**OVERVIEW**

Each state and territory have a statute that provides for the appointment of the state’s insurance regulator as the Receiver of an insurer that is placed in a delinquency proceeding. This Handbook is intended as a guide for insurance regulators and others who assist with carrying out the Receiver’s duties.

The Handbook is organized by subject matter. Each chapter contains an introduction to the subject, followed by an in-depth discussion. In some chapters, checklists are included as an aid to implementing the actions described in the chapter.

References are provided to the applicable provisions of the NAIC model receivership laws and relevant case law in each chapter. As the legal references reflect the NAIC models and case law existing at the time the Handbook was drafted, a practitioner should always review the current state of the law.

While receiverships typically share essential principles and elements, there are important variances:

* Each state’s receivership statute may contain unique provisions that are not derived from an NAIC model act or shared with other states.
* Case law interpreting the statutes governing receiverships can vary between states.
* A receivership is a court proceeding, and the judicial process is governed by the state’s court system and rules of procedure.
* Each state insurance department is structured to meet the circumstances of the particular state, and the administrative process for handling receiverships may differ between the states.
* As receiverships vary in size and complexity, a range of approaches may be appropriate.

A practitioner should be aware of the process for handling a receivership in the relevant state, and how it may differ from the examples provided in this Handbook. As described above in the Disclaimer, this Handbook is not an instructional manual for handling a receivership but should be viewed as guidance.

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**CHAPTER 1 – COMMENCEMENT OF THE PROCEEDING**

# I. INTRODUCTION

Insurer receiverships are governed by state law rather than federal bankruptcy law. Although the proceeding is governed principally by the law of the state in which the insurer is domesticated, the laws of the various states and other jurisdictions in which an insurer conducted business, has assets, or has creditors, may also be implicated. Consequently, during the commencement and administration of a troubled or insolvent insurer, it is important for the receiver to consider the laws of those states and jurisdictions.

Most states have enacted statutes that govern the conservation, rehabilitation and liquidation of insurance companies that are patterned at least in part after one of three model acts that have been adopted by the NAIC over the years: the Uniform Insurers Liquidation Act (“Uniform Act”); the Insurers Rehabilitation and Liquidation Model Act (“Liquidation Model Act”); and the Insurer Receivership Model Act (“IRMA”)[[1]](#footnote-2). In this handbook, the model acts will be referred to collectively as the “NAIC Model Acts.”[[2]](#footnote-3) Because of their widespread influence, the NAIC Model Acts are basis for discussion of issues involved in the commencement and administration of troubled or insolvent insurers. Even so, the laws of the individual states may deviate from the models, in whole or part. In some jurisdictions, affiliated service providers (e.g*.*, agencies, premium finance companies, administrative service providers) whose purpose is to provide services solely to the insolvent insurer may be subject to the laws that apply to impaired or insolvent insurers.[[3]](#footnote-4)

Receivership proceedings[[4]](#footnote-5) are usually commenced against an insolvent, financially impaired or otherwise troubled insurer in the insurer’s domiciliary state (the state in which the insurer is incorporated) and in specific courts within that state, generally either the court in the judicial district encompassing the state’s capital or the judicial district of the insurer’s principal office. The NAIC Model Acts require that the chief insurance regulator of the insurer’s domiciliary state be appointed receiver of the insurer to administer the receivership under court supervision. The chief insurance regulator in the individual state may be referred to as commissioner, treasurer, superintendent, or director. For purposes of this handbook, the term “regulator” is used to encompass all such officials. If the insurer is an “alien” insurer admitted to the U.S. market through a “port of entry,” the state through which the insurer was admitted will administer the receivership.

*See Chapter 9 – Legal Considerations for each type of proceeding.*

# II. FORMS OF PROCEEDINGS

## A. Administrative Supervision

Most states authorize the regulator to issue short-term administrative supervision orders against insurers operating in a manner that poses a hazard to policyholders, creditors, or the public. Under such orders, the regulator or their special deputies serves as administrative supervisor of the insurer. In states where administrative supervision orders may be issued without formal court proceedings, the orders are subject to administrative review and are often confidential. Administrative supervision can enhance regulatory oversight while the insurer overcomes what is envisioned as a temporary challenge, such as a crisis in the broader economy. It is also useful in temporarily stabilizing a deteriorating situation prior to the entry of an order of rehabilitation or liquidation. Where administrative supervision is authorized, statutes typically empower the regulator to prohibit the insurer from doing any of the following during the period of supervision, without the prior approval of the regulator:

* Dispose of, convey, or encumber any of its assets or its business in force;
* Spend over specified spending limitations;
* Close any of its bank accounts;
* Lend any of its funds;
* Invest any of its funds;
* Transfer any of its property;
* Incur any debt, obligation, or liability;
* Merge or consolidate with another insurer;
* Enter into any new reinsurance contract or treaty;
* Terminate or cancel reinsurance;
* Terminate, surrender, forfeit, convert, or lapse any policy or contract of insurance (except for nonpayment of premiums due) or to release, pay or refund premium deposits, accrued cash or loan values, unearned premiums, or other reserves on any insurance policy or contract;
* Make changes in the senior management team; and
* Make extraordinary changes in staff.

In addition, supervision orders frequently impose heightened regulatory reporting requirements, such as monthly financial reporting, increased market conduct reporting, and specified special reporting such as changes in reinsurance or performance of invested assets. Supervision is often also a vehicle for more intense analysis of an insurer’s affairs and condition. If the insurer fails to comply with the order of administrative supervision, other grounds exist under the applicable statute, or the company is found to be insolvent, the regulator may petition for a receivership order.

## B. Seizure Orders

In many cases, the proceeding begins with a seizure order (see IRMA §201). Some statutes enacted prior to IRMA may use different terms for this order, such as a conservation or receivership order. In IRMA, this order is referred to as a seizure order; the term conservation order refers to an order entered under IRMA §301.

In the majority of states, the regulator may obtain a seizure order from a court of competent jurisdiction. Generally, a petition for a seizure order must allege: 1) the existence of one or more statutory grounds justifying a formal delinquency proceeding, and 2) that the interests of policyholders, creditors or the public is endangered by a delay in entering such an order. Specific requirements for obtaining a seizure order vary. The thrust of a seizure order is preservation of the insurer pending further analysis and proceedings. Such orders are not intended to be the final stage in regulatory action for a troubled insurer.In the rare case in which further analysis reveals the absence of grounds for additional proceedings, or that the problems have been corrected, the regulator will move for dissolution of the seizure order and return control of the insurer to management. More frequently, analysis leads the regulator to seek commencement of formal receivership proceedings.

A seizure order may be issued by the court *ex parte*—without notice—and without a hearing upon a allegations of statutory grounds. However, in such cases, a hearing is typically set shortly thereafter to permit the insurer to demonstrate that seizure is not appropriate.

Following issuance of a seizure order if the regulator determines that further court orders are necessary to protect policyholders, creditors, the insurer or the public, the court may hold hearings to extend or modify the terms of the order. However, the court must vacate the seizure order as soon as practicable or where the regulator, after having had a reasonable opportunity to do so, has failed to institute rehabilitation or liquidation proceedings.

Most state statutory schemes allow the regulator to apply to the court *ex parte* for an order of seizure. In these circumstances, the proceedings are often sequestered and remain confidential until the court orders otherwise. The *ex parte* application allows the regulator to take over the insurer without giving notice, thereby preventing the potential diversion of funds and dissipation of assets, while the continued confidentiality of the proceedings allows the receiver to assess the insurer’s current status. Confidentiality allows the receiver to discharge the seizure and, if appropriate, return to normal business operations without public knowledge and the resultant harm to the insurer’s business. A seizure order gives the regulator the power to make an immediate hands-on determination of an insurer’s condition as well as preserve and protect its assets. The order is designed to maintain the status quo of an insurer while the regulator decides whether to release the insurer or initiate formal receivership proceedings, whether conservation, rehabilitation, or liquidation. State statutes may require that all records and papers relating to a judicial review of a seizure be confidential (IRMA, §206(A)).

If the regulator determines that formal receivership proceedings are not needed, or if the regulator is successful in resolving the insurer’s difficulties, he or she can release control and return the insurer to its previous management without seriously damaging the insurer’s business. If, however, creditors and the public become aware of an insurer’s potential problems, the insurer could suffer irreparable harm even though the condition requiring seizure has been removed.

## C. Receivership Proceedings Generally

IRMA incorporates three distinct receivership actions—conservation, rehabilitation, and liquidation. In many states, the statutes only contemplate receivership proceedings for rehabilitation or liquidation.

A receivership order authorizes the receiver to conserve, rehabilitate or liquidate the insurer, with various statutory and judicially imposed restrictions that may vary from state to state and case to case. Subject to these restrictions and to the supervision of the court, the receiver controls all aspects of the insurer’s operations, from the initial order until the receiver is discharged. The receiver’s responsibilities extend to policyholders, creditors, regulators, and other interested parties. The receiver should communicate with these parties and keep them informed of the progress of the receivership.

IRMA §207 lists 22 independent grounds, any one of which suffices for the issuance of a receivership order. Many of the same grounds support such orders in most states. A troubled company does not move systematically from one form of receivership to another, but rather, the regulator may choose to petition for the form of receivership appropriate to the circumstances at any given time.

Receivership proceedings are commenced at the behest of the regulator. In some states, creditors and other interested persons may also request that the commissioner be appointed receiver. Such proceedings may seek rehabilitation or liquidation of the insurer or may initially seek conservation, deferring election of one of these other paths until a later day.

### Control of the Insurer

Per IRMA §104.X the Receiver in a receivership proceeding means liquidator, rehabilitator, conservator, or ancillary receiver, as the context requires. IRMA §209.C states a receiver may appoint special deputies that have all the powers and responsibilities of the receiver.

