Ohio Revised Code

Section 3903.301 Protection of rights.

Effective: September 29, 2011
Legislation: House Bill 153 - 129th General Assembly

(A) Notwithstanding any other provision under sections 3903.01 to 3903.59 of the Revised Code, no person shall be stayed or prohibited from exercising any of the following rights:

(1) A contractual right to cause the termination, liquidation, acceleration, or close out of obligations under, or in connection with, a netting agreement or qualified financial contract with an insurer because of either of the following:

(a) The insolvency, financial condition, or default of the insurer at any time;

(b) The commencement of a formal delinquency proceeding under sections 3903.01 to 3903.59 of the Revised Code.

(2) Any right under a pledge, security, collateral, reimbursement, or guarantee agreement or arrangement or any similar security arrangement or credit enhancement relating to a netting agreement or qualified financial contract;

(3) Subject to section 3903.30 of the Revised Code, any right to set off or net out any termination value, payment amount, or other transfer obligation arising under or in connection with a qualified financial contract in which the counterparty or its guarantor is organized under the laws of the United States, a state, or a foreign jurisdiction that the securities valuation office of the national association of insurance commissioners approves as eligible for netting.

(B) If a counterparty to a netting agreement or qualified financial contract with an insurer that is subject to a proceeding under sections 3903.01 to 3903.59 of the Revised Code terminates, liquidates, accelerates, or closes out the agreement or contract, damages shall be measured as of the date or dates of the termination, liquidation, acceleration, or close out. The amount of a claim for damages shall be actual direct compensatory damages.

(C) Upon termination of a netting agreement or qualified financial contract, any net or settlement amount that a nondefaulting party owes to an insurer against which an application or petition has been filed under sections 3903.01 to 3903.59 of the Revised Code shall be transferred to, or on the order of, the receiver for the insurer.

This division applies regardless of whether the insurer is the defaulting party and applies notwithstanding any walkaway clause in the netting agreement or qualified financial contract.

For purposes of this division, a limited two-way payment or first method provision in a netting agreement or qualified financial contract with a defaulting insurer shall be deemed to be a full two-way payment or second method provision as against the defaulting insurer.

Any property or amount transferred under this division shall be a general asset of the insurer except to the extent it is subject to a secondary lien or encumbrance, or to rights of netting or setoff.

(D) In transferring a netting agreement or qualified financial contract of an insurer that is subject to a proceeding under sections 3903.01 to 3903.59 of the Revised Code, the receiver shall do either of the following:

(1) Transfer to one party, other than an insurer subject to a proceeding under sections 3903.01 to 3903.59 of the Revised Code, all netting agreements and qualified financial contracts between a counterparty, or any affiliate of the counterparty, and the insurer that is the subject of the proceeding. The transfer shall include all rights and obligations of each party under each netting agreement and qualified financial contract, and all property, including any guarantees or other credit enhancement, securing any claims of the parties under each agreement or contract.

(2) Transfer none of the netting agreements or qualified financial contracts, including the rights, obligations, and property associated with those agreements and contracts as described in division (D)(1) of this section, with respect to the counterparty and any affiliate of the counterparty.

(E) If a receiver transfers a netting agreement or qualified financial contract, the receiver shall use its best efforts to notify any person who is a party to the transferred agreement or contract of the transfer by noon, of the receiver's local time, on the business day following the transfer.

(F)(1) Notwithstanding any other provision of sections 3903.01 to 3903.59 of the Revised Code and except as otherwise provided in division (F)(2) of this section, a receiver shall not avoid a transfer of money or other property that is made before the commencement of a formal delinquency proceeding under sections 3903.01 to 3903.59 of the Revised Code and that arises under or in connection with either of the following:

(a) A netting agreement or qualified financial contract;

(b) Any pledge, security, collateral, or guarantee agreement or other similar security arrangement or credit support document relating to a netting agreement or qualified financial contract.

(2) A receiver may avoid a transfer under sections 3903.26 to 3903.28 of the Revised Code if the transfer was made with actual intent to hinder, delay, or defraud the insurer, a receiver appointed for the insurer, or existing or future creditors.

(G)(1) In exercising any right of disaffirmance or repudiation with respect to a netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall do either of the following:

(a) Disaffirm or repudiate all netting agreements and qualified financial contracts between the insurer and a counterparty or any affiliate of the counterparty;

(b) Disaffirm or repudiate none of those netting agreements or qualified financial contracts with respect to the counterparty or any affiliate of the counterparty.

(2) Notwithstanding any other provision of sections 3903.01 to 3903.59 of the Revised Code, if a counterparty's claim against the estate of the insurer arising from the receiver's disaffirmance or repudiation of a netting agreement or qualified financial contract has not been previously affirmed in the liquidation or immediately preceding conservation or rehabilitation case, that claim shall be considered as if it had arisen before the filing date of the petition for liquidation. If a conservation or rehabilitation proceeding is converted to a liquidation proceeding, that claim shall be considered as if it had arisen before the filing date of the petition for conservation or rehabilitation. The amount

of the claim shall be the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation.

(H) All rights of a counterparty under sections 3903.01 to 3903.59 of the Revised Code shall apply to netting agreements and qualified financial contracts entered into on behalf of the general account or separate accounts if the assets of each separate account are available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of that separate account.

(I) This section shall not apply to the affiliates of an insurer that is the subject of a formal delinquency proceeding under sections 3903.01 to 3903.59 of the Revised Code.

(J) As used in this section:

(1) "Actual direct compensatory damages" includes normal and reasonable costs of cover or other reasonable measures of damages utilized in the derivatives, securities, or other market for the contract and agreement claims. "Actual direct compensatory damages" does not include punitive or exemplary damages, damages for lost profit or lost opportunity, or damages for pain and suffering.

(2) "Business day" means any day, excluding Saturday, Sunday, and any day on which the New York stock exchange or the federal reserve bank of New York is closed.

(3) "Contractual right" includes any of the following:

(a) Any right set forth in a rule or bylaw of a derivatives clearing organization, as defined in the "Commodity Exchange Act," 7 U.S.C. 1a(9)(A), as amended; a multilateral clearing organization; a national securities exchange; a national securities association; a securities clearing agency; a contract market designated under the "Commodity Exchange Act," 7 U.S.C. 1 et seq., as amended; a derivatives transaction execution facility, including a swap execution facility, registered under the "Commodity Exchange Act," 7 U.S.C. 1 et seq., as amended; a security-based swap execution facility registered under the "Securities Exchange Act of 1934," 15 U.S.C. 78a et seq., as amended; or a board of trade, as defined in the "Commodity Exchange Act," 7 U.S.C. 1a(2);

(b) Any right set forth in a resolution of the governing board of any entity listed in division (J)(3)(a) of this section;

(c) Any right, regardless of whether evidenced in writing, arising under statutory law, common law, or law merchant, or by reason of normal business practice.

(4) "Receiver" means a receiver, conservator, rehabilitator, or liquidator, as applicable.

(5) "Walkaway clause" means a provision under which a party to a netting agreement or qualified financial contract that, after calculation of a value of a party's position or an amount due to or from one of the parties in accordance with its terms upon termination, liquidation, or acceleration of the netting agreement or qualified financial contract is not obligated to pay or does not have a payment obligation extinguished under the agreement or contract, in whole or in part, solely because the party is a nondefaulting party.