

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 758

FINAL READING

Introduced by Scheer, 19.

Read first time January 06, 2016

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to insurance; to amend section 21-104, Reissue
- 2 Revised Statutes of Nebraska, and section 44-8216, Revised Statutes
- 3 Cumulative Supplement, 2014; to prohibit limited liability companies
- 4 from operating as insurers; to change provisions relating to special
- 5 purpose financial captive insurers; and to repeal the original
- 6 sections.
- 7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 21-104, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 21-104 (ULLCA 104) (a) A limited liability company is an entity
4 distinct from its members.

5 (b) A limited liability company may have any lawful purpose, except
6 that a limited liability company may not operate as an insurer as defined
7 in section 44-103.

8 (c) A limited liability company has perpetual duration.

9 (d) A limited liability company shall be classified for state income
10 tax purposes in the same manner as it is classified for federal income
11 tax purposes.

12 Sec. 2. Section 44-8216, Revised Statutes Cumulative Supplement,
13 2014, is amended to read:

14 44-8216 (1) This section provides for the creation of special
15 purpose financial captive insurers to diversify and broaden insurers'
16 access to sources of capital.

17 (2) For purposes of this section:

18 (a) Counterparty means a special purpose financial captive insurer's
19 parent or affiliated entity, which is an insurer domiciled in Nebraska
20 that cedes life insurance risks to the special purpose financial captive
21 insurer pursuant to the special purpose financial captive insurer
22 contract;

23 (b) Guaranty of a parent means an agreement to pay specified
24 obligations of the special purpose financial captive insurer by a parent
25 of the special purpose financial captive insurer approved by the director
26 that is not a counterparty and the guarantor has sufficient equity, less
27 the equity of all counterparties that are subsidiaries of the guarantor,
28 to satisfy the agreement during the life of the guaranty;

29 (c) Insolvency or insolvent means that the special purpose financial
30 captive insurer is unable to pay its obligations when they are due,
31 unless those obligations are the subject of a bona fide dispute;

1 (d) Insurance securitization means a package of related risk
2 transfer instruments, capital market offerings, and facilitating
3 administrative agreements, under which a special purpose financial
4 captive insurer obtains proceeds either directly or indirectly through
5 the issuance of securities, and may hold the proceeds in trust to secure
6 the obligations of the special purpose financial captive insurer under
7 one or more special purpose financial captive insurer contracts, in that
8 the investment risk to the holders of the securities is contingent upon
9 the obligations of the special purpose financial captive insurer to the
10 counterparty under the special purpose financial captive insurer contract
11 in accordance with the transaction terms and pursuant to the Captive
12 Insurers Act;

13 (e) Organizational document means the special purpose financial
14 captive insurer's articles of incorporation, articles of organization,
15 bylaws, operating agreement, or other foundational documents that
16 establish the special purpose financial captive insurer as a legal entity
17 or prescribes its existence;

18 (f) Permitted investments means those investments that meet the
19 qualifications set forth in section 44-8211;

20 (g) Securities means debt obligations, equity investments, surplus
21 certificates, surplus notes, funding agreements, derivatives, and other
22 legal forms of financial instruments;

23 (h) Special purpose financial captive insurer means a captive
24 insurer which has received a certificate of authority from the director
25 for the limited purposes provided for in this section;

26 (i) Special purpose financial captive insurer contract means a
27 contract between the special purpose financial captive insurer and the
28 counterparty pursuant to which the special purpose financial captive
29 insurer agrees to provide insurance or reinsurance protection to the
30 counterparty for risks associated with the counterparty's insurance or
31 reinsurance business; and

1 (j) Special purpose financial captive insurer securities means the
2 securities issued by a special purpose financial captive insurer.

3 (3)(a) The provisions of the Captive Insurers Act, other than those
4 in subdivision (3)(b) of this section, apply to a special purpose
5 financial captive insurer. If a conflict occurs between a provision of
6 the act not in this section and a provision of this section, the latter
7 controls.

8 (b) The requirements of this section shall not apply to specific
9 special purpose financial captive insurers if the director finds a
10 specific requirement is inappropriate due to the nature of the risks to
11 be insured by the special purpose financial captive insurer and if the
12 special purpose financial captive insurer meets criteria established by
13 rules and regulations adopted and promulgated by the director.