A seizure, conservation, or other receivership order that vests in the receiver control of the insurer also has the effect of making the receiver responsible for the company. Even while conducting further analysis to ascertain the company’s financial condition and prepare for any hearing, the receiver must implement measures to safeguard the insurer’s property and affairs. Such measures include:

* Providing for physical security for the insurer’s facilities, including proper controls and limits on staff access;
* Establishing security for information systems and obtaining a forensic backup of company information;
* Familiarization with company staff responsibilities, capabilities, and potential to interfere with receivership proceedings;
* Identification of cash flow pressures;
* Control of company investment, financial institution accounts, and other assets;
* Notification of policyholders, claimants and other interested parties as ordered by court or allowed by statue;
* Communication with landlords and other providers of essential services;
* Court filings necessary to impart notice to the public, and
* Other measures identified as necessary for the preservation of the *status quo*.

### Preparation for the Hearing

Apart from relying on documents in the insurance department’s control (such as filed financials and examination reports) and those available from third parties, much of the case in support of receivership may consist of the insurer’s own documents. It is important that receivership or supervision staff consult with counsel about the manner of gathering and preserving such documents so that they will be admissible evidence. At the same time the key problems should be identified, and steps taken to assure that they don’t worsen pending resolution of the challenge to the receivership.

### contents of the Order

Generally, the receivership order directs the regulator to take possession and control of the property, books, accounts, documents and other records and assets of the insurer. Further, the order usually gives control of the insurer’s physical premises to the regulator. The order is usually accompanied by an injunction prohibiting the insurer, its officers, directors, managers, agents, and employees from disposing of property or transacting business, except upon the regulator’s permission or further court order. The order may enjoin anyone having notice of its provisions from interfering with the receiver or the proceedings, may suspend pending litigation involving the insurer, and may require that all claims and proceedings against the insurer be brought exclusively in the receivership court. In addition, the order may include special provisions like moratoria on cash surrenders, authority for disavowal of executory contracts, and prohibition of creditor self-help.

### duration

The duration of a seizure order can vary. In rare cases, the order will specifically prescribe the time period that it is to remain in effect. Typically, however, the order prescribes that it will remain in effect pending the court’s further orders or for such time as the receivership court may deem necessary for the regulator to ascertain the insurer’s condition, and to request authority to rehabilitate or liquidate the company.

### review

If the proceeding commenced with a temporary seizure order and the insurer wishes to contest the proceeding, it may petition the court for a hearing and review of the order. IRMA, §201(F), provides that the court shall hold such a hearing within 15 days of the request.

### conservation of Property of Foreign or Alien Insurers

Most states also authorize the regulator to apply to the court for an ancillary order to conserve the property of an alien or foreign insurer (IRMA, §1001[[5]](#footnote-6)). The grounds and terms of such an order generally include those necessary to obtain a similar order against a domiciliary insurer, but there may be some differences. Usually, if the foreign or alien insurer has had property sequestered by official action in its domiciliary state or a foreign country, or if its certificate of authority in the state has been revoked or had never been issued, the regulator may seek an order of seizure or conservation.

Commencement of the proceedings may be by agreement with company owners and management (uncontested) or may be contested vigorously when the insurer maintains that there are insufficient grounds for receivership under applicable law. Most frequently, such contested cases focus on disagreements over the insurer’s financial condition and prospects. When the proceedings are contested much of the work done before the hearing will be in preparation to establish the adequacy of grounds for receivership. That work can also commence during the insurer’s supervision.

## D. Conservation

In some states, a court of competent jurisdiction may enter an order of conservation upon the petition of a regulator (IRMA, §301). An order of conservation is designed to give the regulator an opportunity to determine the course of action that should be taken with respect to the troubled insurer. Within 180 days (or up to 360 days if allowed by the court) of the issuance of the order, the regulator/conservator must file a motion to release the insurer from conservation or petition the court for an order of rehabilitation or liquidation (IRMA, §302). Unlike a seizure order, a conservation, rehab, or liquidation order constitute the commencement of formal receivership proceedings, and they are not ex parte proceedings.

## E. Rehabilitation

A rehabilitation proceeding is a formal proceeding, commencing with a complaint filed by the regulator (IRMA, §401). Rehabilitation can be used as a mechanism to remedy an insurer’s problems, to run off its liabilities to avoid liquidation, or to prepare the insurer for liquidation. The regulator will allege the specific statutory grounds in a complaint for placing the insurer in rehabilitation based on the grounds cited in the state’s receivership act. The insurer is served with a complaint and summons. The insurer may respond and must be afforded an opportunity to be heard. When judgment is entered, the losing party may appeal. Note that in some states, the time for filing notice of an appeal may be much shorter than in other causes of action—perhaps just a matter of days.

*Refer to Chapter 9 of this Handbook for further description and guidance regarding rehabilitation.*

### Coordination with Guaranty Associations

Early coordination with the life and health insurance guaranty associations and the property and casualty guaranty funds (collectively the “guaranty associations”) is essential for maximizing protections and achieving optimal outcomes for policyholders and claimants whenever guaranty association covered business is involved. The importance of early coordination with the guaranty associations is reflected in IRMA and was also the subject of a 2004 NAIC Whitepaper.[[6]](#footnote-7) Ideally, such coordination should begin as soon as it appears that there is a significant possibility of liquidation. As noted in the NAIC Whitepaper, the need for coordination among regulators, receivers and guaranty associations may occur even before the insurer is placed under administrative supervision or in conservation or rehabilitation.

At a minimum, IRMA §208 requires notice to all potentially affected guaranty associations upon issuance of any order for conservation, rehabilitation, or liquidation. IRMA also specifically contemplates and requires consultation and coordination with potentially affected guaranty associations upon entry of an order of conservation or rehabilitation *to determine the extent to which guaranty associations will be impacted by or may assist in the efforts to conserve/rehabilitate the insurer,* and *to* *provide appropriate information to the guaranty associations to allow them to evaluate and discharge their statutory responsibilities*. See IRMA §303, §404-405. Confidentiality agreements, addressed both in IRMA and in the NAIC Whitepaper, are commonly used to protect the information disclosed.

This early coordination is essential for several reasons:

* On the life and health side, advanced planning and coordination provides opportunities for guaranty associations to obtain necessary policy data and related information to evaluate, develop and implement strategies for maximizing consumer protections and avoiding disruption to the provision of policy benefits. These strategies could involve negotiated assumption reinsurance transfers of covered blocks of business, which may be timed to coincide with the liquidation order or having in place the infrastructure (including third party administrators, where applicable) needed for seamless policy and claims administration by guaranty associations immediately upon being triggered. In the case of covered health business, policy administration could involve the retention or replacement of providers, such as hospitals, health care providers and pharmacy benefit networks as well as pre-certification and other related service providers. In certain circumstances, the life and health insurance guaranty associations have created captive insurers to administer large blocks of covered business. While guaranty associations have in some cases had to respond to a liquidation with short notice, the best outcome for policyholders occurs when guaranty associations have the lead time necessary to identify, develop and prepare to implement strategies that will maximize value for policyholders and avoid any disruption in benefits. Whatever solution or approach is used, it will require time to coordinate, plan and execute the necessary steps to provide coverage to policyholders on a timely basis.
* On the P&C side, successful, secure data transition is essential for policy and claims administration. Data is typically voluminous in modern insolvencies and may reside on unique or legacy data processing systems which may be under the control of one or more third parties and in different locations. Working together, the receiver and guaranty funds can effectively transition data and work out any third party contractual or practical issues that may arise. However, this must be done well in advance of liquidation in order to avoid disruption in benefits and claims payments. The property and casualty guaranty funds and NCIGF utilize the Uniform Data System (UDS) and have developed processes to facilitate UDS data transition that may be helpful and result in cost savings for the transition process.
* Modern insurance policies and coverage programs can be complex – for example, there may be blocks of cyber liability business, large deductible policies, variable annuity policies with guaranteed living benefits or long-term care policies that have unique policy terms or servicing obligations. There may also be related, ceded reinsurance treaties in place that would have to be evaluated and considered for purposes of life and health insurance guaranty association election rights to assume such reinsurance. Identifying and understanding these complex policies and programs to assure uninterrupted policy and claims handling can require extensive advance planning, coordination, and due diligence.
* The amount of lead time needed for guaranty associations to prepare for a liquidation varies based on the facts and circumstances presented in each case, including the type of insurance business written by the insolvent company. The property and casualty guaranty funds need to analyze the data to adequately protect policyholders - more in complex situations or very large cases. For complex life, health and annuity companies, the lead time needed may be substantially longer.
* In addition to the benefits of early coordination to prepare for liquidation, NOLHGA and the life and health insurance guaranty associations can provide valuable technical expertise and assistance to receivers and regulators considering possible non-liquidation solutions. This includes analyzing financial issues, evaluating reserves, and identifying potential acquiring entities for blocks of business.

*See Section F(4) below for a discussion of guaranty association triggering and Chapter 6 on the guaranty associations’ role and specifics of coordination and information sharing.*

The threshold criteria that a proposed plan of rehabilitation must meet is that claimants against an insolvent estate will fare at least as well under the proposed rehabilitation plan as they would if the insurer were placed into liquidation. *See* *Neblett v. Carpenter*, 305 U.S. 297, 304, 59 S. Ct. 170, 173–74, 83 L. Ed. 182 (1938) (“The order of the Superior Court recites that the [rehabilitation] plan makes adequate provision for each class of policy holders, for the creditors, and for the stockholders; that the plan is fair and equitable; that it does not discriminate unfairly or illegally in favor of any class of policy holders; that the intangible assets conserved by the plan are worth several million dollars and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan.”) The so-called Carpenter rule, named after the aforementioned United States Supreme decision, provides that a rehabilitation plan must be fair and equitable, and that it does not discriminate unfairly or illegally in favor of any class of policyholders; *see also, Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 531 Pa. 598, 613, 614 A.2d 1086, 1093–94 (1992) (“Under *Neblett,* creditors must fare at least as well under a rehabilitation plan as they would under a liquidation,…”); and *In re Frontier Ins. Co.,* 36 Misc. 3d 529, 532, 945 N.Y.S.2d 866, 869 (Sup. Ct. 2012) (*Neblett* “requires a plan of rehabilitation to provide claimants with no less favorable treatment than they would receive in liquidation.”).

