

SENATE BILL No. 937

February 8, 2012, Introduced by Senators HUNE and BIEDA and referred to the Committee on Insurance.

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

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

6 (a) A contractual right to terminate, liquidate, or close out
7 any netting agreement or qualified financial contract with an
8 insurer because of the commencement of a formal delinquency
9 proceeding under this chapter or the insolvency, financial

1 condition, or default of the insurer at any time, provided that the
2 right is enforceable under applicable law other than this act.

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

4 (i) A pledge, security, collateral, **REIMBURSEMENT**, or guarantee
5 agreement or any ~~other~~-similar security **AGREEMENT**.

6 (ii) **AN** arrangement or credit ~~support document~~ **ENHANCEMENT**
7 relating to a ~~AT LEAST 1~~ netting agreement or qualified financial
8 contract.

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

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

insurer. Any such property or amount shall, except to the extent it is subject to 1 or more secondary liens or encumbrances, be a general asset of the insurer.

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

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

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

(4) If a receiver for an insurer makes a transfer of 1 or more netting agreements or qualified financial contracts, ~~then~~ the receiver shall use its best efforts to notify any person who is party to the netting agreements or qualified financial contracts of the transfer by 12 noon of the receiver's local time on the business day following the transfer. For purposes of this subsection, "business day" means a day other than a Saturday, Sunday, or any day on which either the New York stock exchange or

1 the federal reserve bank of New York is closed.

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

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

9 (B) A pledge, security, collateral, **REIMBURSEMENT**, or
 10 guarantee agreement or ~~any other~~ similar security **AGREEMENT.**

11 (C) **AN** arrangement or credit ~~support document~~ **ENHANCEMENT**
 12 relating to a netting agreement or qualified financial contract.
 13 ~~that is made before the commencement of a formal delinquency~~
 14 ~~proceeding under this chapter. However,~~

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

19 (7) ~~(6)~~ In exercising any of its powers under this chapter to
 20 disaffirm or repudiate a netting agreement or qualified financial
 21 contract, the receiver shall take action with respect to each
 22 netting agreement or qualified financial contract and all
 23 transactions entered into in connection with the netting agreement
 24 or qualified financial contract in its entirety. Notwithstanding
 25 any other provision of this chapter, any claim of a counterparty
 26 against the estate arising from the receiver's disaffirmance or
 27 repudiation of a netting agreement or qualified financial contract

1 that has not been previously affirmed in the liquidation or
2 immediately preceding rehabilitation case shall be determined and
3 shall be allowed or disallowed as if the claim had arisen before
4 the date of the filing of the petition for liquidation or, if a
5 rehabilitation proceeding is converted to a liquidation proceeding,
6 as if the claim had arisen before the date of the filing of the
7 petition for rehabilitation. The amount of the claim shall be the
8 actual direct compensatory damages determined as of the date of the
9 disaffirmance or repudiation of the netting agreement or qualified
10 financial contract.

11 (8) ~~(7)~~—This section does not apply to persons who are
12 affiliates of the insurer that is the subject of the proceeding.

13 (9) ~~(8)~~—All rights of counterparties under this act apply to
14 netting agreements and qualified financial contracts entered into
15 on behalf of the general account or separate accounts if the assets
16 of each separate account are available only to counterparties to
17 netting agreements and qualified financial contracts entered into
18 on behalf of that separate account.

19 (10) ~~(9)~~—As used in this section:

20 (a) "Actual direct compensatory damages" includes normal and
21 reasonable costs of cover or other reasonable measures of damages
22 utilized in the derivatives market for the contract and agreement
23 claims, but does not include punitive and exemplary damages,
24 damages for lost profit or lost opportunity, or damages for pain
25 and suffering.

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

27 (i) A contract for the purchase or sale of a commodity for

1 future delivery on, or subject to the rules of, a board of trade
2 designated as a contract market by the commodity futures trading
3 commission under the commodity exchange act, 7 USC 1 to 27f, or
4 board of trade outside the United States.

5 (ii) An agreement that is subject to regulation under section
6 23 of the commodity exchange act, 7 USC 23, and that is commonly
7 known to the commodities trade as a margin account, margin
8 contract, leverage account, or leverage contract.

