

§ 58-30-35. Executory contracts and unexpired leases.

(a) Except as provided in subsections (b), (c), and (d) of this section, the receiver, subject to the Court's approval, may assume or reject any executory contract or unexpired lease of the insurer.

- (b) (1) If there has been a default in an executory contract or unexpired lease of the insurer, the receiver may not assume such contract or lease unless, at the time of assumption of such contract or lease, the receiver:
- a. Cures, or provides adequate assurance that the receiver will promptly cure, such default;
 - b. Compensates, or provides adequate assurance that the receiver will promptly compensate, a party, other than the insurer to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
 - c. Provides adequate assurance of future performance under such contract or lease.
- (2) Subdivision (1) of this subsection does not apply to a default that is a breach of a provision relating to:
- a. The insolvency or financial condition of the insurer at any time before the closing of the case;
 - b. The commencement of a proceeding under this Article; or
 - c. The appointment of or taking possession by a receiver in a proceeding under this Article or a custodian before such commencement.
- (3) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the insurer, other than a default of a kind specified in subdivision (2) of this subsection, the receiver may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The receiver may not assume or assign an executory contract or unexpired lease of the insurer, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if:

- (1) a. Applicable law excuses a party, other than the insurer, to such contract or lease from accepting performance from or rendering performance to the receiver or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
- b. Such party does not consent to such assumption or assignment; or
- (2) Such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the insurer, or to issue a security of the insurer.
- (d) (1) In a proceeding under G.S. 58-30-105, if the receiver does not assume or reject an executory contract or unexpired lease of the insurer within 60 days after the order for liquidation, or within such additional time as the Court, for cause, within such 60-day period, fixes, then such contract or lease is deemed to be rejected.
- (2) In a proceeding under G.S. 58-30-80 the receiver may assume or reject an executory contract or unexpired lease of the insurer at any time before the

order for a plan of rehabilitation, but the Court, on request of any party to such contract or lease, may order the receiver to determine within a specified period of time whether to assume or reject such contract or lease.

- (e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the insurer may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the proceeding solely because of a provision in such contract or lease that is conditioned on:

- a. The insolvency or financial condition of the insurer at any time before the closing of the proceeding;
- b. The commencement of a proceeding under this Article; or
- c. The appointment of or taking possession by a receiver in a proceeding under this Article or a custodian before such commencement.

- (2) Subdivision (1) of this subsection does not apply to an executory contract or unexpired lease of the insurer, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if:

- a. Applicable law excused a party, other than the insurer, to such contract or lease from accepting performance from or rendering performance to the receiver or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties and such party does not consent to such assumption or assignment; or
- b. Such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the insurer, or to issue a security of the insurer.

- (f) (1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the insurer, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the receiver may assign such contract or lease under subdivision (2) of this subsection.

- (2) The receiver may assign an executory contract or unexpired lease of the insurer only if:

- a. The receiver assumes such contract or lease in accordance with the provisions of this section; and
- b. Adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

- (3) Notwithstanding a provision in an executory contract or unexpired lease of the insurer, or in applicable law that terminates or modifies, or permits a party other than the insurer to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the receiver.

- (g) Except as provided in subdivisions (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the insurer constitutes a breach of such contract or lease:

- (1) If such contract or lease has not been assumed under this section or under a plan of rehabilitation under G.S. 58-30-80, immediately before the date of the filing of the petition; or
- (2) If such contract or lease has been assumed under this section or under a plan of rehabilitation under G.S. 58-30-80:
 - a. If before such rejection the proceeding has not been converted to a proceeding under G.S. 58-30-105 at the time of such rejection; or
 - b. If before such rejection the case has been converted to a proceeding under G.S. 58-30-105: (i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or (ii) at the time of such rejection, if such contract or lease was assumed after such conversion.
- (h) (1) If the receiver rejects an unexpired lease of real property of the insurer under which the insurer is the lessor, the lessee under such lease may treat the lease as terminated by such rejection, or, in the alternative, may remain in possession for the balance of the term of such lease and any renewal or extension of such term that is enforceable by such lessee under applicable provision of law outside of this Article.
- (2) If such lessee remains in possession, such lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease, and any such renewal or extension, any damages occurring after such date caused by the nonperformance of any obligation of the insurer after such date, but such lessee does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.
- (i) (1) If the receiver rejects an executory contract of the insurer for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property.
- (2) If such purchaser remains in possession:
 - a. Such purchaser shall continue to make all payments due under such contract but may offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the insurer after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
 - b. The receiver shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.
- (j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the insurer is rejected and under which such party is not in possession, has a lien on the interest of the insurer in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.
- (k) Assignment by the receiver to a person of a contract or lease assumed under this section relieves the receiver and the estate from any liability for any breach of such contract or lease occurring after such assignment. (1989, c. 452, s. 1.)