

LEGISLATIVE BILL 380

Approved by the Governor March 12, 2019

Introduced by La Grone, 49.

A BILL FOR AN ACT relating to the Nebraska Property and Liability Insurance Guaranty Association Act; to amend sections 44-2401, 44-2403, 44-2406, 44-2407, 44-2409, 44-2410, 44-2411, 44-2415, and 44-2418, Reissue Revised Statutes of Nebraska; to redefine terms; to change obligations for covered claims; to change powers and duties of the Nebraska Property and Liability Guaranty Association and the Director of Insurance as prescribed; to change provisions relating to the exhaustion of remedies by claimants; to provide for a stay in proceedings; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 44-2401, Reissue Revised Statutes of Nebraska, is amended to read:

44-2401 The purpose of the Nebraska Property and Liability Insurance Guaranty Association Act ~~sections 44-2401 to 44-2418~~ is to provide a method for the payment of certain claims against insolvent insurance companies, as defined in the act sections 44-2401 to 44-2418, to avoid unnecessary delay in payment of such claims, to avoid financial loss to claimants or to policyholders, to assist in the detection and prevention of insurer insolvencies, and to provide an association of insurers against which the cost of such protection may be assessed in an equitable manner.

Sec. 2. Section 44-2403, Reissue Revised Statutes of Nebraska, is amended to read:

44-2403 As used in the Nebraska Property and Liability Insurance Guaranty Association Act, unless the context otherwise requires:

(1) Account shall mean any one of the three accounts created by section 44-2404;

(2) Director shall mean the Director of Insurance or his or her duly authorized representative;

(3) Association shall mean the Nebraska Property and Liability Insurance Guaranty Association created by section 44-2404;

(4)(a) Covered claim shall mean an unpaid claim ~~which has been timely filed with the liquidator~~ as provided for in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act and which arises out of and is within the coverage of an insurance policy to which the Nebraska Property and Liability Insurance Guaranty Association Act applies issued by a member insurer that becomes insolvent after May 26, 1971, and (i) the claimant or insured is a resident of this state 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 also include the policyholder's unearned premiums paid by the policyholder on an insurance policy to which the act applies issued by a member insurer that becomes insolvent on or after July 9, 1988. Nothing in this section shall be construed to supersede, abrogate, or limit the common-law ownership of accounts receivable for earned premium, unearned premium, or unearned commission;

(b) Covered claim shall not include any amount due any reinsurer, insurer, liquidator, insurance pool, or underwriting association, as subrogation recoveries or otherwise, a ~~policy deductible or self-insured~~ portion of the claim, a claim for any premium calculated on a retrospective basis, any premiums subject to adjustment after the date of liquidation, or any amount due an attorney or adjuster as fees for services rendered to the insolvent insurer. Covered claim shall also not include any amount as punitive or exemplary damages or any amount claimed for incurred but not reported damages. Covered claim shall also not include any claim filed with the guaranty fund after the earlier of twenty-five months after the date of the order of liquidation or the final date set by the court for the filing of claims against the liquidator or receiver. This subdivision ~~Subdivision (4)(b) of this section~~ shall not prevent a person from presenting the excluded claim to the insolvent insurer or its liquidator, but the claim shall not be asserted against any other person, including the person to whom benefits were paid or the insured of the insolvent insurer, except to the extent that the claim is outside the coverage or is in excess of the limits of the policy issued by the insolvent insurer;

(5) Insolvent insurer shall mean a member insurer licensed to transact the business of insurance in this state, either at the time the policy was issued or when the insured event occurred, and against whom a final order of liquidation, with a finding of insolvency, has been entered by a court of competent jurisdiction in the company's state of domicile after September 2, 1977;

(6) Member insurer shall mean any person licensed to write any kind of insurance to which the Nebraska Property and Liability Insurance Guaranty Association Act applies by the provisions of section 44-2402, including the exchange of reciprocal or interinsurance contracts, that is licensed to transact insurance in this state, except assessment associations operating

under Chapter 44, article 8, and also excepting unincorporated mutuals;

(7) Net direct written premiums shall mean direct gross premiums written in this state on insurance policies to which the Nebraska Property and Liability Insurance Guaranty Association Act applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. Net direct written premiums shall not include premiums on contracts between insurers or reinsurers;

(8) Person shall mean any individual, corporation, partnership, limited liability company, association, voluntary organization, or reciprocal insurance exchange; and

(9) Insurance shall mean those contracts defined in section 44-102.

