



Draft date: 11/30/22

*2022 Fall National Meeting
Tampa, Florida*

RECEIVERSHIP AND INSOLVENCY (E) TASK FORCE

Wednesday, December 14, 2022

11:00 a.m. – 12:00 p.m.

JW Marriott—Tampa Bay Ballroom 1-4—Level 4

ROLL CALL

James J. Donelon, Chair	Louisiana	Gary D. Anderson	Massachusetts
Cassie Brown, Vice Chair	Texas	Chlora Lindley-Myers	Missouri
Mark Fowler	Alabama	Troy Downing	Montana
Lori K. Wing-Heier	Alaska	Edward M. Deleon Guerrero	N. Mariana Islands
Peni Itula Sapini Teo	American Samoa	Eric Dunning	Nebraska
Michael Conway	Colorado	Marlene Caride	New Jersey
Andrew N. Mais	Connecticut	Mike Causey	North Carolina
Trinidad Navarro	Delaware	Judith L. French	Ohio
David Altmaier	Florida	Glen Mulready	Oklahoma
Colin M. Hayashida	Hawaii	Michael Humphreys	Pennsylvania
Dana Popish Severinghaus	Illinois	Alexander S. Adams Vega	Puerto Rico
Doug Ommen	Iowa	Elizabeth Kelleher Dwyer	Rhode Island
Vicki Schmidt	Kansas	Michael Wise	South Carolina
Sharon P. Clark	Kentucky	Carter Lawrence	Tennessee
Timothy N. Schott	Maine	Jon Pike	Utah
		Mike Kreidler	Washington

NAIC Support Staff: Jane Koenigsman

AGENDA

1. Consider Adoption of its Oct. 11 and Summer National Meeting Minutes Attachment One
—*Commissioner James J. Donelon (LA)*

2. Consider Adoption of a Request for Model Law Development to Amend the *Property and Casualty Insurance Guaranty Funds (#540)* for Cybersecurity Insurance—*Commissioner James J. Donelon (LA)* Attachment Two

3. Consider Adoption of its Working Group and Subgroup Reports
 - a. Receiver’s Handbook (E) Subgroup—*Kevin Baldwin (IL)*
 - b. Receivership Financial Analysis (E) Working Group—*Donna Wilson (OK) and Jacob Stuckey (IL)*
 - c. Receivership Law (E) Working Group—*Kevin Baldwin (IL) and Laura Slaymaker (PA)* Attachment Three

4. Hear a Report of the Receiver’s UDS AdHoc Group—*Laura Slaymaker (PA)*
5. Discuss Takeaways from the Targeted Jurisdictional Assessment Related to Resolution—*Robert Wake (ME)*
6. Hear an Update on International Resolution Activities—*Robert Wake (ME)*
7. Discuss Any Other Matters Brought Before the Task Force
—*Commissioner James J. Donelon (LA)*
8. Adjournment

Draft: 10/26/22

Receivership and Insolvency (E) Task Force
Virtual Meeting
October 11, 2022

The Receivership and Insolvency (E) Task Force met Oct. 11, 2022. The following Task Force members participated: James J. Donelon, Chair (LA); Cassie Brown, Vice Chair, represented by Brian Riewe (TX); Mark Fowler represented by Marie McKitt (AL); Andrew N. Mais represented by Jared Kosky (CT); Trinidad Navarro represented by Nicole Brittingham (DE); David Altmaier represented by Lorrie Arterburn (FL); Colin M. Hayashida represented by Patrick Lo (HI); Doug Ommen represented by Kim Cross (IA); Dana Popish Severinghaus represented by Kevin Baldwin (IL); Vicki Schmidt represented by Tish Becker (KS); Sharon P. Clark represented by Vicki Lloyd (KY); Gary D. Anderson represented by Christopher Joyce (MA); Timothy N. Schott represented by Robert Wake (ME); Chlora Lindley-Myers represented by Shelley Forrest and John Rehagen (MO); Mike Causey represented by Jackie Obusek (NC); Eric Dunning represented by Justin Schrader (NE); Judith L. French represented by Matt Walsh (OH); Glen Mulready represented by Donna Wilson and Jamin Dawes (OK); Michael Humphreys represented by Laura Lyon Slaymaker (PA); Alexander S. Adams Vega represented by Brenda Perez (PR); Michael Wise represented by Geoffrey Bonham (SC); Carter Lawrence represented by Trey Hancock (TN); Jon Pike represented by Reed Stringham (UT); and Mike Kreidler represented by Steve Drutz (WA).

