

Fifty-sixth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and ninety-nine

HOUSE BILL NO. 1161
(Industry, Business and Labor Committee)
(At the request of the Department of Banking and Financial Institutions)

AN ACT to create and enact a new chapter to title 6 of the North Dakota Century Code, relating to the voluntary and involuntary dissolution and liquidation of state trust companies.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new chapter to title 6 of the North Dakota Century Code is created and enacted as follows:

Action to close state trust company. The commissioner or board may close and liquidate a state trust company on finding that the interests of its clients and creditors are jeopardized by the state trust company's insolvency or imminent insolvency or that the best interests of clients and creditors would be served by requiring that the state trust company be closed and its assets liquidated. A majority of the state trust company's directors, managers, or managing participants may voluntarily close the state trust company and place it with the commissioner for liquidation.

Involuntary closing. After closing a state trust company, the commissioner shall place a sign at its main entrance stating that the state trust company has been closed. A correspondent bank of the closed state trust company may not pay an item drawn on the account of the closed state trust company which is presented for payment after the correspondent has received actual notice of closing unless it previously certified the item for payment. As soon as practicable after posting the sign at the state trust company's main entrance, the commissioner shall file a copy of the notice of the action to close a state trust company in district court in the county where the state trust company's home office is located. The court in which the notice is filed shall docket it as a case styled, "In re liquidation of _____", inserting the name of the state trust company. As soon as this notice is filed, the court has constructive custody of all the state trust company's assets, and any action initiated which seeks to directly or indirectly affect state trust company assets is considered to be an intervention in the receivership proceeding. Venue for an action instituted to effect, contest, or otherwise intervene in the liquidation of a state trust company is Burleigh County, North Dakota, except on a motion filed and served concurrently with or before the filing of the answer, the court, on a finding of good cause, may transfer the action to the county of the state trust company's home office.

Nature and duration of receivership. The court may not require a bond from the commissioner as receiver. Any reference in this chapter to the receiver is a reference to the commissioner as receiver and any successors in office or an independent receiver appointed at the request of the commissioner. The acts of the receiver are the acts of the state trust company in liquidation and this state and its political subdivisions are not liable and may not be held accountable for any debt or obligation of a state trust company in receivership. The receiver has all the powers of the directors, managers, managing participants, officers, and shareholders or participants of the state trust company as necessary to support an action taken on behalf of the state trust company. A state trust company receivership must be administered continuously for the length of time necessary to complete its purposes, and the period prescribed by other law limiting the time for the administration of receiverships or of corporate affairs generally does not apply.

Contest of liquidation. A state trust company, acting through a majority of its directors, managers, or managing participants, may intervene in the action filed by the commissioner to challenge the commissioner's closing of the state trust company and to enjoin the commissioner or other receiver from liquidating its assets. The intervenors must file the intervention not later than the second business day after the closing of the state trust company, excluding legal holidays. The court may issue an ex parte order restraining the receiver from liquidating state trust company assets pending a hearing on

the injunction. The receiver shall comply with the restraining order but may petition the court for permission to liquidate an asset as necessary to prevent its loss or diminution pending the outcome of the injunction. The court shall hear this action as quickly as possible and shall give it priority over other business. The state trust company or receiver may appeal the court's judgment as in other civil cases, except that the receiver shall retain all state trust company assets pending a final appellate court order even if the commissioner does not prevail in the district court. If the commissioner prevails in the district court, liquidation of the state trust company may proceed unless the district court or appellate court orders otherwise. If liquidation is enjoined or stayed pending appeal, the district court retains jurisdiction to permit liquidation of an asset as necessary to prevent its loss or diminution pending the outcome of the appeal.

Notice of state trust company closing. As soon as reasonably practicable after initiation of the receivership proceeding, the receiver shall publish notice, in a newspaper of general circulation in each community where the state trust company's home office and a branch are located. The notice must state that the state trust company has been closed for liquidation, that creditors and clients must present their claims for payment on or before a specific date, and that all safe deposit boxholders and bailors of property left with the state trust company should remove their property not later than a specified date. The receiver shall select the dates to allow the affairs of the state trust company to be wound up as quickly as feasible while allowing creditors, clients, and owners of property adequate time for presentation of claims, withdrawal of accounts, and redemption of property, but may not select a date before one hundred twenty days after the date of the notice. The receiver may adjust the dates with the approval of the court with or without republication if additional time appears needed for these activities. As soon as reasonably practicable given the state trust company records and the adequacy of staffing, the receiver shall mail to each of the state trust company's known clients, creditors, safe deposit boxholders, and bailors of property left for the state trust company, at the mailing address shown on the state trust company records, an individual notice containing the information required in this section. The receiver may determine the form and content notices under this section.

