> *Id.* §§ 2001.142 and 2001.146(c).

<sup>71</sup> *Hernandez v. Tex. Dep't of Ins.*, 923 S.W.2d 192 (Tex.App.—Austin 1996, no writ).

The motion for rehearing is one last opportunity for the agency to correct any errors a party brings to the agency's attention. The agency has no authority to rehear a case on its own motion after overruling a motion for rehearing or after an order is final by operation of law.<sup>72</sup>

An appealing party has 30 days from the time the motion for rehearing is overruled to file a lawsuit in district court to review the agency's decision.<sup>73</sup>

The procedural prerequisites to an appeal of a final TDI order are mandatory and jurisdictional.<sup>74</sup> A motion for rehearing must notify the agency of the error claimed so that the agency can either correct or defend the error.<sup>75</sup>

Once an appeal of the Commissioner's order is filed in state district court, the court or a party, by motion, may ask that the case be transferred to the Third Court of Appeals for review, without a decision from the district court.<sup>76</sup>

In order for a transfer to be granted, the district court has to find that the public interest requires a prompt, authoritative ruling on the legal issues and the case would ordinarily be appealed.<sup>77</sup> Both courts must concur in the transfer.<sup>78</sup> Once the court of appeals grants transfer, the decision of the agency is subject to review by the court of appeals and the administrative record and

the district court records are filed with the appellate court.<sup>79</sup>

## **D. TDI Proceedings Not Subject to APA**

Because TDI is a financial regulatory agency, the Legislature has authorized the agency to take action outside of the APA in various circumstances. Most of these exceptions to the APA are in the area of financial regulation and consumer protection.

### **1. Appeal of TDI Financial Examinations**

TDI generally conducts financial examinations of insurance carriers every five years.<sup>80</sup> In some cases, the carriers dispute the findings made by the examiners. Section 401.056 of the Insurance Code requires TDI to adopt procedures for filing and adoption of examination reports and for hearings to be held under Subchapter B, Chapter 401 and guidelines governing orders issued under the article. The procedures are laid out in 28 Texas Administrative Code § 7.83. The rule provides for two levels of informal appeals within the agency. Although Section 401.056 requires "hearings," in practice agency supervisory officials review the appeal in a meeting at the agency. Any rule, regulation, order, decision or finding by the Commissioner under Subchapter B, Chapter 401 is subject to review in accordance with Subchapter D, Chapter 36 of the Insurance Code.<sup>81</sup> The filing of such suit operates as a stay of any such rule, regulation, order, decision or finding of the Commissioner until the court directs otherwise.<sup>82</sup>

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<sup>72</sup> *Young Trucking, Inc. v. R.R. Comm'n of Tex.*, 781 S.W.2d 719, 720 (Tex.App.—Austin 1989, no writ); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 145-46 (Tex.App.—Austin, 1986, writ ref'd n.r.e.).

<sup>73</sup> TEX. GOV'T CODE ANN. § 2001.176.

<sup>74</sup> *Id.* §§ 2001.175 - .176. See *Grounds v. Tolar ISD*, 707 S.W.2d 889, 891 (Tex. 1986); *Lindsay v. Sterling*, 690 S.W.2d 560, 563 (Tex. 1985); *Butler v. State Bd. of Educ.*, 581 S.W.2d 751 (Tex.Civ.App.—Corpus Christi 1979, writ ref'd n.r.e.).

<sup>75</sup> See *Hamancy v. Tex. State Bd. of Med. Exam'rs*, 900 S.W.2d 423, 425 (Tex.App.—Austin 1995, writ denied).

<sup>76</sup> TEX. GOV'T CODE ANN. § 2001.176(c).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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<sup>79</sup> *Id.*

<sup>80</sup> TEX. INS. CODE ANN. § 401.042.

<sup>81</sup> *Id.* §§ 36.202 and 401.062. Section 36.203 of the Insurance Code states the courts review of the matter shall be on the basis of substantial evidence. However, the agency's proceedings in these matters are informal in nature and no evidence or transcript is taken.

<sup>82</sup> *Id.* § 401.062.