Sec. 3. Section 44-2406, Reissue Revised Statutes of Nebraska, is amended to read:

44-2406 (1) The association shall be obligated only to the extent of the covered claims existing prior to the date a member ~~insurer company~~ becomes an insolvent insurer or arising within thirty days after it has been determined that the insurer is an insolvent insurer, before the policy expiration date, if less than thirty days after such determination, or before the insured replaces the policy or on request effects cancellation, if he or she does so within thirty days of such dates, but such obligation shall include only ~~the that~~ amount of each covered claim ~~that does not exceed which is in excess of one hundred dollars and is less than three hundred thousand dollars~~, except that the association shall pay the amount required by law on any covered claim arising out of a workers' compensation policy. In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the face amount of the policy from which the claim arises. The association shall be obligated on covered claims, including those under a workers' compensation policy, for unearned premiums only for ~~the that~~ amount of each covered claim ~~that does not exceed which is in excess of one hundred dollars and is less than ten thousand dollars per policy~~.

(2) The director shall transmit to the association all covered claims timely filed with him or her pursuant to the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act. The association shall thereupon be considered to have been designated the director's representative pursuant to the act, and it shall proceed to investigate, hear, settle, and determine such claims unless the claimant shall, within thirty days from the date the claim is filed with the director, file with the director a written demand that the claim be processed in the liquidation proceedings as a claim not covered by the Nebraska Property and Liability Insurance Guaranty Association Act. In regard to those claims transmitted to the association by the director, the association and claimants shall have all of the rights and obligations and be subject to the same limitations and procedures as are specified in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act for the determination of claims.

(3) In the case of claims arising from bodily injury, sickness, or disease, including death resulting therefrom, the amount of any such award shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, X-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing, and funeral services, and any amounts actually lost by reason of claimant's inability to work and earn wages or salary or their equivalent, but not other income, that would otherwise have been earned in the normal course of such injured claimant's employment. Such award may also include payments in fact made to others, not members of claimant's household, which were reasonably incurred to obtain from such other persons ordinary and necessary services for the production of income in lieu of those services the claimant would have performed for himself or herself had he or she not been injured. The amount of any such award under this subsection shall be reduced by the amount the claimant is entitled to receive as the beneficiary under any health, accident, or disability insurance, under any salary or wage continuation program under which he or she is entitled to benefits, or from his or her employer in the form of workers' compensation benefits, or any other such benefits to which the claimant is legally entitled, and any claimant who intentionally fails to correctly disclose his or her rights to any such benefits shall forfeit all rights which he or she may have by the provisions of the Nebraska Property and Liability Insurance Guaranty Association Act.

(4) A third party having a covered claim against any insured of an insolvent ~~member~~ insurer may file such claim with the director pursuant to the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act, and the association shall process such claim in the manner specified in subsections (2) and (3) of this section. The filing of such claim shall constitute an unconditional general release of all liability of such insured in connection with the claim unless the association thereafter denies the claim for the reason that the insurance policy issued by the insolvent ~~insurer member company~~ does not afford coverage or unless the claimant, within thirty days from the date of filing his or her claim with the director, files with the director a written demand that the claim be processed in the liquidation proceedings as a claim not covered by the Nebraska Property and Liability Insurance Guaranty Association Act.

