

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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SENATE BILL 501
Insurance Committee Substitute Adopted 4/11/89

Short Title: Guaranty Fund Changes.

(Public)

Sponsors:

Referred to:

March 20, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE POSTASSESSMENT INSURANCE GUARANTY
3 ASSOCIATION ACT.

4 The General Assembly of North Carolina enacts:
5 Section 1. G.S. 58-155.43 reads as rewritten:

6 "§ 58-155.43. Scope.

7 This Article shall apply to all kinds of direct insurance, ~~except life, annuities, title,~~
8 ~~surety, accident and health, credit, mortgage guaranty, ocean marine, and workmen's~~
9 ~~compensation and employer's liability insurance~~ but shall not be applicable to:

- 10 (1) Life, annuity, accident and health or disability insurance;
- 11 (2) Mortgage guaranty, financial guaranty or other forms of insurance
12 offering protection against investment risks;
- 13 (3) Fidelity or surety bonds, or any other bonding obligations;
- 14 (4) Credit insurance, vendors' single interest insurance, collateral
15 protection insurance, or any similar insurance protecting the interests
16 of a creditor arising out of a creditor-debtor transaction;
- 17 (5) Insurance of warranties or service contracts;
- 18 (6) Title insurance;
- 19 (7) Ocean marine insurance;
- 20 (8) Workers' compensation and employers' liability insurance;
- 21 (9) Any transaction or combination of transactions between a person
22 (including affiliates of such person) and an insurer (including affiliates

1 of such insurer) which involves the transfer of investment or credit risk
2 unaccompanied by transfer of insurance risk;

- 3 (10) Insurance written on a retroactive basis to cover known or unknown
4 losses which have resulted from an event with respect to which a claim
5 has already been made, and the claim is known to the insurer at the
6 time the insurance is bound."

7 Sec. 2. G.S. 58-155.45 reads as rewritten:

8 **"§ 58-155.45. Definitions.**

9 As used in this Article:

- 10 (1) 'Account' means any one of the two accounts created by G.S. 58-
11 155.46.
- 12 (1a) 'Affiliate' means a person who directly, or indirectly, through one or
13 more intermediaries, controls, is controlled by, or is under common
14 control with an insolvent insurer on December 31 of the year next
15 preceding the date the insurer becomes an insolvent insurer.
- 16 (2) 'Association' means the North Carolina Insurance Guaranty
17 Association created under G.S. 58-155.46.
- 18 (2a) 'Claimant' means any insured making a first party claim or any person
19 instituting a liability claim; provided that no person who is an affiliate
20 of the insolvent insurer may be a claimant.
- 21 (3) 'Commissioner' means the Commissioner of Insurance of North
22 Carolina.
- 23 (3a) 'Control' means the possession, direct or indirect, of the power to
24 direct or cause the direction of the management and policies of a
25 person, whether through the ownership of voting securities, by contract
26 other than a commercial contract for goods or nonmanagement
27 services, or otherwise, unless the power is the result of an official
28 position with or corporate office held by the person. Control shall be
29 presumed to exist if any person, directly or indirectly owns, controls,
30 holds with the power to vote, or holds proxies representing ten percent
31 (10%) or more of the voting securities of any other person. This
32 presumption may be rebutted by a showing that control does not exist
33 in fact.
- 34 (4) 'Covered claim' means an unpaid claim, including one of unearned
35 premiums, which is in excess of fifty dollars (\$50.00) and arises out of
36 and is within the coverage and not in excess of the applicable limits of
37 an insurance policy to which this Article applies as issued by an
38 insurer, if such insurer becomes an insolvent insurer after the effective
39 date of this Article and (i) the claimant or insured is a resident of this
40 State at the time of the insured event, provided that for entities other
41 than an individual, the residence of a claimant or insured is the state in
42 which its principal place of business is located at the time of the
43 insured event; or (ii) the property from which the claim arises is
44 permanently located in this State. 'Covered claim' shall not include

1 any amount awarded as punitive or exemplary damages; sought as a
 2 return of premium under any retrospective rating plan; or due any
 3 reinsurer, insurer, insurance pool, or underwriting association, as
 4 subrogation or contribution recoveries or otherwise.

