

HOUSE BILL NO. 1161

Introduced by

Industry, Business and Labor Committee

(At the request of the Department of Banking and Financial Institutions)

1 A BILL for an Act to create and enact a new chapter to title 6 of the North Dakota Century
2 Code, relating to the voluntary and involuntary dissolution and liquidation of state trust
3 companies.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

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

14 **Involuntary closing.** After closing a state trust company, the commissioner shall place
15 a sign at its main entrance stating that the state trust company has been closed. A
16 correspondent bank of the closed state trust company may not pay an item drawn on the
17 account of the closed state trust company which is presented for payment after the
18 correspondent has received actual notice of closing unless it previously certified the item for
19 payment. As soon as practicable after posting the sign at the state trust company's main
20 entrance, the commissioner shall file a copy of the notice of the action to close a state trust
21 company in district court in the county where the state trust company's home office is located.
22 The court in which the notice is filed shall docket it as a case styled, "In re liquidation of ____",
23 inserting the name of the state trust company. As soon as this notice is filed, the court has
24 constructive custody of all the state trust company's assets, and any action initiated which

1 seeks to directly or indirectly affect state trust company assets is considered to be an
2 intervention in the receivership proceeding. Venue for an action instituted to effect, contest, or
3 otherwise intervene in the liquidation of a state trust company is Burleigh County, North Dakota,
4 except on a motion filed and served concurrently with or before the filing of the answer, the
5 court, on a finding of good cause, may transfer the action to the county of the state trust
6 company's home office.

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

19 **Contest of liquidation.** A state trust company, acting through a majority of its
20 directors, managers, or managing participants, may intervene in the action filed by the
21 commissioner to challenge the commissioner's closing of the state trust company and to enjoin
22 the commissioner or other receiver from liquidating its assets. The intervenors must file the
23 intervention not later than the second business day after the closing of the state trust company,
24 excluding legal holidays. The court may issue an ex parte order restraining the receiver from
25 liquidating state trust company assets pending a hearing on the injunction. The receiver shall
26 comply with the restraining order but may petition the court for permission to liquidate an asset
27 as necessary to prevent its loss or diminution pending the outcome of the injunction. The court
28 shall hear this action as quickly as possible and shall give it priority over other business. The
29 state trust company or receiver may appeal the court's judgment as in other civil cases, except
30 that the receiver shall retain all state trust company assets pending a final appellate court order
31 even if the commissioner does not prevail in the district court. If the commissioner prevails in

1 the district court, liquidation of the state trust company may proceed unless the district court or
2 appellate court orders otherwise. If liquidation is enjoined or stayed pending appeal, the district
3 court retains jurisdiction to permit liquidation of an asset as necessary to prevent its loss or
4 diminution pending the outcome of the appeal.

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

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

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

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

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

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

18 **New lawsuits.** Except as otherwise provided in this section, the court in which the
19 receivership proceeding is pending under this chapter has exclusive jurisdiction to hear and
20 determine all actions or proceedings instituted by or against the state trust company or receiver
21 after the receivership proceeding starts. The receiver may file in any jurisdiction an ancillary
22 suit that may be helpful to obtain jurisdiction or venue over a person or property. Exclusive
23 venue of an action or proceeding instituted against the receiver or the receiver's designated
24 agent, including an employee of the department, which asserts personal liability on the part of
25 the receiver or designated agent lies in Burleigh County, North Dakota.

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

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

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

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

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

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

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

21 **Fiduciary activities.** As soon after beginning the receivership proceeding as is
22 practicable, the receiver shall terminate all fiduciary positions it holds, surrender all property
23 held by it as a fiduciary, and settle the state trust company's fiduciary accounts. The receiver
24 shall release all segregated and identifiable fiduciary property held by the state trust company
25 to successor fiduciaries. With the approval of the court, the receiver may sell the administration
26 of all or substantially all remaining fiduciary accounts to one or more successor fiduciaries on
27 terms that appear to be in the best interests of the state trust company's estate and the persons
28 interested in the fiduciary accounts. If commingled fiduciary funds held by the state trust
29 company as trustee are insufficient to satisfy all fiduciary claims to the commingled funds, the
30 receiver shall distribute commingled funds pro rata to all fiduciary claimants of commingled
31 funds based on their proportionate interests after payment of administrative expenses related

1 solely to the fiduciary claims. The fictional tracing rule does not apply. The receiver may
2 require certain fiduciary claimants to file proofs of claim if the records of the state trust company
3 are insufficient to identify their respective interests.

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

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