## 2. Emergency Cease and Desist Orders

The Commissioner may issue an *ex parte* emergency cease and desist order if the Commissioner "believes" a licensee is committing an unfair act in a hazardous condition or hazardous financial condition and the conduct "appears to be" fraudulent, hazardous or likely to cause irreparable harm.<sup>83</sup> An *ex parte* cease and desist order is final on the 31st day after the date it is received, unless the affected person requests a hearing under Section 83.053 of the Insurance Code.<sup>84</sup>

## 3. Cease and Desist Hearings under Chapter 541

Chapter 541 of the Insurance Code permits the Commissioner to hold a non-APA hearing if the Commissioner has "reason to believe that a person has engaged in the business of insurance in this state has engaged or is engaging in this state in unfair method of competition or an unfair or deceptive act or practice . . . and that a [hearing] . . . is in the interest of the public."<sup>85</sup> The Commissioner must issue at least five days' notice to the respondent,<sup>86</sup> who will have an opportunity to "show cause why the department should not issue an order requiring the person to cease and desist from the unfair method of competition or unfair or deceptive act or practice described in the charges."<sup>87</sup>

Formal rules of pleading or evidence do not apply to such a hearing, but the Commissioner "on a showing of good cause, shall permit any person to intervene, appear, and be heard by counsel or in person."<sup>88</sup>

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<sup>83</sup> *Id.* § 83.051. See also 28 TEX. ADMIN. CODE §§ 1.901-.911 (Emergency Cease and Desist Orders).

<sup>84</sup> The requested review must be in writing and must state the reasons for the appeal. TEX. INS. CODE ANN. § 83.053. The hearing on appeal is held in accordance with APA. *Id.* § 83.054.

<sup>85</sup> *Id.* § 541.102.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* § 541.103

<sup>88</sup> *Id.* § 541.104.

The Commissioner may require a transcript if requested by a party. A statement of the evidence and proceeding for must be prepared if the ruling is appealed to a state district court.<sup>89</sup> The Commissioner may issue a cease and desist order after the hearing.<sup>90</sup>

## 4. Administrative Class Action Hearings under Subchapter F, Chapter 541

The Commissioner may hold non-APA administrative class action hearings in connection with the issuance of a cease and desist order as provided in Section 541.108 of the Insurance Code.<sup>91</sup> Such class action hearings may be brought by the Attorney General upon request by the Department or may be brought on an individual's own behalf and on behalf of others similarly situated.<sup>92</sup> The administrative class action hearings are not subject to formal rules of procedure or evidence.<sup>93</sup> The Commissioner

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<sup>89</sup> *Id.* § 541.105

<sup>90</sup> *Id.* § 541.108. Any person who violates a cease and desist order under Section 541.108 is required to pay to the State of Texas a sum not to exceed \$50.00, which may be recovered in a civil action. If such violation is found to be willful, the amount of the penalty is not to exceed \$500.00. *Id.* § 541.111. The Commissioner may also impose a fine under Chapter 84 of the Insurance Code for violations of a cease and desist order under Section 541.108. *Id.* § 541.110.

<sup>91</sup> *Id.* § 541.251

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § 541.262. The court may make appropriate orders:

- (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
- (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in a manner the court directs to some or all of the members or the attorney general of:
  - (A) any step in the action;
  - (B) the proposed extent of the judgment; or
  - (C) the opportunity for members to:
    - (i) signify whether the members consider the representation to be fair and adequate;
    - (ii) intervene and present claims or defenses; or
    - (iii) otherwise come into the action;

may require the respondent to account for all premiums collected for policies and make appropriate refunds to insureds who request them.<sup>94</sup> Enforcement of the Commissioner's administrative class action order is referred to the Attorney General for a lawsuit to be filed in Travis County.<sup>95</sup>

### **5. Assurance of Voluntary Compliance under Subchapter H, Chapter 541**

In some cases involving alleged advertising violations or illegal sales activities, TDI may accept "assurance of voluntary compliance" (hereinafter "AVC") to resolve the matter.<sup>96</sup> AVCs are entered in a contract format assurance and are filed with TDI's General Counsel and Chief Clerk. There is a separate AVC docket at TDI.<sup>97</sup>

TDI's acceptance of an AVC may be conditioned on restitution and the payment of investigative fees in lieu of a fine.<sup>98</sup> An AVC is not considered an admission of prior violation of Chapter 541 of the Insurance Code or the Texas Deceptive Trade Practices Act, Section 17.46, Business & Commerce Code.<sup>99</sup> However, unless an AVC has been rescinded by agreement, any subsequent failure to comply with the terms of the AVC is prima facie evidence of a prior violation of those two statutes.<sup>100</sup>