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

12 (c) "Contractual right" includes any right, whether or not
13 evidenced in writing, arising under statutory or common law, a rule
14 or bylaw of a national securities exchange, national securities
15 clearing organization, or securities clearing agency, a rule or
16 bylaw, or a resolution of the governing body, of a contract market
17 or its clearing organization, or under law merchant.

18 (d) "Forward contract" means a contract for the purchase,
19 sale, or transfer of a commodity, as defined in section 1a of the
20 commodity exchange act, 7 USC 1a, or any similar good, article,
21 service, right, or interest that is presently or in the future
22 becomes the subject of dealing in the forward contract trade, or
23 product or by-product thereof, with a maturity date more than 2
24 days after the date the contract is entered into, including, but
25 not limited to, a repurchase transaction, reverse repurchase
26 transaction, consignment, lease, swap, hedge transaction, deposit,
27 loan, option, allocated transaction, unallocated transaction, or a

1 combination of these or option on any of them. Forward contract
2 does not include a commodity contract.

3 (e) "Netting agreement" means a contract or agreement,
4 including terms and conditions incorporated by reference in the
5 contract or agreement, that documents 1 or more transactions
6 between the parties to the agreement for or involving 1 or more
7 qualified financial contracts and that provides for the netting or
8 liquidation of qualified financial contracts or present or future
9 payment obligations or payment entitlements thereunder, including
10 liquidation or close-out values relating to those obligations or
11 entitlements, among the parties to the netting agreement. Netting
12 agreement includes a master agreement that otherwise meets this
13 definition. A master agreement includes all schedules,
14 confirmations, definitions, and addenda to it and transactions
15 under it, which shall be treated as 1 netting agreement.

16 (f) "Qualified financial contract" means a commodity contract,
17 forward contract, repurchase agreement, securities contract, swap
18 agreement, and any similar agreement that the commissioner
19 determines by regulation, resolution, or order to be a qualified
20 financial contract for the purposes of this chapter.

21 (g) "Repurchase agreement", including a reverse repurchase
22 agreement, means an agreement, including related terms, that
23 provides for the transfer of certificates of deposit, eligible
24 bankers' acceptances, or securities that are direct obligations of,
25 or that are fully guaranteed as to principal and interest by, the
26 United States or an agency of the United States against the
27 transfer of funds by the transferee of the certificates of deposit,

1 eligible bankers' acceptances, or securities with a simultaneous
2 agreement by the transferee to transfer to the transferor
3 certificates of deposit, eligible bankers' acceptances, or
4 securities as described above, at a date certain not later than 1
5 year after the transfers or on demand, against the transfer of
6 funds. For the purposes of this definition, the items that may be
7 subject to an agreement include mortgage-related securities, a
8 mortgage loan, and an interest in a mortgage loan, and shall not
9 include any participation in a commercial mortgage loan, unless the
10 commissioner determines by regulation, resolution, or order to
11 include the participation within the meaning of the term.

12 (h) "Securities contract" means a contract for the purchase,
13 sale, or loan of a security, including an option for the repurchase
14 or sale of a security, certificate of deposit, or group or index of
15 securities, including an interest therein or based on the value
16 thereof, or an option entered into on a national securities
17 exchange relating to foreign currencies, or the guarantee of a
18 settlement of cash or securities by or to a securities clearing
19 agency. As used in this definition, "security" includes a mortgage
20 loan, mortgage-related securities, and an interest in any mortgage
21 loan or mortgage-related security.

22 (i) "Swap agreement" means an agreement, including the terms
23 and conditions incorporated by reference in an agreement, that is a
24 rate swap agreement, basis swap, commodity swap, forward rate
25 agreement, interest rate future, interest rate option, forward
26 foreign exchange agreement, spot foreign exchange agreement, rate
27 cap agreement, rate floor agreement, rate collar agreement,

1 currency swap agreement, cross-currency rate swap agreement,
2 currency future, or currency option or any other similar agreement,
3 and includes any combination of agreements and an option to enter
4 into an agreement.