1. Exposed a Request for NAIC Model Law Development to Amend Model #540

Commissioner Donelon said a proposal to amend the *Property and Casualty Insurance Guaranty Association Model Act* (#540) was received from the National Conference of Insurance Guaranty Funds (NCIGF) to address guaranty fund coverage of cybersecurity insurance (Attachment One-A). At the Summer National Meeting, the Executive (EX) Committee approved a request to amend Model #540 for revisions specific to restructuring mechanisms. The Receivership Law (E) Working Group is currently working on those revisions. Since that request was limited to a specific topic, if the Task Force agrees to amend Model #540 for cybersecurity insurance, a second request will need to be approved by Executive (EX) Committee.

Roger Schmelzer (NCIGF) said the NCIGF identified the possibility of a readiness threat of not being prepared for a cybersecurity insurance liquidation: Either a company that writes cybersecurity exclusively or that writes it is a one line of business. He said the NCIGF legal committee lead by Rowe Snyder (Locke Lord LLP) has done a lot of research over the past year.

Mr. Snyder summarized the proposed amendments to Model #540. He said the NCIGF legal committee studied cybersecurity insurance at a technical level. The NCIGF's memorandum reflects the findings and recommendations from several meetings conferring with different experts in the cybersecurity area. The NCIGF's proposed amendments to sections of Model #540 were drafted with a minimalized approach. It wants to give state guaranty associations the solvency tools needed to handle a cybersecurity insurance claim. The amendments do not erase all the challenges in handling these claims. There would be a lot of planning to get ready for such an insolvency.

Mr. Snyder said there are four amendments:

- In Section 3.E, the amendment confirms guaranty fund coverage for cybersecurity insurance. The change amends the exclusion of warranties and service contract from guaranty fund coverage. The reason for this is that a range of services paid for under a cybersecurity insurance policy are varied and novel compared to traditional property/casualty (P/C) products. He said the amendments propose to clarify the exclusion

of warranties and service contracts because services and restoration of computer systems, database, and etc., are inherent parts of these types of policies. The drafting note in Section 3 states: “This Act focuses on property and liability kinds of insurance and therefore exempts those kinds of insurance deemed to present problems quite distinct from those of property and liability insurance.” This confirms that Model #540 has not been drafted to think about the kinds of services and protections inherent in cybersecurity insurance. The determination of coverage will be a state-by-state analysis, but the amendments are believed to be appropriate.

- In Section 5.I., it is proposed to add a definition of cybersecurity insurance.
- In Section 8.A.(1)(iii), it is proposed that there is one claim cap applicable on a guaranty fund coverage for each cybersecurity incident. Policies contain a similar provision, but a statutory provision is believed to be appropriate. Mr. Snyder said the NCIGF believes that one claim cap is applicable based on the number of consumers that could be impacted and based on the extent of accurate data about the cost of a cybersecurity event. He said a large number of cybersecurity events occur at small or medium-sized businesses with losses of \$2 million in revenue. Therefore, the NCIGF believes this cap is appropriate for this size company.
- In Section 8.A.(4), it is proposed to provide state guaranty associations with unequivocal and express authority to point and replace, if necessary, the specialized service providers, as well as defense counsel. Specialized services providers include a variety of services not in typical P/C insurance such as forensic experts and reputational repair experts.

Additionally, in Section 13.B., Mr. Snyder said the objective of the amendments is to provide for clear pay and recover rights for state guaranty funds where those guaranty funds have high net worth policyholder coverage exclusions. Due to the nature of the cybersecurity claims being more urgent than normal claims, it requires an immediate response from forensic experts, breach coaches, and other service providers. There is no time to vet the net worth of any policyholder. The amendments allow a state guaranty association to act quickly with confidence to do what is necessary. When the net worth of the policyholder is determined, consistent with the public policy in that state, the cost of handling that policy can be transferred back to the high net worth policyholder. All states have these high-net-worth exclusions, which are triggered at \$25 million or \$50 million of net worth.

Mr. Snyder said the NCIGF’s memorandum asks for collaboration with all stakeholders in the insurance resolution process in making these amendments and any other changes necessary to the law or planning process. Mr. Schmelzer said the NCIGF has been in contact with industry, and industry has had a lot of input into this proposal. He said the NCIGF has told industry it would pursue these amendments to states’ laws, and it would be helpful for Model #540 to be amended to propel those changes in states’ laws.

Mr. Baldwin made a motion, seconded by Mr. Kosky, to expose the Request for NAIC Model Law Development to amend Model #540 for a 30-day public comment period ending Nov. 10 (Attachment One-B). The motion passed unanimously.

