

ACT # 2009- 716

1 HB511
2 109088-8
3 By Representative Ford
4 RFD: Banking and Insurance
5 First Read: 17-FEB-09



1
2 ENROLLED, An Act,

3 To amend Sections 27-42-5, 27-42-8, and 27-42-11,
4 Code of Alabama 1975, relating to insurance and the Alabama
5 Insurance Guaranty Association; to define terms; to allow the
6 association to pursue recovery from "high net worth insureds"
7 on paid "covered claims"; and to allow the association the
8 right to recover attorney fees incurred in obtaining
9 reimbursement.

10 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

11 Section 1. Sections ~~27-42-3~~, 27-42-5, 27-42-8, and
12 27-42-11, Code of Alabama 1975, are amended to read as
13 follows:

14 "§27-42-3.

15 ~~"This chapter shall apply to all kinds of direct~~
16 ~~insurance, except life, annuities, disability, accident and~~
17 ~~health, title, surety, credit, mortgage guaranty, insurance of~~
18 ~~warranties or service contracts and ocean marine insurance.~~

19 "§27-42-5.

20 "As used in this chapter, the following terms shall
21 have the following meanings, respectively, unless the context
22 clearly indicates otherwise:

23 "(1) ACCOUNT. Any one of the three accounts created
24 by Section 27-42-6.

1 "(2) AFFILIATE. A person who directly, or
 2 indirectly, through one or more intermediaries, controls, is
 3 controlled by, or is under common control with another person
 4 on December 31 of the year immediately preceding the date the
 5 insurer becomes an insolvent insurer.

6 "~~(2)~~(3) ASSOCIATION. The Alabama Insurance Guaranty
 7 Association created under Section 27-42-6.

8 "~~(3)~~(4) COMMISSIONER. The Commissioner of Insurance
 9 of the State of Alabama.

10 "(5) CONTROL. The possession, direct or indirect, of
 11 the power to direct or cause the direction of the management
 12 and policies of a person, whether through the ownership of
 13 voting securities, by contract other than a commercial
 14 contract for goods or nonmanagement services, or otherwise,
 15 unless the power is the result of an official position with or
 16 corporate office held by the person. Control shall be presumed
 17 to exist if a person, directly or indirectly, owns, controls,
 18 holds with the power to vote, or holds proxies representing,
 19 10 percent or more of the voting securities of any other
 20 person. This presumption may be rebutted by a showing that
 21 control does not exist in fact.

22 "~~(4)~~(6) COVERED CLAIM. An unpaid claim, including
 23 one of unearned premiums, which arises out of, and is within
 24 the coverage and not in excess of, the applicable limits of an
 25 insurance policy to which this chapter applies, issued by an

1 insurer, if such insurer becomes an insolvent insurer after
2 January 1, 1981, and (i) the claimant or insured is a resident
3 of this state at the time of the insured event; or (ii) the
4 property from which the claim arises is permanently located in
5 this state. "Covered claim" shall not include any amount due
6 any reinsurer, insurer, insurance pool, self-insurer, or
7 underwriting association, as subrogation recoveries or
8 otherwise, nor shall "covered claim" include any first party
9 claims by ~~an insured whose net worth exceeds twenty five~~
10 ~~million dollars (\$25,000,000) on December 31 of the year prior~~
11 ~~to the year in which the insurer becomes an insolvent insurer;~~
12 ~~provided that an insured's net worth on that date shall be~~
13 ~~deemed to include the aggregate net worth of the insured and~~
14 ~~all of its subsidiaries as calculated on a consolidated basis.~~
15 a "high net worth insured."

16 "(7) HIGH NET WORTH INSURED. Any insured whose net
17 worth exceeds twenty-five million dollars (\$25,000,000) on
18 December 31 of the year prior to the year in which the insurer
19 becomes an insolvent insurer; provided that an insured's net
20 worth on that date shall be deemed to include the aggregate
21 net worth of the insured and all of its subsidiaries and
22 affiliates as calculated on a consolidated basis.

23 "(5)(8) INSOLVENT INSURER. An insurer licensed to
24 transact insurance in this state, either at the time the
25 policy was issued or when the insured event occurred, and

1 against whom an order of liquidation with a finding of
2 insolvency has been entered after January 1, 1981, by a court
3 of competent jurisdiction in the insurer's state of domicile
4 or of this state under the provisions of Chapter 32 of this
5 title, which order of liquidation has not been stayed or been
6 the subject of a writ of supersedeas bonds or other comparable
7 order.

