

GENERAL ASSEMBLY OF NORTH CAROLINA
1989 SESSION

CHAPTER 206
SENATE BILL 501

AN ACT TO AMEND THE POSTASSESSMENT INSURANCE GUARANTY
ASSOCIATION ACT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 58-155.43 reads as rewritten:

"§ 58-155.43. Scope.

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

- (1) Life, annuity, accident and health or disability insurance;
- (2) Mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risks;
- (3) Fidelity or surety bonds, or any other bonding obligations;
- (4) Credit insurance, vendors' single interest insurance, collateral protection insurance, or any similar insurance protecting the interests of a creditor arising out of a creditor-debtor transaction;
- (5) Insurance of warranties or service contracts;
- (6) Title insurance;
- (7) Ocean marine insurance;
- (8) Workers' compensation and employers' liability insurance;
- (9) Any transaction or combination of transactions between a person (including affiliates of such person) and an insurer (including affiliates of such insurer) which involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk;
- (10) Insurance written on a retroactive basis to cover known or unknown losses which have resulted from an event with respect to which a claim has already been made, and the claim is known to the insurer at the time the insurance is bound."

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

"§ 58-155.45. Definitions.

As used in this Article:

- (1) 'Account' means any one of the two accounts created by G.S. 58-155.46.
- (1a) 'Affiliate' means a person who directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common

- control with an insolvent insurer on December 31 of the year next preceding the date the insurer becomes an insolvent insurer.
- (2) 'Association' means the North Carolina Insurance Guaranty Association created under G.S. 58-155.46.
- (2a) 'Claimant' means any insured making a first party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.
- (3) 'Commissioner' means the Commissioner of Insurance of North Carolina.
- (3a) 'Control' means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly owns, controls, holds with the power to vote, or holds proxies representing ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.
- (4) 'Covered claim' means an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars (\$50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event, provided that for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. 'Covered claim' shall not include any amount awarded as punitive or exemplary damages; sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation or contribution recoveries or otherwise.
- (5) 'Insolvent insurer' means (i) an insurer licensed and authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) ~~determined to be insolvent~~ against whom an order of liquidation with a finding of insolvency has been entered after the effective date of this Article by a court of competent jurisdiction in the insurer's state of domicile or of this State under the provisions of G.S. 58-155.11, and which order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

- (6) 'Member insurer' means any person who (i) writes any kind of insurance to which this Article applies under G.S. 58-155.43, including the exchange of reciprocal or interinsurance contracts, and (ii) is licensed and authorized to transact insurance in this State.
- (7) 'Net direct written premiums' means direct gross premiums written in this State on insurance policies to which this Article applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. 'Net direct written premiums' does not include premiums on contracts between insurers or reinsurers.
- (8) 'Person' means any individual, corporation, partnership, association or voluntary organization.
- (9) 'Policyholder' means the person to whom an insurance policy to which this Article applies was issued by an insurer which has become an insolvent insurer."

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

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

(a) The Association shall:

- (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, ~~but such obligation shall include only that amount of each covered claim which.~~ This obligation includes only the amount of each covered claim that is in excess of fifty dollars (\$50.00) and is less than three hundred thousand dollars (\$300,000). However, the Association has no obligation to pay a claimant's covered claim, if:
 - a. The insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars (\$300,000) and applicable to the claimant's loss; or
 - b. The insured's coverage is written subject to a self-insured retention equal to or in excess of three hundred thousand dollars (\$300,000).

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

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

- (2) Be deemed the insurer to the extent of the Association's obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. However, the Association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does have the obligation to defend the matter in accordance with policy."
- (3) Allocate claims paid and expenses incurred among the two accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligation of the Association under subsection (a) above subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under G.S. 58-155.53 and other expenses authorized by this Article. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account; provided, for purposes of assessment only, premiums otherwise reportable by a servicing insurer under any plan of operation approved by the Commissioner of Insurance under Articles 18A or 18B of this Chapter shall not be deemed to be the net direct written premiums of such servicing insurer or association, but shall be deemed to be the net direct written premiums of the individual insurers to the extent provided for in any such plan of operation. Each member insurer shall be notified of the assessment not later than 30 days before it is due. No member insurer may be assessed in any year on any account an amount greater than two percent (2%) of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such

claims by the member insurer if they are chargeable to the account for which the assessment is made.

- (4) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which such settlements, releases and judgments may be properly contested.
 - (5) Notify such persons as the Commissioner directs under G.S. 58-155.50(b)(1).
 - (6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.
 - (7) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association and shall pay the other expenses of the Association authorized by this Article.
- (b) The Association may:
- (1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association.
 - (2) Borrow funds necessary to effect the purposes of this Article in accord with the plan of operation.
 - (3) Sue or be sued.
 - (4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this Article.
 - (5) Perform such other acts as are necessary or proper to effectuate the purpose of this Article.
 - (6) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities if, at the end of any calendar year, the board of directors finds that the assets of the Association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year."

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

"(a) Any person recovering under this Article shall be deemed to have assigned his rights under the policy or at law to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Article shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association shall not operate to

reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments."

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

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

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

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

"§ 58-155.52. Nonduplication of recovery.

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

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

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

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

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

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

"§ 58-155.53. Prevention of insolvencies.

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

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

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

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

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

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

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

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

All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this State shall be stayed automatically for 60-120 days and such additional time thereafter as may be determined by the court from the date the insolvency is determined or any ancillary proceedings are initiated in this State, whichever is later, to permit proper defense by the Association of all pending causes of action. Any party to any proceeding which is stayed pursuant to this section shall have the right, upon application and notice, to seek a vacation or modification of such stay. ~~as to a~~ Any covered claims arising from any judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured,

the Association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or finding shall, upon application and notice by the Association be vacated and set aside by the same court in which such judgment, order, decision, verdict, or finding is entered and set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and the Association either on its own behalf or on behalf of any insured or an insolvent insurer, shall be permitted to defend against such claim on the merits. Any party who has obtained any such judgment or order shall have the right, upon application and notice, to have the judgment or order restored if within 90 days following the entry of the judgment or order the Association has not notified such party and the court that it intends to defend the matter on the merits."

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

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

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

However, in the case of a deposit made by an insolvent domestic insurer, ~~only~~ the portions of the deposit made for the protection of policyholders having covered claims shall be delivered by the Commissioner to the Association. As for the general deposit, said portions shall be in the proportions that the insolvent domestic insurer's domestic net direct written premiums for the preceding calendar year on the kinds of insurance in the account bears to its total net direct written premiums for the preceding calendar year on the kinds of insurance in the account.

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

Sec. 10. This act is effective upon ratification.
In the General Assembly read three times and ratified this the 5th day of June,
1989.