2. Requested Regulator Volunteers for Ad Hoc Feedback on UDS Revisions

Commissioner Donelon said the P/C guaranty funds are considering future enhancements to the Uniform Data Standards (UDS). UDS is a data format for transferring data from an insurer to the P/C guaranty funds in liquidation. Pennsylvania attends the meetings with the guaranty funds about UDS and would like to discuss regulator input into future enhancements.

Ms. Slaymaker said there is a small group meeting, facilitated by the NCIGF, concerning the possible formation of a new UDS 3.0 platform. She said Pennsylvania is leading a small team within the group tasked with getting input and participation by stakeholders from within the receivership and guaranty fund communities. She asked if the Task Force could coordinate on this process. Commissioner Donelon asked about the time frame for this project. Ms. Slaymaker said it is a long-term project and is not expected to result in changes for probably several years.

Commissioner Donelon said that if the Task Force agrees that it would like state insurance departments to provide input, the Task force could ask for a few states to volunteer to participate with Pennsylvania on an ad hoc basis and report back to the Task Force. If the NCIGF and the guaranty funds would like the state regulator's approval of the revised UDS forms, he said the Task Force can consider doing that once the revisions are made.

Hearing no objection, with Pennsylvania as the lead, Commissioner Donelon asked for volunteers. Illinois, Louisiana, and Oklahoma volunteered to participate. Jane Koenigsman (NAIC) said other state insurance departments that wish to volunteer can notify her.

3. Adopted a Memorandum of Understanding for Pre-Liquidation Planning

Mr. Baldwin said the Receivership Law (E) Working Group met several times in 2022 to address a referral from the Task Force to consider proposals presented by NCIGF related to pre-liquidation coordination and information sharing. The option that the Working Group chose to pursue was a memorandum of understanding that could be entered into by receivers and guaranty funds during the process of planning for a liquidation to provide a legal ability to share information in advance of liquidation. The memorandum is an optional tool that can be customized to the unique circumstances of a given receivership. It is applicable to P/C liquidations as the National Organization of Life and Health Guaranty Associations (NOLHGA) has indicated it has mechanisms that it has used for coordination in pre-liquidation planning.

The Working Group reviewed the memorandum by section and worked collaboratively with the NCIGF to make edits. The memorandum was exposed for a 45-day public comment period, and no comments on the content of the memorandum were received. On Sept. 14, the Working Group adopted the memorandum without any objections. The Working Group also adopted sending referrals to NAIC analysis and examination working groups that maintain analysis and examination handbooks to request a reference and description of the memorandum be included within pre-receivership guidance. Additionally, guidance will be considered for the *Receiver's Handbook for Insurance Company Insolvencies* (Receiver's Handbook). The referrals are subject to the memorandum's final adoption.

Mr. Wake made a motion, seconded by Mr. Stringham, to adopt the memorandum (Attachment One-C). The motion passed unanimously.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.

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Draft: 8/17/22

Receivership and Insolvency (E) Task Force
Portland, OR
August 11, 2022

The Receivership and Insolvency (E) Task Force met in Portland, OR, Aug. 11, 2022. The following Task Force members participated: James J. Donelon, Chair (LA); Cassie Brown, Vice Chair, represented by Brian Riewe (TX); Michael Conway represented by Rolf Kaumann (CO); Andrew N. Mais represented by Jared Kosky (CT); Trinidad Navarro represented by Charles Santana (DE); David Altmaier represented by Anoush Brangaccio (FL); Colin M. Hayashida represented by Sherri Sakamoto (HI); Doug Ommen represented by Kim Cross (IA); Dana Popish Severinghaus represented by Kevin Baldwin (IL); Vicki Schmidt represented by Justin McFarland (KS); Sharon P. Clark represented by Jeff Gaither (KY); Gary D. Anderson represented by Christopher Joyce (MA); Timothy N. Schott represented by Robert Wake (ME); Chlora Lindley-Myers represented by John Rehagen (MO); Edward M. Deleon Guerrero (MP); Troy Downing represented by Erin Snyder (MT); Mike Causey represented by Angela Hatchell (NC); Eric Dunning represented by Justin Schrader (NE); Marlene Caride represented by David Wolf (NJ); Glen Mulready represented by Donna Willson (OK); Michael Humphreys represented by Crystal McDonald (PA); Alexander S. Adams Vega (PR); Elizabeth Kelleher Dwyer (RI); Carter Lawrence represented by Trey Hancock (TN); Jon Pike represented by Reed Stringham (UT); and Mike Kreidler represented by Charles Malone (WA).