8 "~~(6)~~ (9) MEMBER INSURER. Any person who (i) writes
9 any kind of insurance to which this chapter applies under
10 Section 27-42-3, including the exchange of reciprocal or
11 interinsurance contracts, and (ii) is licensed to transact
12 insurance in this state.

13 "~~(7)~~ (10) NET DIRECT WRITTEN PREMIUMS. Direct gross
14 premiums written in this state on insurance policies to which
15 this chapter applies, less return premiums thereon and
16 dividends paid or credited to, policyholders on such direct
17 business. "Net direct written premiums" do not include
18 premiums on contracts between insurers or reinsurers.

19 "(11) NET WORTH. The total assets of a person, less
20 the total liabilities against those assets as determined in
21 accordance with generally accepted accounting principles. A
22 person's net worth shall be deemed to include the aggregate
23 net worth of the person and all of its subsidiaries and
24 affiliates as calculated on a consolidated basis.

1 "~~(8)~~(12) PERSON. Any individual, ~~corporation,~~
2 ~~partnership, association, or voluntary organization~~ or legal
3 entity, including governmental entities.

4 "(13) RESIDENCY. For purposes of determining
5 residency in this chapter, the residency of a claimant or
6 insured that is a corporation, partnership, association, or
7 voluntary organization is the state in which the claimant's or
8 insured's principal place of business is located.

9 "(14) SELF-INSURER. A person that covers its
10 liability through a qualified individual or group
11 self-insurance program or any other formal program created for
12 the specific purpose of covering liabilities typically covered
13 by insurance.

14 "\$27-42-8.

15 "(a) The association shall:

16 "(1) Be obligated to the extent of the covered
17 claims existing prior to the determination of insolvency and
18 arising within 30 days after the determination of insolvency,
19 or before the policy expiration date if less than 30 days
20 after the determination, on or before the insured replaces the
21 policy or causes its cancellation, if he or she does so within
22 30 days of the determination, but the association's obligation
23 shall include only that amount of each covered claim which is
24 in excess of one hundred dollars (\$100) and is less than one
25 hundred fifty thousand dollars (\$150,000), except that the

1 association shall pay the full amount of any covered employee
2 benefit claim arising under Section A of workers' compensation
3 policy. In no event shall the association be obligated to a
4 policyholder or claimant in an amount in excess of the
5 obligation of the insolvent insurer under the policy from
6 which the claim arises. Notwithstanding any other provisions
7 of this chapter, a covered claim shall not include any claim
8 filed with the guaranty fund after the final date set by the
9 court for the filing of claims against the liquidator or
10 receiver of an insolvent insurer.

11 "(2) Be deemed the insurer only to the extent of its
12 obligation on the covered claims and to such extent, subject
13 to the limitations provided in this chapter, shall have all
14 rights, duties, and obligations of the insolvent insurer as if
15 the insurer had not become insolvent including, but not
16 limited to, the right to pursue subrogation recoveries and
17 retain salvage and subrogation recoveries on paid covered
18 claims. The association shall not be deemed the insolvent
19 insurer for any purpose relating to the issue of whether the
20 association is amendable to the personal jurisdiction of the
21 courts of any jurisdiction.

22 "(3) Allocate claims paid and expenses incurred
23 among the three accounts separately, and assess member
24 insurers separately for each account amounts necessary to pay
25 the obligations of the association under subdivision (1) of

1 this subsection subsequent to an insolvency, the expenses of
2 handling covered claims subsequent to an insolvency, the cost
3 of examinations under Section 27-42-13 and other expenses
4 authorized by this chapter. The assessments of each member
5 insurer shall be in the proportion that the net direct written
6 premiums of the member insurer for the calendar year preceding
7 the assessment on the kinds of insurance in the account bears
8 to the net direct written premiums of all member insurers for
9 the calendar year preceding the assessment on the kinds of
10 insurance in the account. Each member insurer shall be
11 notified of the assessment not later than 30 days before it is
12 due. No member insurer may be assessed in any one year on any
13 account an amount greater than one percent of that member
14 insurer's net direct written premiums for the calendar year
15 preceding the assessment on the kinds of insurance in the
16 account. If the maximum assessment, together with the other
17 assets of the association in any account, does not provide in
18 any one year in any account an amount sufficient to make all
19 necessary payments from that account, the funds available
20 shall be prorated and the unpaid portion shall be paid as soon
21 thereafter as funds become available. The association shall
22 pay claims in any order which it may deem reasonable,
23 including the payment of claims as they are received from the
24 claimants or in groups or categories of claims. The
25 association may exempt or defer, in whole or in part, the