Inventory. As soon as reasonably practicable given the condition of the state trust company records and the adequacy of staffing, the receiver shall prepare a comprehensive inventory of the state trust company's assets for filing with the court. The inventory must be open to inspection.

Title and receiver. The receiver has title to all the state trust company's property, contracts, and rights of action, wherever located, beginning on the date the state trust company is closed for liquidation. The rights of the receiver have priority over all liens that arise after the date of the closing of the state trust company for liquidation.

Rights fixed. The rights and liabilities of state trust company liquidation and of a client, creditor, officer, director, manager, managing participant, employee, shareholder, participant, agent, or other person interested in the state trust company's estate are fixed on the date of closing of the state trust company for liquidation, except as otherwise directed by the court or as expressly provided by this chapter.

Depositories. The receiver may deposit funds collected on behalf of the state trust company estate in the Bank of North Dakota or one or more depository institutions in this state. If receivership funds deposited in an account at a depository institution exceed the maximum insured amount, the receiver shall require the excess deposit to be adequately secured through pledge of securities or otherwise, without approval of the court.

Pending lawsuits. A judgment or order of a court of this state or of any other jurisdiction in an action pending by or against the state trust company, rendered after the date the state trust company was closed for liquidation, is not binding on the receiver unless the receiver was made a party to the suit. Before the first anniversary of the date the state trust company was closed for liquidation, the receiver may not be required to plead to any suit pending against the state trust company in a court in this state on the date the state trust company was closed for liquidation and in which the receiver is a proper plaintiff or defendant.

New lawsuits. Except as otherwise provided in this section, the court in which the receivership proceeding is pending under this chapter has exclusive jurisdiction to hear and determine all actions or proceedings instituted by or against the state trust company or receiver after the receivership

proceeding starts. The receiver may file in any jurisdiction an ancillary suit that may be helpful to obtain jurisdiction or venue over a person or property. Exclusive venue of an action or proceeding instituted against the receiver or the receiver's designated agent, including an employee of the department, which asserts personal liability on the part of the receiver or designated agent lies in Burleigh County, North Dakota.

Records with third parties. Each state trust company affiliate, officer, director, manager, managing participant, employee, shareholder, participant, trustee, agent, employee, attorney, attorney-in-fact, or correspondent shall immediately upon request deliver to the receiver any property, book, record, account, document, or other writing of the state trust company which relates to the business of the state trust company, without cost to the receiver.

Injunction in aid of liquidation. On application by the receiver, the court may with or without notice issue an injunction restraining each state trust company, officer, director, manager, managing participant, employee, shareholder, participant, trustee, agent, employee, attorney, attorney-in-fact, accountant or accounting firm, correspondent, or another person from transacting the state trust company's business or wasting or disposing of its property or requiring the delivery of its property or assets to the receiver subject to the further order of the court. The court, at any time during a proceeding under this chapter, may issue another injunction or order considered necessary or desirable to prevent interference with the receiver of the proceeding, waste of the assets of the state trust company, the beginning of prosecution of an action, the obtaining of a preference, judgment, attachment, garnishment, or other lien, or the making of a levy against the state trust company or its assets.

Subpoena. In addition to the authority granted by law to the receiver relating to the taking of a deposition of a witness in a civil action, the receiver may request the court ex parte to issue a subpoena to compel the attendance and testimony of a witness before the receiver and the production of a book, account, record, paper, or correspondence, or other record relating to the receivership estate. For this purpose, the receiver or the receiver's designated representative may administer an oath or affirmation, examine a witness, or receive evidence. The court has statewide subpoena power and may compel attendance and production of a record before the receiver at the state trust company, the office of the receiver, or another location. In case of disobedience of a subpoena, or of the contumacy of a witness appearing before the receiver or the receiver's designated representative, the receiver may request and the court may issue an order requiring the person subpoenaed to obey the subpoena, give evidence, or produce any record relating to the matter in question.