5 (5) 'Insolvent insurer' means (i) an insurer licensed and authorized to
 6 transact insurance in this State either at the time the policy was issued
 7 or when the insured event occurred and (ii) ~~determined to be insolvent~~
 8 against whom an order of liquidation with a finding of insolvency has
 9 been entered after the effective date of this Article by a court of
 10 competent jurisdiction in the insurer's state of domicile or of this State
 11 under the provisions of G.S. 58-155.11, and which order of liquidation
 12 has not been stayed or been the subject of a writ of supersedeas or
 13 other comparable order.

14 (6) 'Member insurer' means any person who (i) writes any kind of
 15 insurance to which this Article applies under G.S. 58-155.43, including
 16 the exchange of reciprocal or interinsurance contracts, and (ii) is
 17 licensed and authorized to transact insurance in this State.

18 (7) 'Net direct written premiums' means direct gross premiums written in
 19 this State on insurance policies to which this Article applies, less
 20 return premiums thereon and dividends paid or credited to
 21 policyholders on such direct business. 'Net direct written premiums'
 22 does not include premiums on contracts between insurers or reinsurers.

23 (8) 'Person' means any individual, corporation, partnership, association or
 24 voluntary organization.

25 (9) 'Policyholder' means the person to whom an insurance policy to which
 26 this Article applies was issued by an insurer which has become an
 27 insolvent insurer."

28 Sec. 3. G.S. 58-155.48 reads as rewritten:

29 **"§ 58-155.48. Powers and duties of the Association.**

30 (a) The Association shall:

31 (1) Be obligated to the extent of the covered claims existing prior to the
 32 determination of insolvency and arising within 30 days after the
 33 determination of insolvency, or before the policy expiration date if less
 34 than 30 days after the determination, or before the insured replaces the
 35 policy or causes its cancellation, if he does so within 30 days of the
 36 determination, ~~but such obligation shall include only that amount of each~~
 37 ~~covered claim which.~~ This obligation includes only the amount of each
 38 covered claim that is in excess of fifty dollars (\$50.00) and is less than
 39 three hundred thousand dollars (\$300,000). However, the Association
 40 has no obligation to pay a claimant's covered claim, if:

41 a. The insured had primary coverage at the time of the loss with a
 42 solvent insurer equal to or in excess of three hundred thousand
 43 dollars (\$300,000) and applicable to the claimant's loss; or

1 b. The insured's coverage is written subject to a self-insured
2 retention equal to or in excess of three hundred thousand dollars
3 (\$300,000).

4 If the primary coverage or the self-insured retention is less than three
5 hundred thousand dollars (\$300,000), the Association's obligation to
6 the claimant is reduced by the coverage and the retention.

7 In no event shall the Association be obligated to a policyholder or
8 claimant in an amount in excess of the obligation of the insolvent
9 insurer under the policy from which the claim arises. Notwithstanding
10 any other provision of this Article, a covered claim shall not include
11 any claim filed with the Association after the final date set by the court
12 for the filing of claims against the liquidator or receiver of an insolvent
13 insurer.

14 (2) Be deemed the insurer to the extent of the Association's obligation on
15 the covered claims and to such extent shall have all rights, duties, and
16 obligations of the insolvent insurer as if the insurer had not become
17 insolvent. However, the Association has the right but not the
18 obligation to defend an insured who is not a resident of this State at the
19 time of the insured event unless the property from which the claim
20 arises is permanently located in this State in which instance the
21 Association does have the obligation to defend the matter in
22 accordance with policy."

23 (3) Allocate claims paid and expenses incurred among the two accounts
24 separately, and assess member insurers separately for each account
25 amounts necessary to pay the obligation of the Association under
26 subsection (a) above subsequent to an insolvency, the expenses of
27 handling covered claims subsequent to an insolvency, the cost of
28 examinations under G.S. 58-155.53 and other expenses authorized by
29 this Article. The assessments of each member insurer shall be in the
30 proportion that the net direct written premiums of the member insurer
31 for the preceding calendar year on the kinds of insurance in the
32 account bears to the net direct written premiums of all member
33 insurers for the preceding calendar year on the kinds of insurance in
34 the account; provided, for purposes of assessment only, premiums
35 otherwise reportable by a servicing insurer under any plan of operation
36 approved by the Commissioner of Insurance under Articles 18A or
37 18B of this Chapter shall not be deemed to be the net direct written
38 premiums of such servicing insurer or association, but shall be deemed
39 to be the net direct written premiums of the individual insurers to the
40 extent provided for in any such plan of operation. Each member
41 insurer shall be notified of the assessment not later than 30 days before
42 it is due. No member insurer may be assessed in any year on any
43 account an amount greater than two percent (2%) of that member
44 insurer's net direct written premiums for the preceding calendar year