1 assessment of any member insurer, if the assessment would
2 cause the member insurer's financial statement to reflect
3 amounts of capital or surplus less than the minimum amounts
4 required for a certificate of authority by any jurisdiction in
5 which the member insurer is authorized to transact insurance;
6 provided, however, that during the period of deferment, no
7 dividends shall be paid to shareholders or policyholders.
8 Deferred assessments shall be paid when payment will not
9 reduce capital or surplus below required minimums. Payments
10 shall be refunded to those companies receiving larger
11 assessments by virtue of a deferment or, at the election of
12 any company, credited against future assessments. Each member
13 insurer may set off against any assessment, authorized
14 payments made on covered claims and expenses incurred in the
15 payment of claims by the member insurer if they are chargeable
16 to the account for which the assessment is made.

17 "(4) Investigate claims brought against the
18 association and adjust, compromise, settle, and pay covered
19 claims to the extent of the association's obligation and deny
20 all other claims and may review settlements, releases, and
21 judgments to which the insolvent insurer or its insureds were
22 parties to determine the extent to which the settlements,
23 releases, and judgments may be properly contested.

24 "(5) Notify such persons as the commissioner directs
25 under subdivision (1) of subsection (b) of Section 27-42-10.

1 "(6) Handle claims through its employees or through
2 one or more insurers or other persons designated as servicing
3 facilities. Designation of a servicing facility is subject to
4 the approval of the commissioner, but such designation may be
5 declined by a member insurer.

6 "(7) Reimburse each servicing facility for
7 obligations of the association paid by the facility and for
8 expenses incurred by the facility while handling claims on
9 behalf of the association and shall pay the other expenses of
10 the association authorized by this chapter.

11 "(b) The association may:

12 "(1) Employ or retain those persons as are necessary
13 to handle claims and perform other duties of the association.

14 "(2) Borrow funds necessary to effect the purposes
15 of this chapter in accord with the plan of operation.

16 "(3) Sue or be sued, and the power to sue includes
17 the power and right to intervene as a party before any court
18 in this state that has jurisdiction over an insolvent insurer
19 as defined by this chapter.

20 "(4) Negotiate and become a party to any contracts
21 as are necessary to carry out the purpose of this chapter.

22 "(5) Perform other acts as are necessary or proper
23 to effectuate the purpose of this chapter.

24 "(6) Refund to the member insurers, in proportion to
25 the contribution of each member insurer to that account, that

1 amount by which the assets of the account exceed the
2 liabilities if, at the end of any calendar year, the board of
3 directors finds that the assets of the association in any
4 account exceed the liabilities of that account as estimated by
5 the board of directors for the coming year.

6 "(c) Suit against the association:

7 "Except for actions by "member insurers" aggrieved
8 by final actions or decisions of the association pursuant to
9 subdivision (7) of subsection (c) of Section 27-42-9, all
10 actions against the association relating to or arising out of
11 this act shall be brought in the Alabama state courts. Such
12 courts shall have exclusive jurisdiction over all actions
13 relating to or arising out of this act against the
14 association.

15 "§27-42-11.

16 "(a) Any person recovering under this chapter shall
17 be deemed to have assigned his or her rights under the policy
18 to the association to the extent of his or her recovery from
19 the association. Every insured or claimant seeking the
20 protection of this chapter shall cooperate with the
21 association to the same extent as such person would have been
22 required to cooperate with the insolvent insurer. The
23 association shall have no cause of action against the insured
24 of the insolvent insurer for any sums it has paid out except
25 for those causes of action the insolvent insurer would have

1 had if such sums had been paid by the insolvent insurer and
2 except as provided in ~~subsection~~ subsections (d), (e), (f),
3 (g), and (h) below. In the case of an insolvent insurer
4 operating on a plan with assessment liability, payments of
5 claims of the association may not operate to reduce the
6 liability of insureds to the receiver, liquidator, or
7 statutory successor for unpaid assessments.