Matters closed by the filing of an AVC may be reopened at any time, and an

AVC does not affect individual rights of recovery.<sup>101</sup>

## **6. Rehabilitation Orders**

The Commissioner may enter *ex parte* orders placing an insurer in "supervision" or "conservatorship" under Subchapters C and D, Chapter 441 of the Insurance Code if the Commissioner has reason to believe the insurer is insolvent or is operating in a manner hazardous to the public.<sup>102</sup> However, the insurer has the right to request a hearing to contest the orders.<sup>103</sup> The hearing is subject to the APA.<sup>104</sup> Insolvency proceedings are addressed in further detail below.

### **III. Insurance Company Insolvencies**

#### **A. Financial Impairment**

Section 443 of the Code is the Insurer Receivership Act ("The Act"). The Act provides that if an insurer becomes financially impaired or insolvent or if its continued operation would be hazardous to its policyholders or the public, the Texas Commissioner of Insurance ("the Commissioner") may commence a judicial proceeding for the purpose of placing the insurer in conservation or rehabilitation or, where necessary, liquidating the company and distributing its remaining assets to its creditors.

#### **B. Receivership**

When a Texas court finds that a Liquidator should take charge of an insurer domiciled in Texas, the Commissioner, or a special deputy receiver designated by the

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(3) imposing conditions on the representative parties or intervenors;

(4) requiring that the pleadings be amended to eliminate allegations relating to representation of absent persons, and that the action proceed accordingly; or

(5) dealing with similar procedural matters.

<sup>94</sup> *Id.* § 541.301.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at Subchapter E, Chapter 541.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* § 541.352(a).

<sup>100</sup> *Id.* § 541.352(b).

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<sup>101</sup> *Id.* §§ 541.353-.354.

<sup>102</sup> *Id.* §§ 441.101 and 441.151.

<sup>103</sup> *Id.* §§ 441.105 and 441.156.

<sup>104</sup> *Id.*

Commissioner to act as a Liquidator, will marshal the insurer's remaining assets and distribute the assets in accordance with the Act.<sup>105</sup> Within 120 days of the

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<sup>105</sup> TEX. INS. CODE ANN. § 443.253, sets forth the classes of claims as follows:

(2) Classes of claims:

(A) Class 1:

(i) All of the receiver's, conservator's, and supervisor's costs and expenses of administration, including repayment of funds advanced to the receiver from the abandoned property fund of the department.

(ii) All of an insurance guaranty association's or foreign insurance guaranty association's costs and expenses of administration related to a receivership estate and all of the expenses of an insurance guaranty association or foreign insurance guaranty association in handling claims. For the purpose of this subparagraph, attorney's fees incurred by an insurance guaranty association or foreign insurance guaranty association in the defense of an insured under a policy issued by an impaired insurer constitute an expense incurred in handling claims.

(iii) Secured creditors to the extent of the value of the security as provided by Section 8(c) of this Article.

(B) Class 2:

(i) All claims by policyholders, beneficiaries, insureds, and liability claims against insureds covered under insurance policies and insurance contracts issued by the insurer.

(ii) All claims by an insurance guaranty association or a foreign insurance guaranty association that are payments of proper policyholder claims.

(C) Class 3: Claims of the federal government not included in Class 2, above.

commencement of an insolvency proceeding, the Liquidator may make application to the court to approve a proposed distribution of assets from the insurer's estate in accordance with the Act, pursuant to the priorities of the classes established in Section 443.253.

Each class of claim, (from 1 to 5), is to be paid in full or adequate funds retained for such payment before the members of the next class receive any payment.<sup>106</sup> No subclasses are established within any class.<sup>107</sup>

A receivership order will fix the rights of all parties as of the date of the receivership, stay all actions<sup>108</sup> pending against the insolvent insurer and preclude the insolvent insurer from continuing to defend its insureds.<sup>109</sup> When taking possession of the assets of an insolvent insurer, the Liquidator, subject to the direction of the court, will conduct the business of the insurer for the purpose of

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(D) Class 4: All other claims of general creditors not falling within any other priority under this section including claims for taxes and debts due any state or local government which are not secured claims.

