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# Chapter 3

# Surety Law Issues

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## § 3.01. Introduction.

The wave of insurer insolvencies during the late 1990s and early 2000s has generated renewed interest in the nature of insurance company rehabilitation and liquidation among mineral law practitioners whose clients post irrevocable surety bonds and have coverage for workers' compensation. Since insurance companies underwrite and adjust surety claims, the financial health of these companies has become increasingly important for the mineral and energy industry.

The rehabilitation and liquidation of insurance companies are governed by state law, not federal law. Insurance companies are specifically excluded from the application of the federal Bankruptcy Code.[1] Further, the

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1 11 U.S.C. § 109. Insurance companies can not be debtors in bankruptcy under the Code.

McCarran Ferguson Act provides that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ."[2] In rehabilitation, the goal is to assist the insurance company in becoming a viable operating entity again. This process is one of evaluation and restructuring. On the other hand, if a determination is made by the appointed receiver that an insurance company is so impaired that liabilities make it impossible to rehabilitate, or that the company is insolvent and cannot be rehabilitated, a petition for liquidation may be made to the state court of competent jurisdiction. Upon the issuance of an order of liquidation, an injunction is issued, to obtain judgments, and to deal with preferences, garnishments, attachments or liens against the insurer, its assets or policyholders, and to prevent any other action which would impair the company's assets or prejudice the rights of policy holders. Eventually there is a distribution following a statutorily prescribed order.

## § 3.02. Overview.

The right of the states to regulate and control insurance companies includes the right to manage their restructuring, dissolution and liquidation. Each state has developed and enacted legislation encompassing the rehabilitation and/or liquidation of insolvent insurance companies conducting business within its borders.[3] If the business of an insurance company and its financial conditions are such that it cannot continue its operations with safety to the public, it may be dissolved at the insistence of the state. The difficulties encountered in the forced liquidation or rehabilitation of insurance companies with assets and liabilities distributed in two or more states has led to the adoption of the Uniform Insurers

2 15 U.S.C. § 1012.

3 Most states have adopted either the Uniform Insurers Liquidation Act (the "Uniform Act") from the National Conference of Commissioners on Uniform State Laws or the Insurers Rehabilitation and Liquidation Model Act (the "Model Act") promulgated by the National Association of Insurance Commissions (NAIC). The uniform law is similar to Article III of the NAIC model.