## F. Considerations Common to Both Conservation and Rehabilitation

### Issues to be Addressed

The receiver’s review of the insurer’s operations should be made at least in part with a view toward identifying and developing a plan to remedy its weaknesses. Areas to be considered include:

undercapitalization;

mismanagement by directors and officers;

uncollectible assets;

assets of minimal value;

dishonest or incompetent agents;

insolvent or weak reinsurers;

reinsurance disputes;

intercompany, affiliate or subsidiary indebtedness;

unprofitable business;

long-tail or long-term liabilities;

rate increases needed on business and insurer’s ability to secure those increases from regulatory authorities;

marketing;

deceptive or misleading practices;

insurance management experience;

claim adjustment experience for lines of business being written;

risky investments;

non-admitted assets;

software and hardware problems;

inadequate reserves;

reserving practices;

excessive operating expenses;

staffing problems;

backlog of mail and filing problems;

market conduct studies;

unfunded agents’ balances or finance notes;

management of the insurer’s assets and investments;

Numerous/recent changes in Information Technology or software applications, particularly accounting, claims or policy management systems;

failure to collect all outstanding reinsurance receivables;

failure to collect all balances due from agents; and

failure to collect outstanding judgments in favor of the insurer.

In addition, the receiver may bring causes of action on behalf of the estate, including to prevent or reverse preferences; voidable transfers; fraudulent transfers; other improper conveyances; fraud; misrepresentation by directors, officers, management, and auditors; and negligence, gross negligence and mismanagement by directors, officers, management, and auditors. *(See Chapter 4—Investigation and Asset Recovery).* The receiver also may diversify the insurer’s investment portfolio, coordinate with guaranty associations, and prepare the insurer for future business operations for sale or liquidation

In cases of limited liquidity, the receiver should evaluate which assets can be marshaled and which liabilities compromised in order to provide sufficient cash flow to administer the insurer’s day-to-day operations. Generally, the receivership prevents the insurer from incurring further liabilities and increasing the impairment or insolvency. Conversely, it is essential that the insurer’s profitable lines of business be identified and maximized for underwriting profit, cash flow and possible sale to investors. A determination should be made whether there is an opportunity for a contribution by the owner, an outside investor or purchaser to stabilize the insurer’s cash flow problems pending a comprehensive corrective action plan to conserve or rehabilitate the insurer. Once the insurer’s cash flow is stabilized, the receiver should continue efforts to marshal the insurer’s assets and reduce outstanding liabilities.

### Operational Issues

The receiver may need to make periodic budget projections and cash flow studies to establish whether the insurer has sufficient cash flow for its operational needs and to determine the amount of money that would be required from an investor to fund the insurer’s future operations and meet statutory surplus requirements. The rehabilitation of the insurer might depend upon the valuation of certain assets or the future profitability of the insurer’s book of business. It may be necessary to value those assets in accordance with Generally Accepted Accounting Principles (“GAAP”) and Statutory Accounting Principles (“SAP”) to determine their value in a rehabilitation, acquisition, merger, or asset sale. It may be prudent to prepare a balance sheet based on current market values. *(See Chapter 3—Accounting & Financial Analysis and the exhibits thereto.)* A determination may need to be made as to the diversification of the receivership’s investment portfolio as of the date of the receivership.

The receiver should assess the marketability of the insurer or its assets, including its subsidiaries and investments in affiliates. There should be some focus on the value of the insurer’s book of business and its agency network. A decision needs to be made as to whether the insurer will write or limit new or existing business. The strengths and weaknesses of the business need to be determined. Actuaries may need to be retained to perform rate studies and other evaluations, including an evaluation of whether new or pending changes in the law will affect the profitability of the insurer’s products (e.g., no fault laws).

In order to preserve the value of the books of business, the payment of claims and cash surrender requests (if applicable) need to be carefully analyzed by the receiver. In some situations, claim handling may be continued in the normal course of business. In life and health insolvencies, the receiver should also consider whether a moratorium on cash surrenders, policy loans and dividends should be imposed.

### Possible Sale of Insurer

During conservation/rehabilitation, the sale of the insurer to outsiders may be considered, if allowed by state law. A plan for the sale of the insurer should identify the areas that a receiver or investor should cover in any bid or proposal to acquire or invest in the insurer. Among those subjects that should be addressed in a proposed acquisition are the following:

the purchaser/investor’s financial stability and ability to fund the transaction from existing or readily available funds;

The source of the funds for the acquisition;

The identity and background of the acquiring party;

the ability of the purchaser to comply with statutory and regulatory requirements;

the expected impact of the transaction on the insurer’s policyholders and creditors;

The likelihood of success in completing the transaction; and

Whether the transaction presents other regulatory or public policy concerns;

Whether the proposed transaction would adversely impact guaranty association/guaranty fund coverage available to policyholders in the event of a future liquidation;

## G. Liquidation

The regulator may petition the court for an order of liquidation when any of the grounds set forth in the applicable statute exists (see IRMA §207), or, if the company is in rehabilitation or conservation, the regulator believes that further attempts to rehabilitate or conserve the insurer would substantially increase the risk of loss to policyholders or the public or would be futile. In liquidation, the liquidator must identify creditors and marshal and distribute assets in accordance with statutory priorities and dissolve the insurer.

### Order of Liquidation

Once a petition for liquidation is filed, the company will have an opportunity to defend itself, which can result in a trial or an evidentiary hearing. If the court determines that the regulator has sufficiently established any of the statutory grounds for liquidation, it shall enter an order of liquidation, appointing the regulator as the liquidator of the insurer and vesting the liquidator with title to all of the insurer’s assets and records. The order enables the liquidator to control all aspects of the insurer’s operations under the general supervision of the court. Orders of liquidation may be appealed by management and/or shareholders of the insurer.

Statutes in most states provide that upon issuance of the order, all of the rights and liabilities of the insurer, its creditors and policyholders are fixed as of the date of entry of the order of liquidation. State statutes may describe the effect of the order of liquidation upon contracts of the insolvent insurer.

Upon entry of the order of liquidation, the receiver is charged with the duty to secure, marshal, and distribute the assets of the estate. The power to perform these duties is provided by the order of liquidation and the state receivership statute. It is important for the order of liquidation to include certain other items, which should be determined by applicable provisions of the law in the state of domicile of the insurer. These items typically include provisions for: the appointment of the liquidator; delineation of the powers of the liquidator as provided by state statute; the immediate delivery of all books, records, and assets of the insurer to the liquidator; and enjoinment of other parties from proceeding with actions against the liquidator, the insurer, or policyholders. In addition, it may provide for notice to policyholders and cancellation of policies.

### Effect on Policies

The cancellation of policy obligations raises several legal issues with respect to the obligations of property/casualty insurers and the cancelable obligations of life insurers. In general, the courts enforce the statutes that provide for the cancellation of insurance policies upon liquidation. Several cases have considered the question of whether a policyholder’s claim would be accepted if filed after the bar date established in the order. Courts have held that the order of liquidation effectively cancels outstanding policies and fixes the date for ascertaining debts and claims against the insolvent insurer. However, the insolvency of a life insurer presents a unique situation. The NAIC Model Acts provide for the continuation of life, health, and annuity policies. Typically, life and annuity contracts (and, to a lesser extent, health contracts) are transferred to solvent third-party insurers.

### powers and Duties of the Liquidator

The liquidator is granted certain powers by statute and/or court order, which include the following:

vesting the receiver with title to all assets;

authorizing the receiver to marshal assets;

authorizing the receiver to sue and defend in the receiver’s name or in the name of the insurer;

enjoining lawsuits in other courts, whether in the same jurisdiction or elsewhere;

Enjoining interference with the receivership;

Enjoining creditor self-help;

Appointing one or more special deputies;

authorizing the retention of attorneys, consultants, accountants, and other specialists as necessary;

authorizing the sale, abandonment, or other disposition of the insurer’s assets;

Borrowing on the security of the insurer’s assets;

coordinating with guaranty associations;

Coordinating with NCIGF and/or NOLHGA, as necessary; and

entering into and canceling contracts.

Most jurisdictions hold that the liquidator generally steps into the shoes of the insolvent insurer and possesses the rights and obligations of the insurer. There is also authority for the proposition that the standing of the receiver is broader than that of the insurer to the extent he or she also represents the interest of policyholders and creditors. Several cases have focused on the liquidator’s specific duties. These cases allow liquidators to compound or sell any uncollectible or doubtful claims owed to the insolvent insurer, to disaffirm fraudulent conveyances, to disavow leases and other executory contracts, to act as statutory receiver of the insolvent insurer’s property, to sell the insurer’s property, to conduct business using the insurer’s assets, and to control bonds and mortgages held as collateral security

### Triggering of Guaranty Associations

As a general rule, the guaranty association laws provide for the mandatory triggering of coverage by guaranty associations upon the entry of an order of liquidation with a finding of insolvency against a member insurer. Advanced coordination with affected GA associations and/or NOLHGA (in life and health cases) or NCIGF (in property and casualty cases) with respect to the liquidation petition and proposed liquidation order will help to ensure consistency in triggering in multi-state insolvencies.

On the life and health side, there are a small number of states where mandatory triggering may also occur, under certain circumstances, during rehabilitation if the member insurer is not timely paying claims. In property and casualty cases, guaranty fund triggering normally occurs upon an order of liquidation with a finding of insolvency. There are a minority of states that can be triggered with a finding of insolvency only.

Most of the state life and health insurance guaranty association laws also provide a mechanism for permissive triggering, at the discretion of the association, where a member insurer has been placed under an order of rehabilitation or conservation. (Generally, no such permissive triggering exists in the property and casualty state laws.) These provisions are based on the NAIC Life and Health Insurance Guaranty Association Model Act, section 8(B), which provides the guaranty association discretion to provide coverage if a member insurer is an impaired insurer (i.e., placed under an order of conservation or rehabilitation). This authority is subject to any conditions imposed by the guaranty association that do not impair the contractual obligations of the impaired insurer and that are approved by the Commissioner in the guaranty association's state. Some state statutes also provide life and health guaranty associations limited discretion to act in cases where the impaired insurer has been deemed by the Commissioner to be potentially unable to fulfill its contractual obligations. This language dates back to the original definition of “impaired insurer” in the 1970 version of the NAIC Model Act. This language was later removed from the model act as part of the 1997 amendments but still remains in a small minority of state statutes.