(E) Class 5: Claims of surplus or contribution note holders, holders of debentures or holders of similar obligations and proprietary claims of shareholders, members, or other owners according to the terms of the instruments.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> An "action" is generally construed as a lawsuit. We could find no reported cases interpreting the phrase "action". However, in one highly visible case, a state district judge ruled that the term "action" can only mean a lawsuit, resulting in some legislative revisions to the Texas Insurance Code as a result. *State Farm Mutual Automobile Ins. Co. et al. v. The Attorney General of Texas, Dan Morales, et al.*, Cause No. 96-01410 in the 98th Judicial District Court of Travis County, Texas; Legislative Bill Analysis, S.B. 1106, 75<sup>th</sup> Tex. Leg. ["The phrase 'bring an action' has been interpreted by the courts to mean filing a lawsuit."]

<sup>109</sup>

liquidating or otherwise dealing with such assets.<sup>110</sup> The Code sets procedures for settling claims and the Liquidator is considered to be acting on behalf of the receivership estate.

The order may also require that all creditors be provided with a copy of the order and a proof of claim form to be completed and returned to the Liquidator on or before a date certain (the bar date).<sup>111</sup> When the Liquidator receives a completed proof of claim, the Liquidator must either allow or disallow the claim within a prescribed period of time, and then provide a notice of the determination to the claimant.<sup>112</sup>

### C. Rehabilitation Procedures

Before an insurance company is placed in receivership, Section 441 of the Code requires that several steps must be taken first.<sup>113</sup> Section 3 of such Article states that, if at any time the Commissioner of Insurance determines that an insurance company is insolvent, its condition is such that its business is hazardous to the public, it exceeds its powers, it fails to comply with the law, or if it consents, the Commissioner shall notify the company of such determination and furnish a list of requirements to abate his determination. If the Commissioner then decides to place the company under supervision, the company has no more than 180 days from the date of the Commissioner's notice of such supervision to comply with the Commissioner's requirements. The Commissioner may schedule a hearing with at least 10 days' notice to all parties of records and, if after the hearing, it is determined that the company has failed to

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<sup>110</sup> TEX. INS. CODE § 443.

<sup>111</sup> The bar date may not be less than 90 days from the date of the receivership. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See, El Paso Elec. Co. v. Texas Dep't of Ins.*, 937 S.W. 2d 432, 434-35 (Tex. 1996) {outlining the "comprehensive scheme for the liquidation, rehabilitation, and reorganization of insolvent insurers."}

comply with the requirements of the Commissioner, a conservator may be appointed to take charge of the insurance company and its property and effects.

Section 441.153 of the Code sets forth the guidelines for conservatorship of an insolvent insurer. If at any time during the pendency of a conservatorship, the Commissioner finds that the company is not in a condition to continue business in the interest of its policy or certificate holders, the Commissioner shall give notice to the Attorney General who shall apply to a court in Travis County, Texas for leave to file suit to forfeit the company's charter. The Commissioner may also report to the Attorney General for the purpose of taking remedial action such as the appointment of a Liquidator under the Act of the Code. Section 441.159 of the Code requires the conservator to complete his duties no later than 90 days after the date he is appointed, although the Commissioner, without hearings, may grant a series of 30-day extensions to the conservatorship (which extensions shall not exceed at total of 180 days) if he determines that there is a substantial likelihood of the company's rehabilitation.

Section 441 and the Act of the Code do not prohibit the Commissioner from placing an insurer directly into receivership without placing the insurer in either supervision or conservation. However, in practice, the Commissioner will attempt to rehabilitate an insurer prior to issuing an impairment order and asking a district court for a receivership order. The impairment order triggers coverage under the Life Insurance Guaranty Act and the Property and Casualty Insurance Guaranty Act, which will pay claims by insurers and third-party claimants.<sup>114</sup> This cost is ultimately borne by state taxpayers.<sup>115</sup>

An automatic stay will be in effect with respect to actions against insolvent insurer

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<sup>114</sup> TEX. INS. CODE §§ 462 and 463.