14 (c) In determining whether to issue a certificate of authority or to
15 approve an amended plan of operation for a special purpose financial
16 captive insurer required under section 44-8205, the director may consider
17 any additional factors the director may deem relevant, including the
18 specific type of life insurance risks insured by the special purpose
19 financial captive insurer, the financial ability of a parent that issues
20 a guaranty pursuant to this section to satisfy such guaranty, and any
21 actuarial opinions or other statements or documents required by the
22 director to evaluate such application.

23 (d) At the time a special purpose financial captive insurer files an
24 application for a certificate of authority or submits an amended plan of
25 operation in accordance with section 44-8205, and on each date the
26 special purpose financial captive insurer is required to file an annual
27 financial statement in this state, a senior actuarial officer of each
28 ceding insurer shall file with the director a certification that the
29 ceding insurer's transactions with the special purpose financial captive
30 insurer are not being used to gain an unfair advantage in the pricing of
31 the ceding insurer's products. A ceding insurer shall not be deemed to

1 have gained an unfair advantage if the pricing of the policies and
2 contracts reinsured by the special purpose financial captive insurer
3 reflects, at the time those policies and contracts were issued, a
4 reasonable long-term estimate of the cost to the ceding insurer of an
5 alternative third-party transaction and utilizes current pricing
6 assumptions.

7 (4) A special purpose financial captive insurer may be established
8 as a stock corporation, ~~limited liability company, partnership,~~ or other
9 form of organization approved by the director.

10 (5)(a) A special purpose financial captive insurer may not issue a
11 contract for assumption of risk or indemnification of loss other than a
12 special purpose financial captive insurer contract. However, the special
13 purpose financial captive insurer may cede risks assumed through a
14 special purpose financial captive insurer contract to third-party
15 reinsurers through the purchase of reinsurance or retrocession protection
16 if approved by the director.

17 (b) A special purpose financial captive insurer may enter into
18 contracts and conduct other commercial activities related or incidental
19 to and necessary to fulfill the purposes of the special purpose financial
20 captive insurer contract, insurance securitization, and this section.
21 Those activities may include, but are not limited to: Entering into
22 special purpose financial captive insurer contracts; entering into
23 agreements in connection with obtaining guaranties of its parent; issuing
24 securities of the special purpose financial captive insurer in accordance
25 with applicable securities law; complying with the terms of these
26 contracts or securities; entering into trust, swap, tax, administration,
27 reimbursement, or fiscal agent transactions; or complying with trust
28 indenture, reinsurance, retrocession, and other agreements necessary or
29 incidental to effectuate a special purpose financial captive insurer
30 contract or an insurance securitization in compliance with this section
31 and in the plan of operation approved by the director.

1 (6)(a) A special purpose financial captive insurer may issue
2 securities, subject to and in accordance with applicable law, its
3 approved plan of operation, and its organization documents.

4 (b) A special purpose financial captive insurer, in connection with
5 the issuance of securities, may enter into and perform all of its
6 obligations under any required contracts to facilitate the issuance of
7 these securities.

8 (c) The obligation to repay principal or interest, or both, on the
9 securities issued by the special purpose financial captive insurer shall
10 be designed to reflect the risk associated with the obligations of the
11 special purpose financial captive insurer to the counterparty under the
12 special purpose financial captive insurer contract.

13 (7) A special purpose financial captive insurer may enter into swap
14 agreements, or other forms of asset management agreements, including
15 guaranteed investment contracts, or other transactions that have the
16 objective of leveling timing differences in funding of up-front or
17 ongoing transaction expenses or managing asset, credit, prepayment, or
18 interest rate risk of the investments in the trust to ensure that the
19 investments are sufficient to assure payment or repayment of the
20 securities, and related interest or principal payments, issued pursuant
21 to a special purpose financial captive insurer insurance securitization
22 transaction or the obligations of the special purpose financial captive
23 insurer under the special purpose financial captive insurer contract or
24 for any other purpose approved by the director. All asset management
25 agreements entered into by the special purpose financial captive insurer
26 must be approved by the director.

27 (8)(a) A special purpose financial captive insurer, at any given
28 time, may enter into and effectuate a special purpose financial captive
29 insurer contract with a counterparty if the special purpose financial
30 captive insurer contract obligates the special purpose financial captive
31 insurer to indemnify the counterparty for losses and contingent

1 obligations of the special purpose financial captive insurer under the
2 special purpose financial captive insurer contract are securitized
3 through a special purpose financial captive insurer insurance
4 securitization, which security for such obligations may be funded and
5 secured with assets held in trust for the benefit of the counterparty
6 pursuant to agreements contemplated by this section and invested in a
7 manner that meet the criteria as provided in section 44-8211.