1. Adopted its June 2 Meeting Minutes

The Task Force met June 2 and took the following action: 1) adopted its Spring National Meeting minutes; and 2) adopted a Request for NAIC Model Law Development to amend the *Property and Casualty Insurance Guaranty Association Model Act* (#540).

Ms. Cross made a motion, seconded by Mr. Kaumann, to adopt the Task Force's June 2 minutes (Attachment One). The motion passed unanimously.

2. Adopted the Report of the Receiver's Handbook (E) Subgroup

Mr. Baldwin said the Receiver's Handbook (E) Subgroup met July 19 and took the following action: 1) adopted its Nov. 18 minutes (*see NAIC Proceedings – Fall 2021, Receivership and Insolvency (E) Task Force, Attachment Five*); 2) adopted the re-drafted version of Chapter 1 and Chapter 2 of the *Receiver's Handbook for Insurance Company Insolvencies* (Receiver's Handbook); and 3) exposed revisions to Chapter 3, Chapter 4, and Chapter 5 of the Receiver's Handbook for a 30-day public comment period ending Aug. 19. Mr. Baldwin said the drafting groups are continuing their work on Chapter 6 and Chapter 7. The drafting groups have worked diligently on this project, and based on the progress to date and the extensive nature of the revisions, the Subgroup would agree to extend the deadline of the Receiver's Handbook re-drafting project until the fall of 2023, which is reflected in the 2023 proposed charges for the Subgroup.

Ms. McDonald made a motion, seconded by Mr. Kaumann, to adopt the report of the Receiver's Handbook (E) Subgroup (Attachment Two). The motion passed unanimously.

3. Adopted the Report of the Receivership Law (E) Working Group

Mr. Baldwin said the Receivership Law (E) Working Group met July 18, June 10, and May 12 to address a referral from this Task Force to consider proposals presented by the National Conference of Insurance Guaranty Funds (NCIGF) related to pre-liquidation coordination and information sharing. The NCIGF had proposed several options

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for improving pre-liquidation information sharing between receivers and guaranty funds. The first option was model law amendments to Model #540, the *Insurance Holding Company System Regulatory Act* (#440), and the *Model Law on Examinations* (#390). Mr. Baldwin said that while some states may need to consider statutory language to enable information sharing, the Working Group agreed this option may not be necessary in all states. Mr. Baldwin said the NCIGF's second option was a memorandum of understanding that could be entered into by receivers and guaranty funds during the process of planning for a liquidation to provide a legal ability to share information in advance of liquidation. The memorandum is an optional tool that can be customized to the unique circumstances of a receivership. The Working Group agreed to pursue this option. Mr. Baldwin said the final recommendation was to draft additional guidance and best practices on pre-receivership coordination, which will be considered as part of the Receiver's Handbook revisions.

Mr. Baldwin said the Working Group reviewed the memorandum by section and proposed edits. During its July 18 meeting, the Working Group exposed the draft memorandum for a 45-day public comment period ending Sept. 1. He encouraged all states and interested parties to review the memorandum and submit any comments or proposed edits.

Mr. Stringham made a motion, seconded by Mr. Joyce, to adopt the report of the Receivership Law (E) Working Group (Attachment Three). The motion passed unanimously.

4. Adopted the Report of the Receivership Financial Analysis (E) Working Group

Ms. Wilson said the Receivership Financial Analysis (E) Working Group met Aug. 11 in regulator-to-regulator session, pursuant to paragraph 3 (specific companies, entities, or individuals) of the NAIC Policy Statement on Open Meetings, to discuss companies in receivership and related topics.

Ms. Wilson made a motion, seconded by Mr. Schrader, to adopt the report of the Receivership Financial Analysis (E) Working Group. The motion passed unanimously.

5. Adopted its 2023 Proposed Charges

Commissioner Donelon discussed the 2023 proposed charges of the Task Force and its working groups and subgroup. The proposed charges would remain the same, with one exception. The charges of the Receiver's Handbook (E) Subgroup would be extended through the fall of 2023. While the Subgroup has made progress on the Receiver's Handbook revisions so far and expects to make even more progress through the remainder of the year, it is anticipated that some of the work may not be finalized before this year-end.

Mr. Rehagen made a motion, seconded by Mr. Wake, to adopt the Task Force's 2023 proposed charges (Attachment Four). The motion passed unanimously.