1 on the kinds of insurance in the account. If the maximum assessment,
2 together with the other assets of the Association in any account, does
3 not provide in any one year in any account an amount sufficient to
4 make all necessary payments from that account, the funds available
5 shall be prorated and the unpaid portion shall be paid as soon
6 thereafter as funds become available. The Association may exempt or
7 defer, in whole or in part, the assessment of any member insurer, if the
8 assessment would cause the member insurer's financial statement to
9 reflect amounts of capital or surplus less than the minimum amounts
10 required for a certificate of authority by any jurisdiction in which the
11 member insurer is authorized to transact insurance. Each member
12 insurer may set off against any assessment, authorized payments made
13 on covered claims and expenses incurred in the payment of such
14 claims by the member insurer if they are chargeable to the account for
15 which the assessment is made.

- 16 (4) Investigate claims brought against the Association and adjust,
17 compromise, settle, and pay covered claims to the extent of the
18 Association's obligation and deny all other claims and may review
19 settlements, releases and judgments to which the insolvent insurer or
20 its insureds were parties to determine the extent to which such
21 settlements, releases and judgments may be properly contested.
- 22 (5) Notify such persons as the Commissioner directs under G.S. 58-
23 155.50(b)(1).
- 24 (6) Handle claims through its employees or through one or more insurers
25 or other persons designated as servicing facilities. Designation of a
26 servicing facility is subject to the approval of the Commissioner, but
27 such designation may be declined by a member insurer.
- 28 (7) Reimburse each servicing facility for obligations of the Association
29 paid by the facility and for expenses incurred by the facility while
30 handling claims on behalf of the Association and shall pay the other
31 expenses of the Association authorized by this Article.

32 (b) The Association may:

- 33 (1) Employ or retain such persons as are necessary to handle claims and
34 perform other duties of the Association.
- 35 (2) Borrow funds necessary to effect the purposes of this Article in accord
36 with the plan of operation.
- 37 (3) Sue or be sued.
- 38 (4) Negotiate and become a party to such contracts as are necessary to
39 carry out the purpose of this Article.
- 40 (5) Perform such other acts as are necessary or proper to effectuate the
41 purpose of this Article.
- 42 (6) Refund to the member insurers in proportion to the contribution of
43 each member insurer to that account that amount by which the assets
44 of the account exceed the liabilities if, at the end of any calendar year,

1 the board of directors finds that the assets of the Association in any
2 account exceed the liabilities of that account as estimated by the board
3 of directors for the coming year."

4 Sec. 4. G.S. 58-155.51(a) is rewritten to read:

5 "(a) Any person recovering under this Article shall be deemed to have assigned
6 his rights under the policy or at law to the Association to the extent of his recovery from
7 the Association. Every insured or claimant seeking the protection of this Article shall
8 cooperate with the Association to the same extent as such person would have been
9 required to cooperate with the insolvent insurer. The Association shall have no cause of
10 action against the insured of the insolvent insurer for any sums it has paid out except
11 such causes of action as the insolvent insurer would have had if such sums had been
12 paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan
13 with assessment liability, payments of claims of the Association shall not operate to
14 reduce the liability of insureds to the receiver, liquidator, or statutory successor for
15 unpaid assessments."

16 Sec. 5. G.S. 58-155.51 is amended by adding a new subsection to read:

17 "(a1) The Association shall have the right to recover from the following persons the
18 amount of any 'covered claim' paid on behalf of such person pursuant to this Article:

- 19 (1) Any insured whose net worth on December 31 of the year next
20 preceding the date the insurer becomes insolvent exceeds fifty million
21 dollars (\$50,000,000) and whose liability obligations to other persons
22 are satisfied in whole or in part by payments under this Article; or
23 (2) Any person who is an affiliate of the insolvent insurer and whose
24 liability obligations to other persons are satisfied in whole or in part by
25 payments made under this Article."