Given the possibility of subtle variations in triggering provisions in place from state to state, it is important to coordinate with affected GA associations and NOLHGA or NCIGF for purposes of confirming guaranty association triggering. Refer to Exhibits 1-1 and 1-2 for recommended liquidation order language to ensure consistent guaranty association triggering.

### Notice

Most state statutes set forth the minimum requirements for notice to creditors and all persons known, or reasonably expected, to have claims against the insurer. The receiver must give notice to the regulator of each jurisdiction in which the insurer does business, affected guaranty associations, the agents of the insurer, and policyholders at their last known address. The liquidator may also be required to give notice by publication, usually in a newspaper of general circulation in the county in which the insurer has its principal place of business. Potential claimants are required to file their claims on or before the bar date specified in the notice.

Disputes may arise when the claimant alleges that he or she did not receive notice of the liquidation. The cases addressing this issue turn on the specific facts. Courts have allowed late claims where the receiver should have known of the claimant’s existence and should have provided notice.

*See Chapter 5 – Claims for additional discussion*

### deadline for Filing Claims

Unless established by statute, the court establishes a deadline for the filing of claims against the assets of the insolvent insurer. In IRMA, the date is not later than 18 months after the entry of the liquidation order, unless extended by the receivership court (IRMA, §701(A)). The liquidator may be required to permit a claimant to file a late claim under certain circumstances (IRMA, §701(B)). If a claimant does satisfy the criteria for filing a late claim, the claim will be subordinated to a lower distribution priority (IRMA, §801(I)). Some statutes enacted prior to IRMA may provide that such a claim is barred from participating in a distribution. Policyholders covered by guaranty associations typically are not required to file claims with the liquidator.

*See Chapter 5 – Claims for additional discussion*

### Ancillary Proceedings

Liquidation of an insurer is conducted by the liquidator in the insurer’s state of domicile. When an insurer is licensed to do business in another state, that state may have authority to establish an ancillary receivership. Receivership statutes typically permit the commissioner of a state where an insurer is licensed to commence an ancillary proceeding if the insurer is placed in liquidation in the domiciliary state. Some statutes also require the commissioner to commence an ancillary proceeding upon the request of certain residents of the state who have claims against the insurer. If the court grants the petition for an ancillary proceeding, the commissioner of that state is appointed as the ancillary liquidator.

The ancillary liquidator is generally entitled to recover the insurer’s assets in the ancillary state and pay claims of residents in the state with such assets. Some statutes permit a claimant who resides in an ancillary state to file a claim in either the domiciliary or ancillary proceeding.

Owners of secured claims can be affected when there are one or more ancillary proceedings. The owner of the secured claim is entitled to surrender his security and file his claim as an unsecured creditor. Any deficiency in the claim is treated as a claim against the insurer’s general assets on the same basis as claims of unsecured creditors.

IRMA clarified the procedures for ancillary proceedings and the handling of deposits. Under §1001 of IRMA, the need for an ancillary receivership has been curtailed. IRMA allows the appointment of an ancillary conservator under limited circumstances. A domiciliary receiver is automatically vested with title to property in any state adopting IRMA, and the test of whether a state is a “reciprocal state” has been eliminated. IRMA also clarifies the procedures for handling deposits; however, most states have not adopted §1001.

While an ancillary proceeding is required in limited circumstances, the regulator often has discretion to initiate it. When deciding whether to commence an ancillary proceeding, several issues should be considered, particularly if it involves a pre-IRMA statute. As an ancillary proceeding requires the separate administration of the insurer’s assets and claims, it generally will increase costs. It can also complicate the processing and payment of claims, and potentially confuse claimants. Separate distributions to claimants from ancillary and domiciliary receiverships may differ, which can result in disparate payments to creditors in the same class. Finally, the insurer’s debtors may be reluctant to pay amounts owed to the insurer due to the potential for competing claims by domiciliary and ancillary liquidators. To address these potential problems, the domiciliary and ancillary liquidator can enter into an agreement to facilitate the coordination between the proceedings. An agreement could cover matters such as bar dates, claims procedures, the liquidation and disposition of deposits, and the collection of other assets.

*See Section E(9) of Chapter 9 – Legal Considerations for additional discussion*

# III. INTERESTED PERSONS

## A. Guaranty Associations

Guaranty associations have been established in each state, as well as the District of Columbia and Puerto Rico, to provide a measure of protection to policyholders in the event of the impairment or insolvency of an insurer. When guaranty association covered business is involved, it is beneficial to begin coordination as soon as it appears there is a significant possibility of liquidation or that guaranty associations will be triggered.

*See II(D)(2) in this chapter and Chapter 6 for additional discussion.*

## B. Parent Company and Affiliates

An insurer may have a parent company and/or affiliates that may or may not be insurance companies. The interaction of these companies should be reviewed and analyzed carefully including any service agreements, management agreements, pooling agreements, tax sharing agreements and reinsurance agreements. Under certain circumstances, the receiver may want to obtain control of these other entities thru substantive consolidation.

*See Chapter 4 – Investigation and Asset Recovery and Chapter 9 – Legal for further discussion.*

## C. Government Agencies

Federal, state, and local government regulations may require notice of the proceeding and are potentially creditors.

The Federal Priority Act (31 U.S.C 3713) imposes personal liability on the representative of persons or estates to the extent that other debts are paid (or otherwise compensated) prior to claims of the federal government. A 3713 Release from the United States of America through the Department of Justice may be requested. As much of the information required for the release is historical, the Receiver should start collecting the information at the inception of the liquidation.

*See Chapter 5 – Claims, Chapter 9 - Legal and Chapter 10 – Closing Estates for additional discussion of federal government involvement.*

# IV. RECEIVERSHIP ADMINISTRATION

## A. Planning

The regulator who expects to successfully administer a receivership action must become familiar with the insurer’s operations and business as soon as possible. The checklists included in the exhibits at the end of this chapter include a list of documents that should be reviewed.

### Identify Problems

It is critically important to meet with the regulator’s staff before the receivership order is entered, to discuss the perceived causes of the insurer’s difficulties and the potential for a successful rehabilitation or liquidation. While state statutes may prevent regulator’s staff from sharing documents not available to the general public with non-regulators, insight from financial examiners, financial analysts, market conduct examiners and licensing agents might assist in determining the causes of the insolvency.

It is also important to meet with the insurer’s officers and/or directors, when possible. These meetings are usually clear indicators of how cooperative or hostile the insurer’s management will be after appointment. Hostile environments require additional personnel and security measures at the company location to secure the assets and records. In some circumstances, it may be important to maintain confidentiality about an intended action, in which case a meeting with management may not be possible.

### Identify Key Transitional Elements

As previously discussed, coordination with guaranty associations is essential. When liquidation is reasonably foreseeable and guaranty association covered business is involved, that coordination becomes critical to maximizing protections and achieving optimal outcomes for policyholders and claimants. With proper confidentiality arrangements, this can and should occur even while liquidation is a possibility but there are still other alternatives that might salvage the company. Particular attention should be given to definitions of “covered claim” or “covered policy” for each guaranty association.

The insurer’s officers, directors and employees may be willing and able to advise about the existence of service providers and outside consultants employed by the insurer, including legal counsel, accountants, and actuaries. Access to the insurer’s records and contracts with all consultants and service providers should be secured and determination made which, if any, of the various service providers to retain. It should also be determined if the insurer is a member of a FHLBank and, if so, identify key individuals at the insurer and at the FHLBank.

It is also beneficial to obtain employee agreements and other documents regarding personnel arrangements. The receiver will have to develop a plan to maintain required positions and retain key staff. *See X. Personnel in this chapter for additional discussion*.

*Additional steps to consider during the planning phase are in the checklists included in the exhibits at the end of this chapter.*

### Working Business Plan

During the planning phase of a receivership, it may be helpful for the receiver to develop an internal working business plan with reasonable timeline and objectives that consider multiple paths, taking into consideration claimants, policyholders, taxpayers, and stakeholders (e.g., lenders, shareholder, affiliates, etc.) The development of a multi-option plan (e.g., option A, B or C) in order of most beneficial may help in planning for and supporting each phase of the receivership process and in ultimately developing the Rehabilitation Plan required by the Rehabilitation Order.

### Monitoring and Progress Report

Once the receivership proceeding commences, the receiver should consider maintaining weekly or monthly progress reports that serve as high level report cards of the key issues and the progress made in servicing policyholders and the effectiveness of the working business plan. The progress reports include a view of the whole insurance company–financial and operational, highlights key data about company activities of each division and also identifies critical compliance areas for financial, operational, legal, and statutory guidelines. Included in this monitoring process may be specific accomplishments and updates that should be made available to policyholders and claimants and the courts. Depending on complexity of the receivership a weekly meeting of managers/staff is recommended to exchange information between the receiver and the managers/staff.

## B. Receivership Order

A receivership order may be issued because the insurer is impaired (generally, a conservation and rehabilitation) or insolvent (liquidation or, in special circumstances, a rehabilitation). The order may also be issued to protect an insurer operating under severe financial impairment, as evidenced by a variety of factors, such as investments in an undiversified portfolio of stocks or bonds, writings to surplus in excess of the allowable amount, issuance of total insurance business by one MGA or TPA or entering into non-risk bearing surplus relief contracts. A receivership may also be instituted if current management is found to be detrimental to the management and/or financial stability of the insurer.

Some common issues addressed in receivership orders are:

* writing of new or renewal business;
* handling of reinsurance;
* dividends or transfer of assets without the receiver’s approval;
* Payments to affiliates;
* limitations on new investments;
* seizure of physical and liquid assets;
* liquidation of certain investments;
* change or dismissal of officers and/or directors;
* Ownership of records and data of the insurer or related entities;
* cancellation of certain MGA, TPA or general agency agreements;
* limitations on funding by premium finance companies;
* Injunctions;
* payment of loss and loss adjustment expense, etc.;
* Triggering of the guaranty associations, if intended;
* Provisions to pre-pay ongoing claims benefits such as workers compensation indemnity benefits while claims data is being transitioned to the guaranty associations;
* Moratoria on claims, cash surrenders, withdrawals, policy loans, etc.;
* WARN (Worker Adjustment and Retraining Notifications) State and Federal - if layoffs of existing staff are anticipated; and
* Hardship Provisions (refer to state statutes, state guaranty associations or to www.ncigf.org and [www.nolhga.com](http://www.nolhga.com)).

