

By: Carona

S.B. No. 421

A BILL TO BE ENTITLED

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AN ACT

relating to coverage of assisted living facilities under professional liability insurance and the Texas Medical Liability Insurance Underwriting Association.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subdivision (2), Section 2, Article 5.15-1, Insurance Code, is amended to read as follows:

(2) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, chiropractor, optometrist, pharmacist, veterinarian, not-for-profit kidney dialysis center, blood bank that is a nonprofit corporation chartered to operate a blood bank and which is accredited by the American Association of Blood Banks, for-profit nursing home or not-for-profit nursing home, for-profit assisted living facility or not-for-profit assisted living facility, or an officer, employee, or agent of any of them acting in the course and scope of his employment, or a health care practitioner or facility that the commissioner, in accordance with Section 3B(b), Article 21.49-3, of this code, determines is eligible for coverage under this article.

SECTION 2. Section 8, Article 5.15-1, Insurance Code, is amended to read as follows:

1 Sec. 8. EXEMPLARY DAMAGES UNDER MEDICAL PROFESSIONAL
2 LIABILITY INSURANCE. No policy of medical professional liability
3 insurance issued to or renewed for a health care provider or
4 physician in this state may include coverage for exemplary damages
5 that may be assessed against the health care provider or physician;
6 provided, however, that the commissioner may approve an endorsement
7 form that provides for coverage for exemplary damages to be used on
8 a policy of medical professional liability insurance issued to a
9 hospital, as the term "hospital" is defined in this article, or to a
10 for-profit or not-for-profit nursing home or assisted living
11 facility.

12 SECTION 3. Subdivision (6), Section 2, Article 21.49-3,
13 Insurance Code, is amended to read as follows:

14 (6) "Health care provider" means:

15 (A) any person, partnership, professional
16 association, corporation, facility, or institution duly licensed
17 or chartered by the State of Texas to provide health care as defined
18 in Section 1.03(a)(2), Medical Liability and Insurance Improvement
19 Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), as:

20 (i) a registered nurse, hospital, dentist,
21 podiatrist, pharmacist, chiropractor, or optometrist;

22 (ii) a for-profit or not-for-profit nursing
23 home;

24 (iii) a radiation therapy center that is
25 independent of any other medical treatment facility and which is
26 licensed by the Texas Department of Health in that agency's
27 capacity as the Texas Radiation Control Agency pursuant to the

1 provisions of Chapter 401, Health and Safety Code, and which is in
2 compliance with the regulations promulgated under that chapter;

3 (iv) a blood bank that is a nonprofit
4 corporation chartered to operate a blood bank and which is
5 accredited by the American Association of Blood Banks;

6 (v) a nonprofit corporation which is
7 organized for the delivery of health care to the public and which is
8 certified under Chapter 162, Occupations Code; ~~[or]~~

9 (vi) a health center as defined by 42 U.S.C.
10 Section 254b, as amended; or

11 (vii) a for-profit or not-for-profit
12 assisted living facility; or

13 (B) an officer, employee, or agent of an entity
14 listed in Paragraph (A) of this subdivision acting in the course and
15 scope of that person's employment.

16 SECTION 4. Section 3A, Article 21.49-3, Insurance Code, as
17 amended by Chapter 1284, Acts of the 77th Legislature, Regular
18 Session, 2001, is amended to read as follows:

19 Sec. 3A. ELIGIBILITY FOR COVERAGE. (a) The commissioner
20 ~~[board]~~ shall establish by order the categories of physicians and
21 health care providers who are eligible to obtain coverage from the
22 association and may, from time to time, revise its order to include
23 or exclude from eligibility particular categories of such
24 physicians and health care providers.

25 (b) If a category of physicians or health care providers has
26 been excluded from eligibility to obtain coverage from the
27 association, the commissioner ~~[board]~~ may determine, after notice

1 of at least 10 days and a hearing, that medical liability insurance
2 is not available. On that determination, the category of
3 physicians or health care providers is eligible to obtain insurance
4 coverage from the association.