8 "(b) The receiver, liquidator, or statutory
9 successor of an insolvent insurer shall be bound by
10 settlements of covered claims by the association or a similar
11 organization in another state. The court having jurisdiction
12 shall grant these claims priority equal to that which the
13 claimant would have been entitled in the absence of this
14 chapter against the assets of the insolvent insurer. The
15 expenses of the association or similar organization in
16 handling claims shall be accorded the same priority as the
17 liquidator's expenses.

18 "(c) The association shall periodically file with
19 the receiver or liquidator of the insolvent insurer statements
20 of the covered claims paid by the association and estimates of
21 anticipated claims on the association which shall preserve the
22 rights of the association against the assets of the insolvent
23 insurer.

1 ~~"(d) The association shall have the right to recover~~
2 ~~from the following persons the amount of any covered claim~~
3 ~~paid on behalf of the person:~~

4 ~~"(1) An insured whose net worth on December 31 of~~
5 ~~the year immediately preceding the date the insurer becomes an~~
6 ~~insolvent insurer exceeds twenty-five million dollars~~
7 ~~(\$25,000,000) and whose liability obligations, including~~
8 ~~obligations under workers' compensation insurance coverages,~~
9 ~~to other persons are satisfied in whole or in part by the~~
10 ~~payments.~~

11 ~~"(2) Any person who is an affiliate of the insolvent~~
12 ~~insurer and whose liability obligations, including obligations~~
13 ~~under workers' compensation insurance coverages, to other~~
14 ~~persons are satisfied in whole or in part by the payments.~~

15 "(d) The association shall not be obligated to pay
16 any first party claims by a "high net worth insured."

17 "(e) The association shall have the right to recover
18 from a high net worth insured all amounts paid by the
19 association to or on behalf of such insured, whether for
20 indemnity, defense, or otherwise.

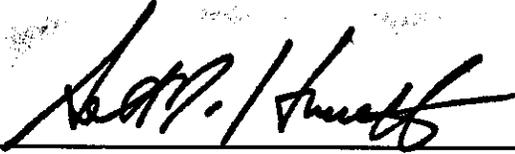
21 "(f) The association shall have the right to recover
22 from any person who is an affiliate of the insolvent insurer
23 all amounts paid by the association to or on behalf of such
24 person, whether for indemnity, defense, or otherwise.

1 "(g) The association shall establish procedures for
2 requesting financial information from insureds and claimants
3 on a confidential basis for purposes of applying sections
4 concerning the net worth of insureds or first party and third
5 party claimants, subject to such information being shared with
6 any other association similar to the association and the
7 liquidator for the insolvent insurer on the same confidential
8 basis. If the insured or claimant refuses to provide the
9 requested financial information, the association may deem the
10 net worth of the insured or claimant to be in excess of
11 twenty-five million dollars (\$25,000,000) at the relevant
12 time.

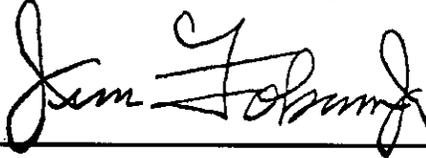
13 "(h) In any lawsuit contesting the applicability of
14 this section or the exclusion from "covered claims" of claims
15 by "high net worth insureds" embodied in subdivisions (6) and
16 (7) of Section 27-42-5, where the insured has refused to
17 provide financial information under the procedure established
18 pursuant to subsection (g), there shall be a rebuttable
19 presumption that the insured's net worth exceeded twenty-five
20 million dollars (\$25,000,000) at the relevant time. If the
21 court finds that the insured's net worth exceeded twenty-five
22 million dollars (\$25,000,000) at the relevant time the court
23 may award to the association, attorney's fees and costs."

1 Section 2. This act shall become effective on the
2 first day of the third month following its passage and
3 approval by the Governor, or its otherwise becoming law.

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Speaker of the House of Representatives



President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 16-APR-09, as amended.

Greg Pappas
Clerk

Senate

14-MAY-09

Passed

APPROVED May 21, 2009

TIME 1:15 p.m.


GOVERNOR

Alabama Secretary Of State

Act Num.....: 2009-716
Bill Num....: H-511