Sec. 4. Section 44-2407, Reissue Revised Statutes of Nebraska, is amended to read:

44-2407 (1) The association shall:

(a) Allocate claims paid and expenses incurred among the three accounts

separately and assess member insurers separately for each account in the amounts necessary to pay the obligations of the association under section 44-2406, the expenses of handling covered claims, the cost of examinations under sections 44-2412 and 44-2413, and other expenses authorized by the Nebraska Property and Liability Insurance Guaranty Association Act. The assessments of each member insurer shall be in the proportion that the net direct written premiums of such member insurer, on the basis of the insurance in the account involved, bears to the net direct written premiums of all member insurers for the same period and in the same account for the calendar year preceding the date of the assessment ~~the member insurer becomes an insolvent insurer. After an initial assessment has been made for an insolvency, any subsequent assessments for that insolvency may be calculated in the same manner as the initial assessment and may use the same calendar year's net direct written premiums as were used in determining the original assessment.~~ The association may make an assessment for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer, not to exceed fifty dollars per member ~~insurer company~~ in any one year. Each member insurer shall be notified of the assessment not later than thirty days before it is due. Except for such administrative assessment, no member insurer may be assessed in any year on any account an amount greater than one percent of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. The association may 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 required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact business as an insurer. Deferred assessments shall be paid when such payment will not reduce capital or surplus below such required minimum amounts. Such deferred assessments when paid shall be refunded to those member ~~insurers companies~~ that received larger assessments by virtue of such deferment or, in the discretion of any such ~~insurer company~~, credited against future assessments. No member insurer may pay a dividend to shareholders or policyholders while such insurer has an unpaid deferred assessment;

(b) Handle claims through its employees or through one or more insurers or other persons designated by the association as a servicing facility, except that the designation of a servicing facility shall be subject to the approval of the director and such designation may be declined by a member insurer;

(c) Reimburse any 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 such other expenses of the association as are authorized by the Nebraska Property and Liability Insurance Guaranty Association Act; ~~and~~

(d) Issue to each insurer paying an assessment under this section a certificate of contribution in appropriate form and terms as prescribed by the director for the amount so paid. All outstanding certificates shall be of equal dignity and priority without reference to amounts or dates of issue. The insurer may offset against its premium and related retaliatory tax liability to this state pursuant to sections 44-150 and 77-908 accrued with respect to business transacted in such year an amount equal to twenty percent of the original face amount of the certificate of contribution, beginning with the first calendar year after the year of issuance through the fifth calendar year after the year of issuance. ~~If Should~~ the association ~~recovers recover~~ any sum representing amounts previously written off by member insurers and offset against premium and related retaliatory taxes imposed by sections 44-150 and 77-908, such recovered sum shall be paid by the association to the ~~director~~ Director of Insurance who shall handle such funds in the same manner as provided in Chapter 77, article 9; ~~-~~

(e) Be deemed the insolvent insurer to the extent of the association's obligation for covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer, subject to the limitations provided in the act, as if the insurer had not become insolvent, with the exception that the liquidator shall retain the sole right to recover any reinsurance proceeds. The association's rights under this section include, but are not limited to, the right to pursue and retain salvage and subrogation recoveries on paid covered claim obligations to the extent paid by the guaranty fund; and

(f) Have access to insolvent insurer records. The liquidator of an insolvent insurer shall permit access by the association or its authorized representatives, and by any similar organization in another state or its authorized representatives, to the insolvent insurer's records which are necessary for the association or such similar organization in carrying out its functions with regard to covered claims. In addition, the liquidator shall provide the association or its representative or such similar organization with copies of such records upon the request and at the expense of the association or similar organization.

(2) The association may:

(a) Appear in, defend, and appeal any action;

(b) Employ or retain such persons as are necessary to handle claims and perform other duties of the association;

(c) Borrow funds necessary to effect the purposes of the Nebraska Property and Liability Insurance Guaranty Association Act in accord with the plan of operation;

(d) Sue or be sued, and such power to sue shall include the power and right to intervene as a party before any court that has jurisdiction over an

insolvent insurer as defined by such act;

(e) Negotiate and become a party to such contracts as are necessary to carry out the purpose of such act;

(f) Perform such other acts as are necessary or proper to effectuate the purpose of such act; and

(g) Bring any action against any third-party administrator, agent, attorney, or other representative of the insolvent insurer to obtain custody and control of all files, records, and electronic data related to an insolvent insurer that is appropriate or necessary for the association, or a similar organization in another state, to carry out duties under such act ~~Refund to the member insurers in proportion to the contribution of each member insurer to any 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 the account exceed the liabilities of that account as estimated by the board of directors for the coming year.~~

Sec. 5. Section 44-2409, Reissue Revised Statutes of Nebraska, is amended to read:

44-2409 (1) The director shall:

(a) Notify the association of the existence of any insolvent insurer not later than three days after he or she receives notice of the determination of the insolvency and order of liquidation pursuant to the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act; and

(b) Upon request of the board of directors of the association, provide the association with a statement of the net direct written premiums of each member insurer.