5 (c) A for-profit or not-for-profit nursing home or assisted
6 living facility not otherwise eligible under this section for
7 coverage from the association is eligible for coverage if the
8 nursing home or assisted living facility demonstrates, in
9 accordance with the requirements of the association, that the
10 nursing home or assisted living facility made a verifiable effort
11 to obtain coverage from authorized insurers and eligible surplus
12 lines insurers and was unable to obtain substantially equivalent
13 coverage and rates.

14 SECTION 5. Article 21.49-3, Insurance Code, is amended by
15 adding Section 3B to read as follows:

16 Sec. 3B. ELIGIBILITY OF OTHER HEALTH CARE PRACTITIONERS AND
17 FACILITIES. (a) In this section:

18 (1) "Health care" includes any medical or health care
19 service, including an examination, treatment, medical diagnosis,
20 or evaluation, and care provided in an inpatient, outpatient, or
21 residential setting.

22 (2) "Health care facility" means a facility providing
23 health care, other than a facility described by Section 2(6) of this
24 article.

25 (3) "Health care practitioner" means an individual,
26 other than an individual described by Section 2(6) of this article,
27 who:

1 (A) is licensed to provide health care; or

2 (B) is not licensed to provide health care but
3 provides health care under the direction or supervision of a
4 licensed individual.

5 (b) After notice and opportunity for hearing, the
6 commissioner may:

7 (1) determine that appropriate liability insurance
8 coverage written by insurers authorized to engage in business in
9 this state is not reasonably available to a type of health care
10 practitioner or health care facility; and

11 (2) by order designate that type of health care
12 practitioner or health care facility to be included as a health care
13 provider eligible to receive coverage under this article.

14 (c) A health care practitioner or facility designated under
15 Subsection (b) of this section is entitled to receive coverage
16 provided under this article in accordance with Article 5.15-1 of
17 this code in the same manner as other health care providers
18 described by Section 2 of this article and Section 2, Article
19 5.15-1, of this code.

20 (d) The commissioner's order may indicate whether a health
21 care practitioner or facility designated under Subsection (b) of
22 this section is included under the policyholder's stabilization
23 reserve fund established under Section 4A or 4B of this article or
24 whether a separate policyholder's stabilization reserve fund is
25 created. A separate policyholder's stabilization reserve fund
26 established under this subsection operates in the same manner as a
27 stabilization reserve fund created under Section 4B of this

1 article.

2 SECTION 6. Subdivisions (1), (3), and (6), Subsection (b),
3 Section 4, Article 21.49-3, Insurance Code, are amended to read as
4 follows:

5 (1) Subject to Subdivision (6) of this subsection, the
6 rates, rating plans, rating rules, rating classification,
7 territories, and policy forms applicable to the insurance written
8 by the association and statistics relating thereto shall be subject
9 to Subchapter B of Chapter 5 of the Insurance Code, as amended,
10 giving due consideration to the past and prospective loss and
11 expense experience for medical professional liability insurance
12 within and without this state of all of the member companies of the
13 association, trends in the frequency and severity of losses, the
14 investment income of the association, and such other information as
15 the commissioner may require; provided, that if any article of the
16 above subchapter is in conflict with any provision of this Act, this
17 Act shall prevail. For purposes of this article, rates, rating
18 plans, rating rules, rating classifications, territories, and
19 policy forms for for-profit nursing homes and for-profit assisted
20 living facilities are subject to the requirements of Article 5.15-1
21 of this code to the same extent as not-for-profit nursing homes and
22 not-for-profit assisted living facilities.

23 (3) Any deficit sustained by the association with
24 respect to physicians and health care providers, other than
25 for-profit and not-for-profit nursing homes and assisted living
26 facilities, or by for-profit and not-for-profit nursing homes and
27 assisted living facilities in any one year shall be recouped,

1 pursuant to the plan of operation and the rating plan then in
2 effect, by one or more of the following procedures in this sequence:

3 First, a contribution from the policyholder's
4 stabilization reserve fund for physicians and health care
5 providers, other than for-profit and not-for-profit nursing homes
6 and assisted living facilities, established under Section 4A of
7 this article or from the stabilization reserve fund for for-profit
8 and not-for-profit nursing homes and assisted living facilities,
9 established under Section 4B of this article, as appropriate, until
10 the respective fund is exhausted;

11 Second, an assessment upon the policyholders
12 pursuant to Section 5(a) of this article;

13 Third, an assessment upon the members pursuant to
14 Section 5(b) of this article. To the extent a member has paid one or
15 more assessments and has not received reimbursement from the
16 association in accordance with Subdivision (5) of this subsection,
17 a credit against premium taxes under Article 4.10 of this code, as
18 amended, shall be allowed. The tax credit shall be allowed at a
19 rate of 20 percent per year for five successive years following the
20 year in which said deficit was sustained and at the option of the
21 insurer may be taken over an additional number of years.