6. Heard an Update on International Activities

Mr. Wake said the Resolution Working Group of the International Association of Insurance Supervisors (IAIS) plans to meet in September in person to work on the application paper on policyholder protection schemes. Commissioner Donelon asked if the IAIS is looking at a guaranty system like Lloyd's of London's system for its syndicates or a system like the U.S. guaranty fund system. Mr. Wake said the IAIS is more focused on systems like the U.S. system and continental guaranty fund systems, rather than one like Lloyd's of London's. Mr. Wake said the U.S. recently completed the IAIS-targeted jurisdictional assessment to evaluate the implementation of the holistic framework, which included an assessment of insurance receivership, and recovery and resolution planning. The reports are currently being finalized.

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7. Discussed Other Matters

Ms. Wilson announced the International Association of Insurance Receivers (IAIR) is holding its Technical Development Series (TDS), which is focused on various claims issues, in Oklahoma City, OK, Oct. 26–28. She said registration is open on the IAIR website for in-person or virtual attendance.

Having no further business, the Receivership and Insolvency (E) Task Force adjourned.

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Considering for Adoption by the Financial Condition (E) Committee, Dec. 15, 2022
Considering for Adoption by the Receivership and Insolvency (E) Task Force, Dec. 14, 2022

REQUEST FOR NAIC MODEL LAW DEVELOPMENT

This form is intended to gather information to support the development of a new model law or amendment to an existing model law. Prior to development of a new or amended model law, approval of the respective Parent Committee and the NAIC's Executive Committee is required. The NAIC's Executive Committee will consider whether the request fits the criteria for model law development. Please complete all questions and provide as much detail as necessary to help in this determination.

Please check whether this is: New Model Law or Amendment to Existing Model

1. Name of group to be responsible for drafting the model:

Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force to complete the drafting.

Note that Model #540 is currently being amended to address restructuring mechanisms, per the request for model law development adopted by NAIC Executive (EX) Committee on August 11, 2022. The Task Force hopes to consider the adoption of further amendments for this request within a similar timeframe.

2. NAIC staff support contact information:

Jane Koenigsman
jkoenigsman@naic.org
816-783-8145

3. Please provide a brief description of the proposed new model or the amendment(s) to the existing model. If you are proposing a new model, please also provide a proposed title. If an existing model law, please provide the title, attach a current version to this form and reference the section(s) proposed to be amended.

- *Property and Casualty Insurance Guaranty Association Model Act (#540)*

As presented by the National Conference of Insurance Guaranty Funds (NCIGF), cyber security insurance coverage is trending into the admitted market. Consequently, NCIGF anticipates the insurance insolvency resolution system will be presented with claims and other issues related to this coverage. These policy obligations may flow both from standalone cyber policies, endorsements, or from coverages that may be found to exist in commercial general liability and other lines of business typically written for business entities. For this reason, policymakers need to determine how such coverages will be handled should an insurer writing this business become insolvent. While each jurisdiction will need to decide whether, and within what parameters, cyber claims will be covered, we offer for consideration and guidance recommended amendments to the NAIC Property and Casualty Insurance Guaranty Association Act (NAIC Model 540). Policy makers should also consider how such claims will be handled before guaranty funds and associations (hereinafter "guaranty funds") are triggered – for example in a rehabilitation proceeding. Likewise, current insolvency processes and transition to the guaranty funds will need to be changed and enhanced to deal with this unique line of business and especially its demanding claims administration standards.

4. Does the model law meet the Model Law Criteria? Yes or No (Check one)

(If answering no to any of these questions, please reevaluate charge and proceed accordingly to address issues).

- a. Does the subject of the model law necessitate a national standard and require uniformity amongst all states?** Yes or No (Check one)

If yes, please explain why:

This proposed change is needed to ensure cyber insurance policyholders in all states are provided with guaranty fund coverage for this trending line of business.

b. Does Committee believe NAIC members should devote significant regulator and Association resources to educate, communicate and support this model law?

Yes or No (Check one)

5. What is the likelihood that your Committee will be able to draft and adopt the model law within one year from the date of Executive Committee approval?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary:

NCIGF has provided a proposal of suggested amendments for consideration. Proposed amendments include a definition of cyber insurance, coverage limitations and updates to other references.

6. What is the likelihood that a minimum two-thirds majority of NAIC members would ultimately vote to adopt the proposed model law?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary: See previous discussion.

7. What is the likelihood that state legislatures will adopt the model law in a uniform manner within three years of adoption by the NAIC?

1 2 3 4 5 (Check one)

High Likelihood

Low Likelihood

Explanation, if necessary:

At this juncture, the amendments being considered are simple and because they have the potential to address future policyholder protection for this line of business, we believe such changes will be widely supported by all parties.