Once the receivership order is entered, the receiver is empowered to operate the insurer. Officers may be retained or terminated, and directors may be relieved of duties, though these actions must be carefully evaluated because of possible adverse effects on litigation involving directors and officers. In fact, a careful evaluation prior to termination of any employee is recommended. An immediate determination may be made as to the need for outside consultants or professionals, such as accountants, actuaries, computer specialists, attorneys, investment counselors, etc.

The insurer may remain in receivership for a fixed period of time or until the occurrence of specified events, e.g., the rehabilitation of the insurer or the liquidation of the estate and the discharge of the receiver.

## C. Notices

Notice of the insurer’s status should be in accordance with the receivership court’s direction. The court may direct the notice to be issued by mail and/or by publication in a newspaper of general circulation. In the case of a conservation (under IMRA) or rehabilitation, the notices may be issued to assist the receiver in informing the policyholders and sustaining the business of the insurer. Notice may be sent to the following persons, among others, when the court requires, as their rights or interests are affected:

* + Policyholders and beneficiaries;
  + Agents;
  + Guaranty associations;
  + State insurance departments;
  + Third-party claimants;
  + NAIC;
  + Internal Revenue Service;
  + U.S. Department of the Treasury;
  + U.S. Department of Justice;
  + State and local offices;
  + Banks;
  + Brokerage or investment banking firms;
  + Managing general agents, general agents, and all agents of record;
  + Reinsurers;
  + Intermediaries;
  + Creditors, including secured creditors; (including the Federal Home Loan Bank, if applicable)
  + Claim adjusters;
  + Third-party administrators;
  + Premium financiers;
  + Vendors;
  + Accountants, actuaries, lawyers and other professionals;
  + Landlords and tenants;
* Officers and directors;
* stockholders and other equity holders; and
* other necessary parties.

Notice may vary depending upon whether the insurer is in rehabilitation or liquidation. Under IRMA, conservation is similar to rehabilitation, and the notice requirement is the same. If the notice is pre-approved by the court, it will avoid potential claims of non-disclosure or omission of material facts.

## D. Implementation of the Order

The order typically includes provisions that enable the receiver to prevent additional financial drain. Throughout this period, the receiver should pay particular attention to preventing illegal preferences, unauthorized set-offs, fraudulent transfers and improper conveyances or distributions.

It is vital that the order be served immediately on the insurer. The receiver should take steps to maintain the integrity of the insurer’s assets, books, and records as of the date of the order and to control the insurer’s operations so that the assets, books, and records are not removed, dissipated, or destroyed. The checklists at the end of this chapter include some of the initial steps that may be taken to ensure the receiver’s control.

## E. Assets

### Initial Asset Control

A principal objective in the initial phase is to identify and secure the assets and determine the liabilities of the insurer. The insurer’s annual and quarterly statements, along with the current general ledger and chart of account listings, should help in locating some of the assets.

Once the assets have been identified and secured, the short-term emphasis shifts to the cash and invested assets, those being the most liquid. These assets should be tightly controlled to prevent any theft or misappropriation. Examples of the various types and forms of assets, as well as immediate actions that can be taken, are provided in the checklists at the end of this chapter. However, as stated, the primary emphasis at this stage should be assets easily converted to cash, such as petty cash, operating bank accounts and investments. Usually, the remaining illiquid assets will be addressed in the ongoing management and administration of the estate. These types of assets will be the focus of various accounting, collection, and legal efforts in the endeavor to marshal all assets of the estate.

It is important to immediately institute appropriate controls and procedures for the processing of cash and cash receipts. The objective of controlling all cash receipts and subsequent processing is to ensure that cash, the most liquid asset, does not disappear. This requires more stringent controls, including immediate deposit of all cash and an accurate daily accounting. Therefore, the receiver should immediately institute procedures for routing of daily cash receipts (create receipt log). With respect to life and health insolvencies (including HMOs if covered by the triggered guaranty association), consideration should be given to coordination with the guaranty associations and/or NOLHGA regarding the treatment of premium billings, reinsurance payments and any other matters necessary to keep the policies in force, pending the sale of the business or assumption of the business by the guaranty association(s). In the case of an HMO insolvency, direct coordination with the entities providing health care protection to the members is crucial. The receiver may find it necessary to open bank accounts in the name of the receivership in order to have complete control of the cash. In a health insurance related insolvency, the receiver should check on the status of coordination of benefits (cob) receivables, hospital credit balances and check the state’s treasury department to see if any providers have escheated funds on behalf of the health insurer. In order to ensure no misappropriation of funds, the receiver must also institute effective controls over disbursements. This includes instituting new check issuance procedures, including the establishment of new check signing and wire transfer authority, and the issuance of new passwords for electronic banking.

The valuation and control of the remaining assets in the estate will necessarily fall into the continuing management and administration stages. Those assets are less liquid in nature and are, therefore, more difficult to value, marshal and misappropriate.

### Administration and Ongoing Asset Management

Once the initial phase has been accomplished and control has been instituted over the liquid cash and other invested assets, attention should be directed toward the remaining assets and potential assets of the estate. Immediate identification of some of the remaining assets may be accomplished by reviewing the balance sheet, general ledger, and chart of accounts. The identification of these assets has been accomplished to a degree in the initial phase. The receiver should take a physical inventory including laptops and mobile devices, office equipment, computer hardware and office furniture. The various checklists at the end of this chapter provide details of types of assets to look for and steps to take with those assets.

Aside from the traditional or listed assets on the balance sheet, insurer operations need to be reviewed to identify any potential non-traditional assets. Simply stated, the receiver is responsible for identifying value in the operations and evaluating the potential for the recovery or collection and conversion of this value. This concept will become clearer as the various categories of assets are revealed. Some of the issues to be considered include the following:

1. reinsurance

With respect to life insolvencies, it is critical that the receiver immediately analyze whether to continue or cancel ceded reinsurance contracts. The Life and Health Insurance Guaranty Association Model Act, the life and health guaranty association statutes in most states and IRMA give the life and health guaranty associations the authority to continue ceded reinsurance contracts that relate to covered obligations of the associations in order to facilitate a sale of the business or to minimize the association’s exposure. The affected guaranty association must make the election to allow a particular treaty to expire or continue within a statutorily established time. If the treaty is continued, the guaranty association becomes liable for the payment of the ongoing premiums. The guaranty association may transfer the reinsurance agreement to a solvent insurer that assumes the underlying policies. (See IRMA §612 and NAIC Life and Health Insurance Guaranty Association Model Act §8N.)

1. Audit premiums

Certain property/casualty premiums are based on loss experience, sales volumes, or payroll amounts. This criteria will differ depending on the type of policy being issued. For example, a “minimum” or “deposit premium” is paid upon issuance of the policy. Final premiums are billed after audit on the basis of loss experience. The additional premium generated is known as audit premium or retro-rated premium and may represent a significant asset of the estate.

Life insurance premiums may be affected by the amounts of dividends paid or by the difference between current billed premiums and maximum billed premiums allowed by the contractual guarantees in the policies. In life insurance insolvencies, the receiver should consider the possibility of Phase III tax liability. (See Chapter 3—Accounting and Financial Analysis, Section VIII.)

1. Taxes

Value to the estate may be generated through the sale of the corporate charter or shell. An analysis of any net operating loss situation and qualification under IRS rules should be made with the advice of tax experts, both in the accounting and legal fields.

Also review the validity and correctness of other state and local taxes paid. A review of prior returns and state tax authority records may uncover overpayments and possible recoverable amounts.

Tax sharing agreements with affiliates and any prior consolidated tax returns should be secured, if possible, and reviewed to determine if any refunds paid to the parent should be remitted to the estate.

1. Property/casualty salvage and subrogation

With respect to property/casualty insurers, a determination should be made as to how the insurer identified and recovered salvage and subrogation. This amount will not be readily identifiable from the statutory statements, as statutory principles prohibit the recognition of salvage and subrogation until it is collected. However, many insurers maintain salvage/subrogation logs, which are a good source for identification of such receipts or potential recoverables. Salvage and subrogation on claims where reinsurance has been received may be held in a segregated account. Because these aggregated funds may be subject to setoff, a portion of the funds may be due the reinsurer.

1. Indemnity

A surety, prior to issuing a bond, will usually require indemnity agreements from the principal and other indemnitors in order to secure the surety from any claims that may be made against the bonds. The agreement is a contractual obligation that provides security for the surety. The indemnity agreement sets forth and expands upon the separate common law obligations between the principal and the surety. A separate indemnity agreement may be issued for each bond. However, more frequently, the parties enter into a general indemnity agreement covering any bonds that the surety may issue to that principal.

Accordingly, all indemnity agreements should be secured and reviewed to identify potential recoverables.

1. Deductibles

Many property and casualty insurance policies contain deductibles that are to be paid by the insured. If the insurer (or a guaranty association) pays the full amount of the loss to an injured third party, the amount of the deductible becomes a claim against the insured. The receiver should evaluate the likelihood and cost of collection, and if appropriate, attempt to recover the amount paid within the deductible. It is important that the collection process be resumed as quickly as possible. Most often the receiver is best situated to continue the collection process as he or she is in possession of the related records. In some cases, the insured will have posted some form of collateral to secure its obligations under the deductible. Pursuant to statute in some states, or agreement between the receiver and the applicable guaranty associations, the amount collected is delivered to the associations that paid the claim. For a fuller discussion of large deductibles, see Chapter 6—Guaranty Associations.

1. Excess expense payments, especially over-billed loss adjustment expenses

A complete review of historical expense payments should be made, paying close attention to the rates charged, hours worked, necessity of work performed and supporting documentation for expenses itemized in defense attorney bills. Reimbursement should be sought, as appropriate.