8 (b) A special purpose financial captive insurer may enter into
9 agreements with affiliated companies and third parties and conduct
10 business necessary to fulfill its obligations and administrative duties
11 incidental to the insurance securitization and the special purpose
12 financial captive insurer contract. The agreements may include management
13 and administrative services agreements and other allocation and cost-
14 sharing agreements, or swap and asset management agreements, or both, or
15 agreements for other contemplated types of transactions provided in this
16 section.

17 (c) A special purpose financial captive insurer contract must
18 contain provisions that:

19 (i) Require the special purpose financial captive insurer to either
20 (A) enter into a trust agreement specifying what recoverables or
21 reserves, or both, the agreement is to cover and to establish a trust
22 account for the benefit of the counterparty and the security holders or
23 (B) establish such other method of security acceptable to the director,
24 including letters of credit or guaranties of a parent as described in
25 subsection (9) of this section;

26 (ii) Stipulate that assets deposited in the trust account must be
27 valued in accordance with their current fair market value and must
28 consist only of permitted investments;

29 (iii) If a trust arrangement is used, require the special purpose
30 financial captive insurer, before depositing assets with the trustee, to
31 execute assignments, to execute endorsements in blank, or to take such

1 actions as are necessary to transfer legal title to the trustee of all
2 shares, obligations, or other assets requiring assignments, in order that
3 the counterparty, or the trustee upon the direction of the counterparty,
4 may negotiate whenever necessary the assets without consent or signature
5 from the special purpose financial captive insurer or another entity; and
6 (iv) If a trust arrangement is used, stipulate that the special
7 purpose financial captive insurer and the counterparty agree that the
8 assets in the trust account, established pursuant to the provisions of
9 the special purpose financial captive insurer contract, may be withdrawn
10 by the counterparty, or the trustee on its behalf, at any time, only in
11 accordance with the terms of the special purpose financial captive
12 insurer contract, and must be utilized and applied by the counterparty or
13 any successor of the counterparty by operation of law, including, subject
14 to the provisions of this section, but without further limitation, any
15 liquidator, rehabilitator, or receiver of the counterparty, without
16 diminution because of insolvency on the part of the counterparty or the
17 special purpose financial captive insurer, only for the purposes set
18 forth in the credit for reinsurance laws and rules and regulations of
19 this state.

20 (d) The special purpose financial captive insurer contract may
21 contain provisions that give the special purpose financial captive
22 insurer the right to seek approval from the counterparty to withdraw from
23 the trust all or part of the assets, or income from them, contained in
24 the trust and to transfer the assets to the special purpose financial
25 captive insurer if such provisions comply with the credit for reinsurance
26 laws and rules and regulations of this state.

27 (9) A special purpose financial captive insurer contract meeting the
28 provisions of this section must be granted credit for reinsurance
29 treatment or otherwise qualify as an asset or a reduction from liability
30 for reinsurance ceded by a domestic insurer to a special purpose
31 financial captive insurer as an assuming insurer for the benefit of the

1 counterparty if and only to the extent:

2 (a)(i) Of the value of:

3 (A) The assets held in trust;

4 (B) Clean, or irrevocable, unconditional letters of credit, issued
5 or confirmed by a qualified United States financial institution as
6 defined in section 44-416.08, or as approved by the director; or

7 (C) Guaranties of the parent; and

8 (ii) For the benefit of the counterparty under the special purpose
9 financial captive insurer contract; and

10 (b) Assets of the special purpose financial captive insurer are held
11 or invested in one or more of the forms allowed in section 44-8211.

12 (10)(a)(i) Notwithstanding the provisions of the Nebraska Insurers
13 Supervision, Rehabilitation, and Liquidation Act, the director may apply
14 to the district court of Lancaster County for an order authorizing the
15 director to rehabilitate or liquidate a special purpose financial captive
16 insurer domiciled in this state on one or more of the following grounds:

17 (A) There has been embezzlement, wrongful sequestration,
18 dissipation, or diversion of the assets of the special purpose financial
19 captive insurer intended to be used to pay amounts owed to the
20 counterparty or the holders of special purpose financial captive insurer
21 securities; or

22 (B) The special purpose financial captive insurer is insolvent and
23 the holders of a majority in outstanding principal amount of each class
24 of special purpose financial captive insurer securities request or
25 consent to conservation, rehabilitation, or liquidation pursuant to the
26 provisions of this section.

27 (ii) The court may not grant relief provided by subdivision (10)(a)
28 (i) of this section unless, after notice and a hearing, the director
29 establishes that relief must be granted.