8. Is this model law referenced in the NAIC Accreditation Standards? If so, does the standard require the model law to be adopted in a substantially similar manner?

No reference in Accreditation Standards.

9. Is this model law in response to or impacted by federal laws or regulations? If yes, please explain.

No.

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Receivership Law (E) Working Group
Virtual Meeting
November 7, 2022

The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met Nov. 7, 2022. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Michael E. Surguine (AR); Joe Holloway (CA); Jared Kosky (CT); Miriam Victorian (FL); Kim Cross (IA); Walt Corey (LA); Christopher Joyce (MA); Robert Wake (ME); Tom Mitchell (MI); Shelley Forrest (MO); Lindsay Crawford (NE); Brian Riewe (TX); and Charles Malone (WA). Also participating was Doug Hartz (OR).

1. Received Comments on Amendments to Model #540

Slaymaker said the Working Group exposed proposed amendments on the *Property and Casualty Insurance Guaranty Association Model Act* (#540) for purpose of addressing guaranty fund coverage for policies that are included in insurance business transfers (IBTs) and corporate divisions (CDs). One comment letter was received from Maine (Attachment Three-A).

Wake said his comments address a general situation that as a policy is transferred to another insurer, the guaranty fund coverage goes with the policy. This problem comes up in other types of policy novation. With limited exceptions, it should be addressed the same way. The only exception is when policyholders are novated coverage into the company's own captive insurer. This example seems like a non-starter.

Wake said in the case of a regulatory business transfer and the business has been transferred to the captive or some other alternative risk being entity and the policyholder had no say, the policyholder should not lose the guaranty fund protection. The answer is that if the state decides the guaranty fund should not be put on the risk, the state should not allow that transfer to happen.

Wake said he put his proposed amendments in the membership section of Model #540 because if there is assessment liability with the policy, it should go with the policy as well. For example, if the business was written shorting before the business transfer. He said including in the covered claim section would be more complicated than what he proposes.

Wake said the assumed claims transaction is already in the existing Model #540 but not many states have adopted that provision. He said it seemed simpler to either replace it or write around it.

Stephen W. Schwab (DLA Piper LLP) asked what if a new insurer is created? Wake said that is why he includes novation and the definition for corporate succession to include mergers.

Wake said the covered claim definition amendment requires the insurer to have been a member insurer at the time of writing the policy. It should not be relevant if you have a situation where the new insurer wasn't licensed until after the policy was written by the former insurer. However, he feels the membership needs to relate to when the policy was written. He said in the case of a new company that does not qualify for licensure going forward, the guaranty fund coverage should still transfer with the policy.

Schwab said in paragraph 5(K)(d)(b) language, it does not apply, which would suggest there would not be continued coverage. Wake said in Schwab's scenario it would be defined as a corporate succession, so it would

apply. He said we need new language to deal with mergers and corporate divisions and we need to clean up the definition of novation.

Patrick Cantilo (Cantilo and Bennett, LLP) asked if the assumed claims transaction works, and the problem is that states haven't adopted it, will amending it be more successful. He said the assumed claims transaction language gets us there or nearly there, with minor edits. He said the IBT and CD amendments as motivation for states to adopt the existing assumed claims transaction language. Wake agreed.

Barbara F. Cox (Barbara F. Cox LLC) said Wake's proposal amends parts of Model #540 that we need to do. Cox said the National Conference of Insurance Guaranty Funds' (NCIGF) proposal could be modified for such transactions. She said NCIGF would work with Wake on amendments. She said the reason the current assumed claims transaction language has not been adopted by many states is that it was not a consistent view among trade association and now a recently adopted policy that if there was coverage before the transaction it should follow the transaction. Conversely, if there was not coverage before the transaction, there should not be coverage created by the transactions. The concern was that the original assumed business language would afford coverage. There was an attempt to solve that with a look-back on assessments, post insolvency. That system does not solve the problem. There might have been either no assessments or a lot of assessments during that three-year look-back. Surplus lines or other unlicensed business that is not covered by the guaranty funds is not regulated the same way as licensed business. That is the objection to the current assumed claims transaction language. She said there is urgency for making these amendments since a couple transactions have already taken place, with more to follow. She hopes that the coverage that is intended to be in place for injured workers and other deserving parties is in place before one of these insurers fails.