26 Sec. 6. G.S. 58-155.52 reads as rewritten:

27 "**§ 58-155.52. Nonduplication of recovery.**

28 (a) Any person having a claim against an insurer under any provision in an
29 insurance policy other than a policy of an insolvent insurer which is also a covered
30 claim, shall be required to exhaust first his rights under such policy. Any amount
31 payable on a covered claim under this Article shall be reduced by the amount of any
32 recovery under such insurance policy.

33 (a1) Any person having a claim or legal right of recovery under any governmental
34 insurance or guaranty program which is also a covered claim shall be required to
35 exhaust first his right under such program. Any amount payable on a covered claim
36 under this Article shall be reduced by the amount of any recovery under such program.

37 (b) Any person having a claim which may be recovered under more than one
38 insurance guaranty association or its equivalent shall seek recovery first from the
39 association of the place of residence of the policyholder except that if it is a first party
40 claim for damage to property with a permanent location, he shall seek recovery first
41 from the association of the location of the property. Any recovery under this Article
42 shall be reduced by the amount of recovery from any other insurance guaranty
43 association or its equivalent.

1 (c) No claim held by an insurer, reinsurer, insurance pool, or underwriting
2 association, based on an assignment or on rights of subrogation or contribution, may be
3 asserted in any legal action against a person insured under a policy issued by an
4 insolvent insurer except to the extent the amount of such claim exceeds the obligation of
5 the Association under G.S. 58-155.48(a)(1).

6 (d) Any person that has liquidated by settlement or judgment a claim against an
7 insured under a policy issued by an insolvent insurer, which claim is a covered claim
8 and is also a claim within the coverage of any policy issued by a solvent insurer, shall
9 be required to exhaust first his rights under such policy issued by the solvent insurer
10 before execution, levy, or any other proceedings are commenced to enforce any
11 judgment obtained against or the settlement with the insured of the insolvent insurer.
12 Any amount so recovered from a solvent insurer shall be credited against the amount of
13 the judgment or settlement."

14 Sec. 7. G.S. 58-155.53 reads as rewritten:

15 "**§ 58-155.53. Prevention of insolvencies.**

16 (a) ~~To aid in the detection and prevention of insurer insolvencies, it shall be the~~
17 ~~duty of the board of directors, upon majority vote, to notify the Commissioner of any~~
18 ~~information indicating any member insurer may be insolvent or in a financial condition~~
19 ~~hazardous to the policyholders or the public.~~

20 (b) To aid in the detection and prevention of insurer insolvencies, ~~the~~ board of
21 directors may, upon majority vote, request that the Commissioner order an examination
22 of any member insurer which the board in good faith believes may be in a financial
23 condition hazardous to the policyholders or the public. Within 30 days of the receipt of
24 such request, the Commissioner shall begin such examination. The examination may be
25 conducted as a National Association of Insurance Commissioners examination or may
26 be conducted by such persons as the Commissioner designates. The cost of such
27 examination shall be paid by the Association and the examination report shall be treated
28 as are other examination reports. In no event shall such examination report be released
29 to the board of directors prior to its release to the public, but this shall not preclude the
30 Commissioner from complying with subsection (c) below. The Commissioner shall
31 notify the board of directors when the examination is completed. The request for an
32 examination shall be kept on file by the Commissioner but it shall not be open to public
33 inspection prior to the release of the examination report to the public.

34 (c) It shall be the duty of the Commissioner to report to the board of directors
35 when he has reasonable cause to believe that any member insurer examined or being
36 examined at the request of the board of directors may be insolvent or in a financial
37 condition hazardous to the policyholders or the public.

38 (d) The board of directors may, upon majority vote, make reports and
39 recommendations to the Commissioner upon any matter germane to the solvency,
40 liquidation, rehabilitation or conservation of any member insurer. Such reports and
41 recommendations shall not be considered public documents.

42 (e) The board of directors may, upon majority vote, make recommendations to
43 the Commissioner for the detection and prevention of insurer insolvencies.