1. Voidable preferences/fraudulent transfers

Early in the administration of an estate, the receiver should review the insurer's recent pre-receivership transactions for purposes of determining whether potential voidable preferences or fraudulent transfers of assets were made. See Chapter 9—Legal Considerations, Section VIII, C and D for a discussion of voidable preferences and fraudulent transfers.

## F. Take Control of Books and Records

One of the receiver’s first steps should be to locate, control and organize certain files. Securing and organizing the records of an insurer in receivership is of paramount importance to successfully completing the receivership.

A plan to deal with records, including all electronic records, should be developed. The plan should provide for the creation of a records inventory. The plan should identify the data to be captured from the insurer’s records, i.e., the names and locations of insureds, reinsurers, etc.,and should deal with both the location and maintenance of the files.

It is best to have experienced personnel and legal counsel with an insurance operations background develop this plan. In crafting the plan, the receiver should consider:

* Establishing a central clearing house for all records or having the receiver’s staff review records in each department to identify and secure key records. In this manner, the receiver will be able to ensure that all records are recovered, reviewed, and appropriately maintained for further use.
* Determining the location of various records, such as those of MGAs, TPAs, agents, independent adjusting firms, attorneys, branch offices and subsidiaries.
* Determining the various categories of documents—such as policies, claims, data processing, banking, accounting, corporate, state, and federal tax, marketing, personnel files, reinsurance files, and administrative files—and how they should be maintained.

Checklists found at the end of this chapter identify items that should be secured and organized under each area.

It is important to limit access to the premises or other facilities to preserve the integrity of the books and records and to prevent the dissipation of receivership assets. It is also essential to provide notice to consultants used by the insurer—such as accountants, actuaries, and lawyers—of the receivership order, demanding that all records of the insurer in their possession be turned over to the receiver. Failure to turn over the insurer’s records to the receiver is a violation of most state statutes (IRMA §118A). In the event a consultant is unwilling to turn over records of the insurer, the receiver should consult with legal counsel.

## G. Inventory

The receiver should inventory the assets, books, and records as soon as possible. This inventory may not only be required by state law, but it may also be useful in determining whether items have been misplaced or were later removed from either the insurer’s premises or the receiver’s offices and facilities. The inventory should be conducted at the insurer’s offices. The items listed in the checklists included in the exhibits at the end of this chapter should be itemized and secured.

While conducting the inventory of books and records, the receiver should begin identifying documents relative to the cause of the insurer’s insolvency. Statute of limitations vary by state. The receiver may have a limited amount of time to file actions against other parties. The NAIC and FBI have developed a questionnaire to be used by a receiver in reporting fraud and other white-collar crimes to the United States Department of Justice for the purposes of initiating a criminal investigation (See Exhibit 1-3). Among the typical causes of insurer insolvency are:

* Undercapitalization;
  + Uncollectible, illiquid, or inflated assets;
  + Insufficient loss reserves for risks assumed;
  + Misappropriation or conversion of insurer funds by management, affiliates, agents, TPAs, or others;
  + Commitment to unprofitable business by uninformed or undisciplined agents;
  + Collectability of reinsurance;
  + Negative cash flows due to unprofitable lines of business;
  + Poor underwriting;
  + Unnecessarily risky investments;
  + Fraudulent transactions;
  + Other forms of mismanagement.

Any indication of fidelity bonds, directors and officer's policies, error and omission policies or other indemnification coverage should be identified, segregated, and made accessible to the receiver and receivership counsel. The documents should be reviewed immediately, and carriers placed on notice to preserve the rights of the estate.

## H. Move to Consolidate

Consolidation of the receivership’s offices and storage facilities could result in increased productivity and reduction of labor and storage costs. For that reason, an assessment of the value of maintaining the insurer’s offices and storage sites should be made in the early days of the receivership. Consolidation of the books and records should take place only after: 1) an inventory is completed; 2) the receiver has considered the impact upon the insurer’s ability to handle claims in an orderly and efficient manner; and 3) the receiver has considered the potential impact upon the insurer’s relations with any existing agency network. If the insurer is in conservation or rehabilitation, the receiver should weigh the effect a consolidation might have upon the insurer’s marketing program.

## I. Coordination With Ancillary Receivers

Any assets of an insurer in liquidation that are held by a non-domiciliary state should be returned to the domiciliary receiver of the insurer. Under §1001 of IRMA, the need for an ancillary receivership has been curtailed. IRMA allows the appointment of an ancillary conservator under limited circumstances. A domiciliary receiver is automatically vested with title to property in any state adopting IRMA, and the test of whether a state is reciprocal has been eliminated. IRMA also clarifies the procedures for handling deposits.

The NAIC models prior to IRMA permit reciprocal states to establish receiverships ancillary to the domestic state’s receivership. Typically, an ancillary receivership would be established to distribute assets in the ancillary state (i.e., statutory deposits) to claimants residing in that state. However, an ancillary receivership may be established for purposes unrelated to claims handling. In certain instances, the domiciliary receiver may request that an ancillary receivership be established for a variety of reasons, e.g., to assist the domiciliary receiver in selling real property located in the ancillary state or to assist the domiciliary receiver in handling litigation pending in the ancillary state.

State statutes based upon NAIC models prior to IRMA allow or may require ancillary receiverships under certain circumstances. If an ancillary receivership is not required by statute, it should be opened only after carefully evaluating the additional administrative costs that would be incurred by the insolvent insurer. The activities of the domiciliary and ancillary receivers should be coordinated to minimize the cost of the ancillary proceedings.

Domiciliary receivers must consider the following issues, which commonly occur between the domestic and ancillary receivers:

* The security of the insurer’s assets and records;
* The security of the insurer’s out-of-state offices or storage facilities;
* Consistency and reciprocity of authority;
* coordination of the transfer of policy/claim files to guaranty associations;
* The need for a receivers’ agreement (see discussion below regarding receivers’ agreement);
* The need for local counsel in other jurisdictions;
* The status of litigation by the ancillary receiver; and
* The method of funding and payment of approved ancillary claims.

To facilitate coordination, the ancillary receiver should request copies (certified, if available) of all domiciliary pleadings and orders, together with the names, addresses (including e-mail addresses), and phone and fax numbers of personnel in the domiciliary state.

Legal counsel for the domiciliary receiver should review the proposed ancillary petition and order as soon as they are received to assure that: 1) under the order, the rights of the ancillary receiver are subordinate to the rights of the domiciliary receiver; and 2) the ancillary receiver’s bar date is no later than the bar date established by the domiciliary receiver. Some state statutes permit ancillary receivers to establish shorter claim filing periods but prohibit claims deadlines that exceed those established by the domiciliary receiver.

In the event that the proposed ancillary order is not acceptable to the domiciliary receiver, the domiciliary receiver should request a revision. If the ancillary receiver refuses, the domiciliary receiver may be required to file an objection in the ancillary proceeding, asserting that the ancillary order violates the law of either or both states.

### Receivers’ Agreement

In some situations, it may be possible to negotiate a receivers’ agreement, with the goal to consolidate functions and to clarify the authority and obligations of the domestic receiver and the ancillary receiver concerning:

* Coordinating the preparation of a jointly acceptable proof of claim form;
* Filing and process­ing proofs of claims;
* funding and maintaining an account for payment of approved claims;
* Identifying and locating TPAs and MGAs licensed by the insurer in each state;
* Identifying and locating all bank and financial accounts;
* locating outstanding claims files and arranging for shipment of files between states;
* coordinating policy cancellation and impairment order dates;
* collecting agents’ balances;
* controlling director and officer litigation by the domiciliary state;
* administering and closing out-of-state offices;
* Marshaling assets located in the ancillary receiver’s jurisdiction;
* Determining the disposition of assets collected by the ancillary receiver;
* Controlling and securing information (e.g., claim files, policy files, premium volume in the ancillary state, etc.) that is essential for the orderly administration of the estate; and
* Coordinating the oversight of the insurer’s out-of-state litigation.

### Claims Handling

When there is no ancillary receivership, citizens of non-reciprocal states should file their claims in the domiciliary state. Some pre-IRMA state statutes provide that a resident of an ancillary state has the right to file a claim in either the domiciliary or the ancillary proceeding. Other states leave the decision to establish a claims procedure in the ancillary state to the discretion of the ancillary receiver.

### Ancillary Proceedings Without a Domiciliary Receiver

Ancillary receiverships are usually established only after a domiciliary receiver has been appointed. However, some states do not have the limitations imposed by IRMA and, even when no domestic receiver has been appointed, do permit the establishment of an ancillary conservatorship or liquidation, provided that the non-domestic regulator can prove one or more of the grounds required to establish a domestic receivership. Nonetheless, the ancillary receivership order operates only upon the assets found in the ancillary jurisdiction.

# V. ACCOUNTING

*Please refer to Chapter 3—Accounting and Financial Analysis and Chapter 4—Investigation and Asset Recovery when reviewing this section.*

Upon taking control, one of the receiver’s primary responsibilities is to secure the insurer’s assets—particularly the most liquid assets, such as cash and securities. This responsibility includes identifying lines of credit, limiting, or removing access to company credit cards and preparing an inventory of all accounting records and documentation as soon as possible. The accounting area will also be responsible for financial statement analyses to determine the true status of the insurer and the continued reporting of financial information for internal decision-making processes.

## A. Secure Assets

Because cash and securities are liquid, the receiver must quickly identify, locate, and secure assets. The receiver should immediately notify all depositories and custodians of the receivership order, provide the new authorized signatories, and establish the procedures to be implemented for all financial transactions. Letters of credit should be identified and secured by the receiver. Once the assets are secure, the receiver will evaluate and value them.

## B. Inventory Accounting Records

As soon as practical, the receiver should identify and secure the on-site and off-site books, records, systems, and documents necessary to maintain and review the accounting functions of the insurer and to determine the actual financial condition of the insurer. These should include most recent insurance department examination workpapers if allowed under state law and CPA audit workpapers.