(2) The director may:

(a) Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer that fails to pay an assessment when due, unless such payment was deferred by the association in the manner provided in the Nebraska Property and Liability Insurance Guaranty Association Act, or fails to comply with the plan of operation; and

(b) Revoke the designation of any servicing facility if he or she finds the claims are not being handled in good faith. Designation of a new servicing facility ~~agency~~ shall be accomplished in the manner set out in subdivision (1) (b) of section 44-2407.

Sec. 6. Section 44-2410, Reissue Revised Statutes of Nebraska, is amended to read:

44-2410 (1) Any person recovering under the Nebraska Property and Liability Insurance Guaranty Association Act ~~provisions of sections 44-2401 to 44-2418~~ shall be deemed to have assigned his or her rights under the policy to the association to the extent of such recovery from the association. Every insured or claimant seeking recovery under the act ~~provisions of sections 44-2401 to 44-2418~~ shall be required to cooperate with the association to the same extent he or she would have been required to cooperate with the insolvent insurer.

(2) Notice of claims to the liquidator or receiver of the insolvent member insurer shall be deemed notice to the association or its agent, and a list of covered claims shall be periodically submitted to the association or similar organization in another state by the receiver or liquidator.

(3) The receiver, liquidator, or statutory successor of an insolvent member insurer shall be bound by settlements of covered claims by the association or a similar organization in another state.

(4) The association shall periodically file with the director statements of covered claims paid by the association and estimates of anticipated claims against the association.

Sec. 7. Section 44-2411, Reissue Revised Statutes of Nebraska, is amended to read:

44-2411 (1) Any person having a claim against any ~~his or her own~~ insurer under any provisions of any ~~his or her own~~ insurance policy, which claim is also a covered claim against an insolvent ~~member~~ insurer under the Nebraska Property and Liability Insurance Guaranty Association Act, shall be required to exhaust all of ~~his or her~~ rights under such ~~his or her own~~ policy before the association is obligated to pay the covered claim under such act. Any amount payable on a covered claim by the provisions of such act shall be reduced by the amount of such recovery under any other ~~the claimant's own~~ insurance policy.

(2) 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 insured, except that if it is a first-party claim for damage to property with a permanent location, from the association of the location of the property, and if it is a workers' compensation claim, from the association of the residence of the claimant. Any recovery pursuant to the Nebraska Property and Liability Insurance Guaranty Association Act shall be reduced by the amount of the recovery from any other insurance guaranty association or its equivalent.

Sec. 8. Section 44-2415, Reissue Revised Statutes of Nebraska, is amended to read:

44-2415 There shall be no liability on the part of, and no cause of action of any nature shall rise against, any member insurer, the association or its agents or employees, the board of directors of the association, any servicing facility designated by the association in accordance with the Nebraska Property and Liability Insurance Guaranty Association Act ~~provisions of sections 44-2401~~

~~to 44-2418~~ or the agents or employees or officers of such servicing facility, or the director or his or her representatives for any action taken by them in the performance of their powers and duties under the act provisions of sections 44-2401 to 44-2418.

Sec. 9. Section 44-2418, Reissue Revised Statutes of Nebraska, is amended to read:

44-2418 Sections 44-2401 to 44-2418 and section 10 of this act shall be known and may be cited as the Nebraska Property and Liability Insurance Guaranty Association Act.

Sec. 10. All proceedings arising out of a claim under a policy of insurance written by an insolvent insurer shall be stayed for one hundred twenty days from the date of entry of the order of liquidation to permit proper defense by the association of all such pending causes of action. Nothing in this section shall be deemed to limit the powers of a receiver appointed pursuant to the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act or to stay any proceeding brought pursuant to such act.

Sec. 11. Original sections 44-2401, 44-2403, 44-2406, 44-2407, 44-2409, 44-2410, 44-2411, 44-2415, and 44-2418, Reissue Revised Statutes of Nebraska, are repealed.