<sup>115</sup> *Id.*

or its property.<sup>116</sup> The creditor cannot make any claim, charge or offset, or commence or prosecute any action, appeal or arbitration, including administrative proceedings, or obtain any preference, judgment, attachment, garnishment, or other lien, or make any levy against insolvent insurer or its property or any part thereof, or against the liquidator/receiver, except as permitted by TEX. INS. CODE § 443, Subchapter F.

Prior to seeking a court order placing the insurer into receivership, the Commissioner can and often does attempt to rehabilitate an insolvent insurer.<sup>117</sup> If the Commissioner

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<sup>116</sup> TEX. INS. CODE § 443, Subchapter F.

<sup>117</sup> Prior to supervision or conservatorship, the Commissioner of Insurance may furnish the company with a written list of requirements to abate the Commissioner's determination of insolvency or hazardous condition. *Id.* §§ 441.051 and 052. TDI refers to this procedure as "administrative oversight." The statute states:

(a) If at any time the commissioner determines that an insurer is insolvent, has exceeded the insurer's powers, or has otherwise failed to comply with the law, the commissioner shall:

(1) notify the insurer of that determination;

(2) provide to the insurer a written list of the commissioner's requirements to abate the conditions on which that determination was based; and

(3) if the commissioner determines that the insurer requires supervision, notify the insurer that the insurer is under the commissioner's supervision and that the commissioner is invoking this chapter.

(b) The commissioner may provide the notice and information to an insurer that agrees to supervision.

(c) The insurer shall comply with the commissioner's requirements.

TEX. INS. CODE § 441.053.

seeks to place an insurer directly into receivership<sup>118</sup>, there will be little if any advance notice available to the insurer or its creditors. However, pursuant to the legislative intent expressed in Section 441-001<sup>119</sup>, the Commissioner will typically seek to rehabilitate the insurer, meaning that the process from supervision (180 days maximum)<sup>120</sup> through conservatorship (180 days maximum)<sup>121</sup> to receivership could take up to 360 days. Examinations<sup>122</sup> and supervision proceedings<sup>123</sup> are confidential by statute, but conservation orders must be published.<sup>124</sup>

#### **IV. Bank as Secured Creditor; Foreclosure**

If an insurer/debtor is put into receivership, the lending bank may be a secured creditor in possession of the collateral, and as such, may foreclose on the collateral without resorting to filing a claim. The Act's Section 443.260 permits a secured creditor to surrender its security and file a claim as a general creditor, or the claim may be "discharged by resort to the security." Any deficiency is treated as a claim against the general assets of the insurer on the same basis as unsecured creditors. The value of any security held by a secured creditor shall be determined under the supervision of the court by converting the security into money according to the terms of the agreement pursuant to which the security was delivered

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<sup>118</sup> The Commissioner may seek to place an insolvent insurer directly into receivership. *Id.*

<sup>119</sup> "The Legislature declares that such values and assets should be preserved if the circumstances of the insurer's financial condition warrant an attempt to conserve or rehabilitate such insurer and such rehabilitation or conservation is otherwise feasible . . ." *Id.*, §441.001.

<sup>120</sup> *Id.*, §102.

<sup>121</sup> *Id.*, § 159.

<sup>122</sup> *Tex. Ins.Code*, art. 1.15.

<sup>123</sup> *Id.*, § 441.201.

<sup>124</sup> *Id.*



to the creditor, or by agreement, arbitration, compromise, or litigation between the creditor and the Liquidator.

The Code does contain the concept of "voidable transfers" and liens can be avoided if a lien upon property or assets of an insurer which is made or created, within four months prior to the commencement of an action in a Texas court against the insurer to liquidate, rehabilitate, reorganize or conserve such insurer, with the intent to give or enable the creditor to obtain a greater percentage of the creditor's debt than any other creditor of the same class.<sup>125</sup>

There is no statutory waiting period; therefore, the creditor may foreclose on the collateral as soon as there is a default and as soon as foreclosure is permitted under the Pledge Agreement and applicable Texas statutes.<sup>126</sup> However, the court may also issue an injunction prohibiting any person transacting business with the insurer from disposing of assets without court approval.<sup>127</sup> In such an instance, it will be necessary for the creditor to secure court approval prior to foreclosing on the collateral.<sup>128</sup>

Although a secured creditor is not technically required to file a claim, the creditor will be required to notify the insolvent insurer's Liquidator of the foreclosure.