## C. Investigation of Insurer’s Financial Statements

The receiver should develop an understanding of the accounting organization, including evaluation of the staff. Flowcharts and narratives of the accounting procedures should be obtained or completed with particular attention to the areas of cash receipts and cash disbursements focusing on decision points and internal controls. To the extent procedures need to be modified to protect the assets, new procedures should be put in place as quickly as possible. From the information developed here, the receiver should begin to investigate the make-up of the balance sheet line items, validate the existence of the assets, and value them.

## D. Financial Reports

Accounting and financial reporting by the insurer will continue to be necessary and important. Financial reports will be required by the receivership court, and cash flow and budget information will be essential for the day-to-day operations of the receivership. Continued filing of the various types of tax forms is mandatory (although some may be eliminated) during the existence of the estate. Additionally, the continued reporting of paid claim information for reinsurance billing and actuarial reserving will also be crucial.

At the beginning of the receivership, the appropriate parties should determine the type of information to be reported to various entities, the frequency of the reporting and the formats the information should take.

# VI. INFORMATION SYSTEMS AND TECHNOLOGY

*Please refer to Chapter 2—Information Systems when reviewing this section.*

This section highlights the activities that should take place for a receiver to understand and take control of the insurer’s systems. To the extent possible, the receiver should not allow anyone access to the insurer’s computer system until a complete backup of the system is complete. It is not uncommon for the insurer’s computer systems to be intertwined with that of its affiliates; therefore, legal consultation is advised prior to taking any action that may impact the affiliates’ operations.

*Detailed tasks are listed in the checklist included in the exhibits at the end of this chapter.*

## A. Evaluating Hardware/Software

For any hardware/software owned by the insurer, the receiver should determine whether to maintain it or sell it. Prior to the sale of any equipment, the receiver should determine if that equipment is required to support any ongoing or contemplated litigation. A sale may require court approval.

## B. System Shut Down

The receiver should arrange for the orderly shutdown of the computer system. Prior to shut down, the receiver should ensure that all records have been updated and all final reports have been run. It is suggested that a data processing checklist of all reports and programs to be run be completed prior to the shutdown period.

With all data updated, the receiver should make certain the information systems department performs a full system backup prior to the clearing of all files on the system. Once completed, the system may be powered down.

# VII. CLAIM OPERATIONS

## A. Take Control of Claim Processing and Payment

A receiver should plan to put in place appropriate controls over claim processing and payment authority of the insurer’s claim department and establish the capability to control and review the insurer’s claim records. Claim records may be contained in hard copy files, electronic records, or a combination of both, and may be under the control of the insurer’s claim department at its main office, branch offices, or by a TPA.

Some of the initial goals in establishing control may include a review of claim policy and procedure manuals, the coverage confirmation process, claim reserving methodology, settlement practices, and applicable electronic claim processing systems. If written documentation of the insurer’s claim policies and procedures does not exist, a receiver may wish to interview key claim personnel to develop and document claim processing procedures.

[For Health receiverships address prior authorization requirements, capitated arrangements and referrals and outside claims handling by PBM mental health and or durable medical equipment]

## B. Develop an Understanding of Claim Operations

A receiver needs to understand the operations of the claim department, including its organization and workflow, processing systems and data, type, and nature of claims, and gather key information on the number of pending claims and outstanding reserves by category of business.

## C. Review of Claim Handling

A receiver may wish to review the claim handling process by obtaining or preparing an overview of the typical workflow for processing a claim. This workflow might include a summary of all key interactions between claim personnel and other departments. If workflows vary by claim type and product line, the preparation of a separate workflow summary for each product line may be necessary.

The receiver should determine whether the insurer uses an active diary system for claims. Such a system monitors the claim handling process and records the dates of each step in the process. As part of the claim diary system investigation, obtain an overview of the diary functions, including the relationship between the manual and the electronic elements of the processing system.

With a basic understanding of claim handling policy and procedures, a receiver may wish to determine whether there are any constrictions in the claim resolution process such as:

* setup of new claims;
* correspondence files;
* claim diaries;
* indemnity payments;
* loss adjustment expense payments;
* the handling of insurance department complaints;
* reinsurer claim inquiry;
* reporting to reinsurers;
* Subrogation and salvage recovery; or
* inventory of unprocessed claims including those claims not yet entered on the claims system.

## D. Review Outside Involvement in Claim Handling

In addition to TPAs, several other types of outside parties may participate in claim handling, e.g., legal counsel, independent adjusters, appraisers, investigators, etc. A receiver should review these roles and determine whether to confirm or reject contracts with such vendors.

## E. Claims Handling in Conservation/Rehabilitation

Depending upon the insurer’s financial position and liquidity, circumstances may require a receiver to impose a moratorium on the continued ordinary payment of claims, defense of insureds, cash surrenders, policy loans or dividends. In such circumstances, consideration may be given to hardship exceptions for claims that meet certain established criteria for continued payment or partial payment, such as claim category or payment percentage. Hardship exceptions to a claim payment moratorium should be approved by the supervising court and based on exigent circumstances such as disability of an employee or policyholder, the impoundment of an automobile undergoing repairs, or the future availability of guaranty association coverage.

*For detailed information on how to handle claims in a liquidation, see Chapter 5—Claims.*

## F. Uniform Data Standard

In December 1993, the NAIC adopted the Uniform Data Standard (UDS) for use in reporting policy and claim information between property and casualty guaranty associations and receivers for property and casualty receivership estates. UDS is a defined series of electronic data file formats that facilitate data exchange between receivers and guaranty associations related to the insurer’s unearned premium, claims, and loss adjustment expense. The UDS Operations Manual provides an explanation of the current reporting format. A copy of the Uniform Data Standard Operations Manual P&C (“Claims manual”) can be downloaded from the National Conference of Insurance Guaranty Funds website (ncigf.org) for free.

*Refer to Chapter 2—Information Systems and Chapter 6—Guaranty Funds for further information on UDS.*

# VIII. REINSURANCE

*Please refer to Chapter 7 - Reinsurance when reviewing this section.*

Understanding reinsurance is critical to the receiver’s ability to marshal this asset. With respect to property/casualty insurers, reinsurance receivables usually represent the largest asset of the estate. With respect to life insurers, reinsurance may be critical to the rehabilitation or liquidation proceeding, and generally all ceded reinsurance agreements should be continued. See §612 of IRMA and Section 8(N) of the Life and Health Insurance Guaranty Association Model Act. This asset may require immediate attention upon commencement of the receivership.

## A. Location of Reinsurance Documents

Before the receiver can begin to marshal reinsurance receivables, it is necessary to understand the reinsurance relationships of the insurer. To accomplish this, the receiver must first locate and categorize the various documents reflecting the reinsurance arrangements of the insurer. The receiver should take control of original reinsurance contract documents. These records should be secured, copied, or scanned and then inventoried. The receiver may create working copies for use during the receivership. The integrity of the original records should be maintained in the event they are needed in the future.

## B. LETTERS OF CREDIT AND TRUST AGREEMENTS

Letters of credit (LOC) and trust agreements must be located and placed in a secure area. These documents should be reviewed as soon as possible to determine whether any immediate action is necessary to ensure the continuation of the LOC or trust agreement. Under certain forms of letters of credit, the LOC may expire by its own terms, although it is more common that they renew automatically. In some instances, the original LOC must be presented to the issuing financial institution to draw against the letter of credit.

## C. Role of Intermediaries

It may be in the best interests of the receivership to continue working with intermediaries. The intermediary has at its disposal detailed information that the receiver may not have. The intermediary should be notified of the insolvency proceedings immediately and instructed as soon as possible on duties and responsibilities it should continue to perform for the receiver.

The duties of the intermediary need to be clarified. The receiver may decide to instruct the intermediary to take one or more of the following actions:

* Advise all reinsurers or cedents of the status of the insolvent insurer;
* turn over all funds in their possession due the insurer;
* turn over original LOCs;
* continue to render accounts to receivers and reinsurers;
* assist in the collection of funds from reinsurers;
* transmit claims and other notices to the receiver and the reinsurers;
* establish procedures for the handling of reinsurance inquiries; and
* cease netting of accounts among insurers.

Under certain circumstances, the receiver may find it preferable to discontinue the use of the intermediary. In this event, the receiver should deal directly with the reinsurers, with appropriate notice to the intermediary.

## D. Identification of Funds Held

The receiver should prepare a list of insurers that are holding funds of the insolvent insurer, as well as a list of insurers for which the insolvent insurer is holding funds.

## E. Payments to Reinsurers

One of the key issues facing the receiver in the short term is whether to continue to pay reinsurers on a current basis and/or cure prior defaults. This may be necessary to continue the reinsurance in effect, particularly if there have been pre-receivership defaults. This is a legally intensive problem, and the receiver needs to engage legal counsel on these matters as soon as possible. The decision will depend on an array of factors, including the terms of the reinsurance agreements, applicable state law, and the payment status of the contract.

# IX. HUMAN RESOURCES

## A. Open Lines of Communication

The commencement of a receivership can be difficult for an insurer’s employees. Many employees are not aware of the circumstances that have led to the receivership. Productivity and employee morale often decline. Meetings with employees at the commencement to explain the receivership process as well as the receiver’s current objectives can be very important. Establishing an open dialogue and clear lines of communication will minimize the spread of misinformation and can mitigate untimely staff departures.

## B. Personnel, Payroll and Benefits

It is important that a receiver assume oversight of an insurer’s direct employees, payroll, and employee benefits with minimal disruption to existing processes. A receiver may also need to assume oversight of pension or 401(k) plans, over time, establish new benefit programs for direct employees, and consider whether to continue, replace, and wind-down existing employee benefit programs. A summary of the critical human resource tasks is contained in the checklists included in the exhibits at the end of this chapter.

Employees may be employed by an affiliate or holding company, rather than as direct employees of the insurer. In such cases, a receiver will need to review existing cost-sharing arrangements or contracts for reimbursement with the affiliate. In such instances, a receiver typically would not have direct responsibility for the employee benefit programs pertaining such employees.