1 (f) The board of directors ~~shall~~may, at the conclusion of any domestic insurer
2 insolvency in which the Association was obligated to pay covered claims, prepare a
3 report on the history and causes of such insolvency, based on the information available
4 to the Association, and submit such report to the Commissioner."

5 Sec. 8. G.S. 58-155.58 reads as rewritten:

6 **"§ 58-155.58. Stay of proceedings; reopening of default judgments.**

7 All proceedings in which the insolvent insurer is a party or is obligated to defend a
8 party in any court in this State shall be stayed automatically for 60-120 days and such
9 additional time thereafter as may be determined by the court from the date the
10 insolvency is determined or any ancillary proceedings are initiated in this State,
11 whichever is later, to permit proper defense by the Association of all pending causes of
12 action. Any party to any proceeding which is stayed pursuant to this section shall have
13 the right, upon application and notice, to seek a vacation or modification of such stay. as
14 ~~to a~~ Any covered claims arising from any judgment under any decision, verdict or
15 finding based on the default of the insolvent insurer or its failure to defend an insured,
16 ~~the Association either on its own behalf or on behalf of such insured may apply to have such~~
17 ~~judgment, order, decision, verdict or finding shall, upon application and notice by the~~
18 Association be vacated and set aside by the same court in which such judgment, order,
19 decision, verdict, or finding is entered and set aside by the same court or administrator that
20 ~~made such judgment, order, decision, verdict or finding and the Association either on its~~
21 own behalf or on behalf of any insured or an insolvent insurer, shall be permitted to
22 defend against such claim on the merits. Any party who has obtained any such
23 judgment or order shall have the right, upon application and notice, to have the
24 judgment or order restored if within 90 days following the entry of the judgment or
25 order the Association has not notified such party and the court that it intends to defend
26 the matter on the merits."

27 Sec. 9. G.S. 58-155.60 reads as rewritten:

28 **"§ 58-155.60. Use of deposits made by insolvent insurer.**

29 Notwithstanding any other provision of this Chapter pertaining to the use of deposits
30 made by insurance companies for the protection of policyholders, the Commissioner
31 shall deliver to the Association, and the Association is hereby authorized to expend, any
32 deposit or deposits previously or hereinafter made, whether or not required by statute,
33 by an insolvent insurer to the extent those deposits are needed by the Association first to
34 pay the covered claims as required by this Article and then to the extent those deposits
35 are needed to pay all expenses of the Association relating to the insurer: Provided that
36 before delivering any deposit to the Association the Commissioner may retain an
37 amount of the deposit up to five thousand dollars (\$5,000) to defray administrative costs
38 to be incurred by the Commissioner in carrying out his powers and duties with respect
39 to the insolvent insurer, notwithstanding G.S. 58-185. As used in this section, the term
40 'administrative costs' does not include any salary or expenses paid to or on behalf of any
41 State employee or to any person appointed or employed pursuant to G.S. 58-155.11(f)
42 or 58-155.36.

43 However, in the case of a deposit made by an insolvent domestic insurer, ~~only~~the
44 portions of the deposit made for the protection of policyholders having covered claims

1 shall be delivered by the Commissioner to the Association. As for the general deposit,
2 ~~S~~said portions shall be in the proportions that the insolvent domestic insurer's domestic
3 net direct written premiums for the preceding calendar year on the kinds of insurance in
4 the account bears to its total net direct written premiums for the preceding calendar year
5 on the kinds of insurance in the account.

6 The Association shall account to the Commissioner and the insolvent insurer for all
7 deposits received from the Commissioner hereunder, and shall repay to the
8 Commissioner a portion of the deposits received which shall be equal to the total
9 amount of the claims against the insolvent insurer that are not covered claims under this
10 Article solely by reason that the amount of the claim is fifty dollars (\$50.00) or less.
11 Said repayment shall in no way prejudice the rights of the Association with regard to the
12 portion of the deposit repaid to the Commissioner. After all of the deposits of the
13 insolvent insurer have been expended by the Association for the purposes set out in this
14 section, the member insurers shall be assessed as provided by this Article to pay any
15 remaining liabilities of the Association arising under this Article."

16 Sec. 10. This act is effective upon ratification.