### **A. Interest on Bank's Claim**

If secured lender forecloses on its collateral instead of filing a claim in receivership, the question would be moot. However, if the creditor does get involved in the receivership proceedings, and a claim is filed, the creditor is not entitled to interest on its claim during the receivership proceeding. of delinquency proceedings.

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<sup>125</sup> Id. § 443.204-205.

<sup>126</sup> Id., §443.008.

<sup>127</sup> Id.

<sup>128</sup> Id.

### **B. Liquidator's Power to Force Substitution of Collateral**

A Liquidator cannot force a creditor to accept substitute collateral. A creditor's rights with regard to the collateral specifically enumerated in the Act. The creditor may foreclose on secured collateral in its possession without filing a claim. There is no right for the Liquidator to force the creditor to substitute collateral.

However, the Act provides that the value of the collateral held by a secured creditor shall be determined under supervision of the court by converting the security into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by agreement, arbitration, compromise, or litigation between the creditor and the Liquidator. In other words, it is possible that the court's determination of the collateral's value may differ from the value placed on the collateral by the creditor.

### **C. Can Any Other Claim Be Prior to the Bank's Secured Claim?**

The Act gives priority to Class 1 claims, which are claims of secured creditors to the extent of the value of the security and the costs of the Liquidator, conservator, supervisor, and other administrative costs and expenses. If the value of the security is insufficient to cover the claim of the secured creditor, the deficiency constitutes an unsecured claim and several classes of claimants have priority over this type of unsecured claim. Class 2 claims include claims of policyholders, beneficiaries, insureds, and all liability claims against insureds covered under insurance policies and insurance contracts issued by the insurer, as well as claims by insurance guaranty associations or a foreign insurance guaranty association that are payments of proper policyholder claims. Class 3 claims are claims of the federal government not included in Class 2. Class 4 claims are claims of general creditors not falling within any other priority, including claims of unsecured creditors. Class 5 claims are

claims of surplus or contribution note holders, holders of debentures or holders of similar obligations and proprietary claims of shareholders, members or other owners according the terms of the instruments. Therefore, a secured creditor would have first priority in distribution to the extent that the value of the security, but any additional amounts not covered by the security would be Class 4 unsecured claims which are subordinate to all Class 2 and Class 3 claims.

## **V. Compliance by Depository Banks with Court Orders and Receivership Statutes**

In addition to making sure to properly file a claim and otherwise to protect its interests as a creditor, a bank or other financial institution should take steps to ensure compliance with state and federal laws and to cooperate with government authorities.

In order to comply with a receivership order and applicable Texas law, a bank holding deposits from an impaired insurance company should, at a minimum, ensure that the following procedures are implemented:

1. Circulate the receivership order internally to key employees at the bank with an explanatory cover e-mail highlighting key points of the order.

2. Issue a "litigation hold" memorandum identifying document retention/electronic mail and data retention/litigation hold requirements in the receivership order and circulate the memorandum to appropriate employees (see Appendix B).

3. Inform key personnel of the various restraining and enjoining provisions in the receivership order which are binding upon the bank (along with other financial institutions). The employees must understand the bank's obligations to properly

preserve the accounts, property, etc., of the insolvent insurer as required.

4. Inform the bank's litigation counsel the automatic stay in effect with respect to actions against insolvent insurer or its property.<sup>129</sup> The bank cannot make any claim, charge or offset, or commence or prosecute any action, appeal or arbitration, including administrative proceedings, or obtain any preference, judgment, attachment, garnishment, or other lien, or make any levy against insolvent insurer or its property or any part thereof, or against the liquidator/receiver, except as permitted by TEX. INS. CODE § 443, Subchapter F.

5. Make certain that the bank is taking appropriate internal steps to be in compliance with the Court Order (and Insurance Code § 443 requirements).

6. Make sure that the bank has properly frozen/protected assets, accounts, deposits, involving the insolvent insurer's entities.

## **VI. Conclusion**

State insurance regulatory procedures, including those governing insurance company insolvencies, can create problems, and even traps, for the unwary. A bank loaning money to an insurer should ensure that the loan is properly secured and that the insurer itself is in compliance with regulatory requirements.

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<sup>129</sup> TEX. INS. CODE § 443, Subchapter F.