Preferences. Any transfer of or lien on the property or assets of a state trust company is voidable by the receiver if the transfer or lien is made or created after four months before the date the state trust company is closed for liquidation or one year before the date the state trust company is closed for liquidation if the receiving creditor was at the time an affiliate, officer, director, manager, principal shareholder, or participant of the state trust company or an affiliate of the state trust company, or was made or created with the intent of giving to a creditor, enabling the creditor to obtain a greater percentage of the claimant's debt that is given or obtained by another claimant of the same class.

Administrative expenses. The receiver may employ agents, legal counsel, accountants, appraisers, consultants, and other personnel the receiver considers necessary to assist in the performance of the receiver's duties. The receiver may use personnel of the department if the receiver considers the use to be advantageous or desirable. The expense of employing these persons is an administrative expense of liquidation.

Disposal of property and settling claims. In the course of liquidating a state trust company, the receiver on order of the court entered with or without hearing may sell all or part of the real and personal property of the state trust company; borrow money and pledge all or part of the assets of the state trust company to secure the debt created, except that the receiver may not be held personally liable to repay borrowed funds; compromise or compound a doubtful or uncollectible debt or claim owed by or owing to the state trust company; and enter another agreement on behalf of the state trust company that the receiver considers necessary or proper to the management, conservation, or liquidation of its assets.

Filing reports and expenses. The receiver shall file quarterly reports with the court showing the operation, receipts, expenditures, and general condition of the state trust company in liquidation. The receiver shall also file a final report regarding the liquidated state trust company showing all receipts and expenditures and giving a full explanation and a statement of the disposition of all assets of the state trust company. The receiver shall pay all administrative expenses out of funds or assets of the state trust company. Each quarter the receiver shall submit an itemized report of those expenses.

Fiduciary activities. As soon after beginning the receivership proceeding as is practicable, the receiver shall terminate all fiduciary positions it holds, surrender all property held by it as a fiduciary, and settle the state trust company's fiduciary accounts. The receiver shall release all segregated and identifiable fiduciary property held by the state trust company to successor fiduciaries. With the approval of the court, the receiver may sell the administration of all or substantially all remaining fiduciary accounts to one or more successor fiduciaries on terms that appear to be in the best interests of the state trust company's estate and the persons interested in the fiduciary accounts. If commingled fiduciary funds held by the state trust company as trustee are insufficient to satisfy all fiduciary claims to the commingled funds, the receiver shall distribute commingled funds pro rata to all fiduciary claimants of commingled funds based on their proportionate interests after payment of administrative expenses related solely to the fiduciary claims. The fictional tracing rule does not apply. The receiver may require certain fiduciary claimants to file proofs of claim if the records of the state trust company are insufficient to identify their respective interests.

Disposition and maintenance of records. On approval by the court, the receiver may dispose of records of the state trust company in liquidation which are obsolete and unnecessary to continue administration of the receivership proceeding. Records of a liquidated state trust company are not public records for any purpose and are exempt from public disclosure. To maintain the records of a liquidated state trust company after the closing of the receivership proceeding, the receiver may reserve assets of an estate, deposit them in an account, and use them for maintenance, storage, and disposal of records in closed receivership estates.

Filing claims. A person who has a claim against the estate of a state trust company in liquidation must file proof of claim pursuant to rules adopted by the state banking board. The priority of disposition of assets from the estate of a state trust company must be in accordance with the order of each class as provided by this section. Every claim in each class must be paid in full, or adequate funds must be retained for that payment, before the members of the next class receive any payment. A subclass may not be established within a class, except for a preference or subordination within a class expressly created by contract or other instrument in the articles of association. Assets must be distributed in the following order of priority: administrative expenses; approved claims of secured trust deposits; approved claims of secured creditors; approved claims by beneficiaries insufficient to satisfy all fiduciary claims to commingled fiduciary funds or missing fiduciary property and approved claims of clients of the state trust company; other approved claims of general creditors not falling within a higher priority under this section; approved claims of a type described above that were not filed within the period prescribed; and claims of capital note or debenture holders or holders of similar obligations and proprietary claims of shareholders, participants, or other owners accorded the terms established by issue, class, or series. After completion of the liquidation, any unclaimed property remaining in the hands of the receiver must be considered abandoned property.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-sixth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1161.

House Vote: Yeas 92 Nays 0 Absent 6

Senate Vote: Yeas 47 Nays 0 Absent 2

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 1999.

Approved at _____ M. on _____, 1999.

Governor

Filed in this office this _____ day of _____, 1999,

at _____ o'clock _____ M.

Secretary of State