## C. Staffing Plan

One of the receiver’s responsibilities will be to develop a staffing plan for the receivership that identifies both short- and long-term personnel requirements A receiver may wish to develop an organizational chart, comprehensive job descriptions, and personnel files for receivership staff. As responsibilities and job functions may change during the receivership process, including transitions from conservation, rehabilitation, and liquidation, a receiver may be required to periodically assess and update the receivership staffing plan.

## D. Retention of Legacy Staff

Legacy staff can be well positioned to provide a receiver with institutional and operational knowledge that will benefit the future operations of a receivership estate. A receiver may accordingly wish to look to legacy staff to augment the short- and long-term receivership staffing plan.

## E. Legacy Staff Retention

Staff resignations and reductions in force are typical during a receivership as certain operations begin to wind-down and the insurer is no longer perceived to be a going concern. A receiver’s staffing plan may also include the retention of certain legacy employees until their requisite knowledge and expertise are no longer necessary for the operation of the receivership estate. In such instances, retention incentives may be required to achieve the receiver’s staffing objectives. Retention incentives may include one or more of the following:

* Maintenance or adjustment of existing benefits , including severance;
* Performance and salary review process;
* Retention bonuses;
* Educational or tuition reimbursement;
* Providing outplacement services.

## F. Other Personnel Issues

The receiver should identify any personnel related litigation and other disputes to include equal employment opportunity complaints, workers’ compensation claims and wage and hour complaints, etc. These matters should be managed by the receiver’s personnel consultants and/or legal counsel.

# X. CLOSURE OF THE ESTATE

*Please refer to Chapter 10 – Closing Estates when reviewing this section.*

The best time to start planning for closure is at the start of the receivership. Since the receivership process may take several years, the receiver may wish to prepare a closure task list or checklist. A partial list can usually be developed through a review of the receivership statute of the domiciliary state. The following are some of the general tasks that should be accomplished before a liquidation estate can be closed:

* all assets have been marshaled;
* litigation has been resolved;
* ancillary proceedings have been closed or resolved to a point that will not impede closure of the domiciliary receivership;
* guaranty association claims against the estate are finalized to the extent that a final distribution can be made to the associations;
* all claims have been allowed or disallowed by the supervising court;
* appropriate distributions have been made to creditors;
* where appropriate, the dissolution of the corporate entity has been resolved; and
* Final tax returns have been prepared and filed with the federal government and financial settlements prepared as required.

## A. Guaranty Associations

The claims of guaranty associations may not be completely certain at the time non-guaranty-association-covered claims (including contested claims) are adjudicated by the liquidator. The covered claims that the guaranty associations handle are subject to a number of variables. Prior to making a final distribution, the liquidator may, where appropriate, consider policy reserve calculations as a basis for valuing guaranty association policy level claims (e.g., through the use of present value method). If early access payments were excessive, overages will have to be returned prior to processing the final distribution.

*For a discussion of guaranty associations, see Chapter 6—Guaranty Associations.*

## B. Ancillary Receiverships

Closure of an ancillary receivership is generally less complicated than closing a domiciliary proceeding. Ancillary receiverships should be closed before the domiciliary receivership begins closure proceedings. Some state statutes provide that special deposits are established for the benefit of the policyholders in that state, who will either be paid in full or will share *pro rata* in the special deposit. If excess special deposit assets exist, the excess should be returned to the domiciliary receiver for distribution to the creditors.

Distributions to ancillary special deposit claimants are subject to the rule that all claims at that priority level share at the same percentage to the extent possible. If distributions in the ancillary proceeding will be made beyond the policyholder claimant level, the domiciliary liquidator should arrange for the excess unpaid portion of the ancillary special deposit funds to be returned to the domiciliary estate.

## C. Tax Returns

When the receivership is required to file tax returns, scheduling the filing of the final return may be difficult. The filing of the final return will follow the application and order for closure. Counsel and tax advisors should be consulted to determine the best method for handling the filing of a final return for a particular receivership. The timing of the dissolution of the entity should be carefully considered because valuable tax attributes may be lost.

*See Chapter 3, Section VIII for further discussion.*

## D. Final Accounting Matters

### Adjusting and Closing Entries

Timing adjusting and closing entries with regard to the final report can be difficult. Generally, the liquidator will want to have the accounting books closed prior to the issuance of the final report and the filing of an application for closure with the supervising court. But there usually will be some accounting activity that must take place after either the final report or closure order.

During the early phases of the receivership, efforts are centered on determining what the assets and liabilities of the insurer were on the liquidation date. After the liquidator has written off any uncollectible assets, marshaled all the available assets, and distributed all the monies that can be paid, there may remain assets to be written off and unpaid claims as unsatisfied liabilities. Provision should be made for dealing with outstanding checks, escheat funds and post-closure recoveries that do not justify reopening the estate.

### Reserving Final Expenses

Expenses may be incurred after the closure order has been issued; therefore, funds may need to be reserved for administrative expenses. These expenses may include final lease payments; employee withholding and taxes; storage charges; transportation charges; final tax preparation; bank charges; legal, accounting and data processing consulting expenses; postage; court costs; and salaries. In preparation for closure, it is necessary to have all administrative expenses current.

## E. Abandoned Assets and Causes of Action

There may be both assets and causes of action that may not be cost-beneficial for the liquidator to pursue. Since the duties of the liquidator include marshaling the assets and liquidating them for the benefit of the creditors of the insolvent insurer, it is advisable for the liquidator to obtain court approval of any decisions regarding abandonment. The liquidator may also wish to consider negotiating with guaranty associations for the transfer of assets and causes of action to the guaranty associations as distributions in kind, potentially reducing their claims against the state.

## F. Final Reports and Applications or Motions

A final report on the liquidation must be made to the supervising court. This final report may be filed before, after or with the application or motion for closure of the estate. *(See Chapter 9—Legal Considerations.)* Prior to closure, there may be a need to have the supervising court approve, to the extent it has not already done so, the following actions:

* expenditures;
* reserves set for final and post-closure expenses;
* amounts to be paid in final distribution to creditors;
* arrangements for destruction or storage of records;
* valuation of any distributions of assets-in-kind to any claimants; or
* any other significant transactions or procedures.

## G. Final Claims Matters

### Final Distribution

The final distribution percentage is calculated by dividing the assets available for distribution by the amounts allowed for claims filed and approved by the supervising court. The receiver must reserve sufficiently for administrative expenses that may be incurred after the distribution has been made.

There may have been interim distributions from the estate that will need to be considered when calculating the distribution percentage applicable to the final distribution. Also, early access payments made to guaranty associations should, by order of the supervising court, be treated as distributions and taken into account when the final distribution is made. If there is a need to have guaranty associations return any portion of the early access payments, it must be identified when the receiver starts calculating the final distribution percentages.

### Former Insureds with Unsettled Litigation

Ongoing litigation of non-guaranty-association-covered claims may impede closure of an estate. Some states provide that the insured’s claims can only be paid based on the lower of: (1) the recommended and allowed amount assigned to the claim; or (2) the amount established in the underlying claim against the insured. This may require that the receiver waits for all claims against former insureds be settled or barred before making final distributions and moving the estate to closure.

### Reducing Reserves or Recorded Allowances on Claims

After a distribution has been made, the record of allowed claims may need to be adjusted for tax purposes or to enable additional distributions to be made.

### Unclaimed Dividends and Escheated Funds

The receiver may not be able to locate all claimants. Also, there are claimants who will refuse to accept their liquidation distribution because they are involved in litigation and believe that accepting payment would prejudice their case. State statutes may require special treatment of funds related to unclaimed distributions. Further, after a certain time period, funds held for unclaimed distributions will escheat to the treasury of the domiciliary state. *(See Chapter 9—Legal Considerations, Section III.)*

## H. Closing the Office

After all the records have been either destroyed or sent to the appropriate archives, any separate office maintained for the liquidation will need to be closed. One of the items related to closing the office may be cancellation of any remaining lease term and insurance coverage on staff, equipment, and the office space itself. In many cases during a liquidation, the office will have been closed early in the receivership process to reduce expenses.

## I. Post Closure Matters

There may be inquiries for records and information made by former agents, insureds, and other interested parties after the closure of the estate. Usually, these will be referred to the domiciliary insurance department, and basic insurer information may be posted on the domiciliary insurance department’s website. If the request is for pre-insolvency financial data, the request will probably be handled by the department. Arrangements should be made to brief someone on the permanent receivership staff or in another division within the department of insurance so that post-closure questions can be answered.

## J. Potential Reopening of Estate

Some statutes provide for the reopening of an estate upon the occurrence of certain events. For example, assets not previously discovered or written off may become available, making an additional distribution possible. However, a careful analysis should be made to determine whether an additional distribution would be cost-effective.

1. Refer to Appendix XXX for a chart outlining key differences between the Uniform Act, IRLMA and IRMA. [↑](#footnote-ref-2)
2. Refer to NAIC website for state charts that provide state law citations to determine which version of IRMA a state has adopted. <https://content.naic.org/model-laws>. Note that some states that have not adopted IRMA in full; but may have adopted specific provisions from IRMA. [↑](#footnote-ref-3)
3. In 2021, the NAIC adopted revisions to the *Insurance Holding Company System Regulatory Act* (#440) and *Insurance Holding Company System Model Regulation with Reporting Forms and Instructions* (#450) that bring affiliate service providers deemed “integral” or “essential” to an insurer’s operations under the jurisdiction of a rehabilitator, conservator, or liquidator for purposes of interpreting, enforcing, and overseeing the affiliate’s obligations under the service agreement. [↑](#footnote-ref-4)
4. The NAIC Global Receivership Information Database provides publicly available information about insolvent insurers including receivership orders (conservation, rehabilitation, and liquidation). <https://isiteplus.naic.org/grid/gridDisc.jsp> [↑](#footnote-ref-5)
5. Under IRMA, the proceeding is referred to as an ancillary conservation and the commissioner is appointed as conservator. [↑](#footnote-ref-6)
6. The NAIC’s Receivership and Insolvency Task Force (RITF) published a Whitepaper dated August 12, 2004, and titled “Communication and Coordination Among Regulators, Receivers, and Guaranty Associations: An Approach to a National State Based System.” [↑](#footnote-ref-7)