Baldwin said Wake's proposal makes the edits to the members insurer section of Model #540 while NCIGF's proposal addresses the issue in the covered claims definition. He asked Cox to discuss the placement of the amendment. Cox said the NCIGF proposed language calls for the policy to be issued by the now insolvent insurer and that requirement weaves its way to the definition of insolvent insurer. When you put them together you do not have coverage for the IBT or CD because it was not issued by the insolvent insurer. She said NCIGF would prefer a simple solution where there is no coverage for anything that was not covered before the transaction.

Baldwin said the covered claims section is where we would go to evaluate the actual granting of coverage in an insolvency.

Baldwin recommended a drafting group to consider further edits to the Model #540 amendments. Baldwin, Slaymaker, Hartz, Wake, Cox, Schwab, and Rowe Snider (Locke Lord LLP) volunteered.

Having no further business, the Receivership Law (E) Working Group adjourned.

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Receivership Law (E) Working Group
Virtual Meeting
September 14, 2022

The Receivership Law (E) Working Group of the Receivership and Insolvency (E) Task Force met Sept. 14, 2022. The following Working Group members participated: Kevin Baldwin, Co-Chair (IL); Laura Lyon Slaymaker, Co-Chair (PA); Joe Holloway (CA); Jared Kosky (CT); Miriam Victorian (FL); Kim Cross (IA); Tom Travis (LA); Christopher Joyce (MA); Robert Wake (ME); Tom Mitchell (MI); Shelley Forrest (MO); Justin Schrader (NE); Brian Riewe (TX); and Charles Malone (WA). Also participating were: Steve Kinion (DE); and Doug Hartz (OR).

1. Adopted a Memorandum of Understanding for Pre-Liquidation Planning

Slaymaker said the memorandum of understanding for pre-liquidation planning is an optional tool state insurance regulators and receivers can use to collaborate and share information with guaranty funds in the pre-liquidation planning period. It can be customized for the specific needs of the state and the circumstances of the company that is about to enter liquidation.

Slaymaker said the National Conference of Insurance Guaranty Funds (NCIGF) submitted a comment letter. While the NCIGF does not have any additional comments on the substance of the memorandum of understanding, it recommends that the Working Group send referrals to the analysis and examination groups to update appropriate analysis and examination guidance with respect to pre-receivership collaboration and communication, which already exists to some extent in various handbooks.

Travis made a motion, seconded by Mitchell, to adopt the memorandum of understanding (Attachment Three-B). The motion passed unanimously.

Holloway made a motion, seconded by Mitchell, to send referrals to the financial analysis and examination groups to update state insurance regulator guidance on pre-receivership guidance to refer the memorandum of understanding, contingent upon its final adoption. The motion passed unanimously.

2. Exposed Amendments to Model #540

Baldwin said the Executive (EX) Committee adopted the Request for NAIC Model Law Development to amend the *Property and Casualty Insurance Guaranty Association Model Act* (#540) for this purpose at the Summer National Meeting. The NCIGF proposed amendments to Model #540 for the purpose of addressing guaranty fund coverage for policies that are included in insurance business transfers (IBTs) and corporate divisions (CDs).

Baldwin said the Restructuring Mechanisms (E) Working Group has been discussing IBTs and CDs. One of the issues that came out of the early discussions was the need to ensure that policies that had guaranty fund coverage before an IBT or CD retain their guaranty fund coverage after the transaction. The NCIGF recommended specific language for Model #540 intended to achieve this important priority. The language updates the definition of a covered claim to address this need for continuity of coverage.

Baldwin said the Receivership and Insolvency (E) Task Force heard discussions on the Request for NAIC Model Law Development, including discussion on whether the *Life and Health Insurance Guaranty Association Model Act* (#520) should also be amended. The Task Force determined that Model #520 does not need any revisions at this

time. The Receivership Law (E) Working Group has been assigned to complete the drafting of Model #540 amendments.

Barbara F. Cox (Barbara F. Cox LLC) said there are two revisions proposed. The first indicates that notwithstanding other provisions of the act, the guaranty fund would cover a claim that was originally a guaranty fund covered before the transaction if there is no remaining liability on the part of the transferor. Second, the proposed language states that if there was no guaranty fund coverage before the transaction, there would not be after the transaction. Cox said most state acts lack the language about assumed business that is in Model #540. The covered claims definition in most states says it is required to be issued by the insolvent insurer. In these transactions, the policy would not have been issued by the insolvent insurer and would rather be the transferee. The transferee receives the obligation in the form of an IBT or CD. Cox said the NCIGF believes the amendment is necessary. She said the NCIGF did not address assessments in the Model #540 amendments. She said the goal of the amendments is to protect policyholders and claimants that the guaranty fund system was designed to protect.