30 (b) Notwithstanding any other applicable law, rule, or regulation,
31 upon any order of rehabilitation or liquidation of a special purpose

1 financial captive insurer, the receiver shall manage the assets and
2 liabilities of the special purpose financial captive insurer pursuant to
3 the provisions of subsection (11) of this section.

4 (c) With respect to amounts recoverable under a special purpose
5 financial captive insurer contract, the amount recoverable by the
6 receiver must not be reduced or diminished as a result of the entry of an
7 order of conservation, rehabilitation, or liquidation with respect to the
8 counterparty, notwithstanding another provision in the contracts or other
9 documentation governing the special purpose financial captive insurer
10 insurance securitization.

11 (d) An application or petition, or a temporary restraining order or
12 injunction issued pursuant to the provisions of the Nebraska Insurers
13 Supervision, Rehabilitation, and Liquidation Act, with respect to a
14 counterparty does not prohibit the transaction of a business by a special
15 purpose financial captive insurer, including any payment by a special
16 purpose financial captive insurer made pursuant to a special purpose
17 financial captive insurer security, or any action or proceeding against a
18 special purpose financial captive insurer or its assets.

19 (e) Notwithstanding the provisions of any applicable law or rule or
20 regulation, the commencement of a summary proceeding or other interim
21 proceeding commenced before a formal delinquency proceeding with respect
22 to a special purpose financial captive insurer, and any order issued by
23 the court, does not prohibit the payment by a special purpose financial
24 captive insurer made pursuant to a special purpose financial captive
25 insurer security or special purpose financial captive insurer contract or
26 the special purpose financial captive insurer from taking any action
27 required to make the payment.

28 (f) Notwithstanding the provisions of any other applicable law,
29 rule, or regulation:

30 (i) A receiver of a counterparty may not void a nonfraudulent
31 transfer by a counterparty to a special purpose financial captive insurer

1 of money or other property made pursuant to a special purpose financial
2 captive insurer contract; and

3 (ii) A receiver of a special purpose financial captive insurer may
4 not void a nonfraudulent transfer by the special purpose financial
5 captive insurer of money or other property made to a counterparty
6 pursuant to a special purpose financial captive insurer contract or made
7 to or for the benefit of any holder of a special purpose financial
8 captive insurer security on account of the special purpose financial
9 captive insurer security.

10 (g) With the exception of the fulfillment of the obligations under a
11 special purpose financial captive insurer contract, and notwithstanding
12 the provisions of any other applicable law or rule or regulation, the
13 assets of a special purpose financial captive insurer, including assets
14 held in trust, must not be consolidated with or included in the estate of
15 a counterparty in any delinquency proceeding against the counterparty
16 pursuant to the provisions of this section for any purpose including,
17 without limitation, distribution to creditors of the counterparty.

18 (11) A special purpose financial captive insurer may not declare or
19 pay dividends in any form to its owners other than in accordance with the
20 insurance securitization transaction agreements, and in no instance shall
21 the dividends decrease the capital of the special purpose financial
22 captive insurer below two hundred fifty thousand dollars, and, after
23 giving effect to the dividends, the assets of the special purpose
24 financial captive insurer, including any assets held in trust pursuant to
25 the terms of the insurance securitization, must be sufficient to satisfy
26 the director that it can meet its obligations. Approval by the director
27 of an ongoing plan for the payment of dividends, interest on securities,
28 or other distribution by a special purpose financial captive insurer must
29 be conditioned upon the retention, at the time of each payment, of
30 capital or surplus equal to or in excess of amounts specified by, or
31 determined in accordance with formulas approved for the special purpose

1 financial captive insurer by, the director.

2 (12) Information submitted pursuant to the provisions of this
3 section shall be given confidential treatment, shall not be subject to
4 subpoena, and shall not be made public by the director or any other
5 person, except to other state, federal, foreign, and international
6 regulatory and law enforcement agencies if the recipient agrees in
7 writing to maintain the confidentiality of the information, without the
8 prior written consent of the special purpose financial captive insurer
9 unless the director, after giving the special purpose financial captive
10 insurer notice and opportunity to be heard, determines that the best
11 interest of policyholders, shareholders, or the public will be served by
12 the publication thereof, in which event he or she may publish all or any
13 part thereof in such manner as he or she may deem appropriate.

14 Sec. 3. Original section 21-104, Reissue Revised Statutes of
15 Nebraska, and section 44-8216, Revised Statutes Cumulative Supplement,
16 2014, are repealed.