Wake said this is in some ways a general concern with novation. He said as Cox points out, Model #540 already has options for assumed claims transactions, but states have not adopted that language.

Hartz asked if in Section 5.H(1)(c) there was discussion of the word “direct” in the phrase “sole direct responsibility of another insurer.” He said adding the word “direct” heightens the distinction between reinsurance and assumption reinsurance. The direct responsibility was shifted from one insurer to another. Cox said the NCIGF would be receptive to such a technical edit and would support the review of this edit. Wake said he agrees.

Kinion said Delaware supports the continuation of guaranty fund coverage. He said there could be a conflict with CD statutes enacted in states’ laws. He said when the IBT or CD occurs, it is intended to provide finality. He reads the draft to mean the liability now reverts back to the transferor if the assuming insurer is placed into liquidation.

Cox said if the transferring entity transfers the business into a captive insurer, which clearly states that there is no guaranty fund benefit, there is no guaranty fund coverage on the transferred business. That might create hesitancy on the part of the reviewing authority to say it is okay to move that licensed business into a captive. Cox said that decision comes at the point of entering into the transaction and may require an amendment to the IBT or captive laws. This revision to Model #540 applies to the insolvency of the transferee company. The business moves from entity one to entity two, then entity two becomes insolvent. Cox said she does not interpret it to revert the liability back to entity one, the transferring entity.

Wake said he agrees with Cox. He said the language could be misread. He recommended getting comments on the draft to see if anyone proposes a way to state the intent better.

Kinion said some states allow transferees to be captive insurers. He said most states’ insurance statutes prohibit captives from guaranty fund coverage.

Baldwin said Kinion said he believes the issue raised should be addressed by the state insurance regulators that are approving the CDs, as opposed to the Working Group. He said he understands that it is already the practice of state insurance regulators to review these transactions, taking into consideration the preservation of guaranty fund coverage. He suggested sending a reminder to the Restructuring Mechanisms (E) Working Group to ensure that the preservation of guaranty fund coverage is on the radar of state insurance regulators reviewing these transactions. He requested that comment letters be submitted on the exposure draft regarding the issue and the best ways to address it in laws or other guidance.

Wake said a state's guaranty fund law can only impose obligations on its guaranty fund and not on the other foreign insurers that might have been involved in the transaction.

Baldwin said the issue is on the regulatory review of the transaction and not a receivership issue.

Kinion said he agrees, and IBT laws have a provision that the IBT cannot be materially adverse to policyholders and claimants, so that is the provision state insurance regulators should be watchful of, as well as the statutory mandate.

Baldwin said if amendments to Model #540 are adopted, then a referral should be sent to the Restructuring Mechanisms (E) Working Group to ensure that the continuation of guaranty fund coverage is addressed in any guidance it develops.

Baldwin recommended exposing the draft Model #540 amendments for a 30-day comment period ending Oct. 14. He asked for comments on the proposed amendments, the issues discussed today, and edits to any other section to align with these definitions. If there are substantive edits proposed in the comments, the Receivership Law (E) Working Group may consider a second exposure.

Wake said he will send comments on whether the definition of covered claim is the best place to address this issue and how to define a covered claim.

Wake made a motion, seconded by Joyce, to expose the amendments to Model #540 as proposed (Attachment Three-C) for a 30-day public comment period ending Oct. 14. The motion passed unanimously.

3. Discussed Exemptions for the FHLB

Kinion said many states have amended their laws to allow the Federal Home Loan Bank (FHLB) to prevent stay provisions in liquidation orders affecting the collateral when insurers borrow or take advances from the FHLB. He said half of the states have adopted such exemptions. He asked if any states have seen any issues with the exemption from the stay on the FHLB.

Victorian said the Florida Office of Insurance Regulation (OIR) opposed the last legislative attempt by the FHLB because it believes under Florida law that the FHLB would be treated as a secured creditor; therefore, the legislation was not necessary. She said the FHLB may renew its request in the next legislative session.

Jane Koenigsman (NAIC) said in 2013, the NAIC looked at this issue. She said consensus was not reached to either support or oppose the FHLB's proposed legislation. Rather, it was left to the states to decide what is best for the insurers in each state. A memorandum was produced that outlines considerations and recommendations for states if they are approached by the FHLB. The memorandum is available on the Receivership and Insolvency (E) Task Force web page.

Wayne Mehlman (American Council of Life Insurers—ACLI) said several states included some of the NAIC's recommendations in their legislation.

Having no further business, the Receivership Law (E) Working Group adjourned.

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