22 (6) The rates applicable to professional liability
23 insurance provided by the association that cover nursing homes and
24 assisted living facilities that are not for profit must reflect a
25 discount of 30 percent from the rates for the same coverage provided
26 to others in the same category of insureds. The commissioner shall
27 ensure compliance with this subdivision.

1 SECTION 7. Section 4A, Article 21.49-3, Insurance Code, as
2 amended by Chapters 921 and 1284, Acts of the 77th Legislature,
3 Regular Session, 2001, is reenacted and amended to read as follows:

4 Sec. 4A. POLICYHOLDER'S STABILIZATION RESERVE FUND FOR
5 PHYSICIANS AND CERTAIN HEALTH CARE PROVIDERS [~~OTHER THAN FOR-PROFIT~~
6 ~~AND NOT-FOR-PROFIT NURSING HOMES~~]. (a) There is hereby created a
7 policyholder's stabilization reserve fund for physicians and
8 health care providers, other than for-profit and not-for-profit
9 nursing homes and assisted living facilities, which shall be
10 administered as provided herein and in the plan of operation of the
11 association. The stabilization reserve fund created by this
12 section is separate and distinct from the stabilization reserve
13 fund for for-profit and not-for-profit nursing homes and assisted
14 living facilities created by Section 4B of this article.

15 (b) Each policyholder shall pay annually into the
16 stabilization reserve fund a charge, the amount of which shall be
17 established annually by advisory directors chosen by health care
18 providers, other than for-profit and not-for-profit nursing homes
19 and assisted living facilities, and physicians eligible for
20 insurance in the association in accordance with the plan of
21 operation. The charge shall be in proportion to each premium
22 payment due for liability insurance through the association. Such
23 charge shall be separately stated in the policy, but shall not
24 constitute a part of premiums or be subject to premium taxation,
25 servicing fees, acquisition costs, or any other such charges.

26 (c) The stabilization reserve fund shall be collected and
27 administered by the association and shall be treated as a liability

1 of the association along with and in the same manner as premium and
2 loss reserves. The fund shall be valued annually by the board of
3 directors as of the close of the last preceding year.

4 (d) [~~Except as provided by Subsection (e) of this section,~~
5 ~~collections~~] Collections of the stabilization reserve fund charge
6 shall continue until such time as the net balance of the
7 stabilization reserve fund is not less than the projected sum of
8 premiums for physicians and health care providers, other than
9 for-profit and not-for-profit nursing homes and assisted living
10 facilities, to be written in the year following valuation date.

11 [~~(e) If in any fiscal year the incurred losses and defense~~
12 ~~and cost-containment expenses from physicians or any single~~
13 ~~category of health care provider result in a net underwriting loss~~
14 ~~and exceed 25 percent of the stabilization reserve fund, as valued~~
15 ~~for that year, the commissioner may by order direct the initiation~~
16 ~~or continuation of the stabilization reserve fund charge for~~
17 ~~physicians or that category of health care provider until the fund~~
18 ~~recovers the amount by which those losses and cost-containment~~
19 ~~expenses exceed 25 percent of the fund.]~~

20 (e) The stabilization reserve fund shall be credited with
21 all stabilization reserve fund charges collected from physicians
22 and health care providers, other than for-profit and not-for-profit
23 nursing homes and assisted living facilities, and shall be charged
24 with any deficit sustained by physicians and health care providers,
25 other than for-profit and not-for-profit nursing homes and assisted
26 living facilities, from the prior year's operation of the
27 association.

1 ~~[(f) The stabilization reserve fund shall be credited with~~
2 ~~all stabilization reserve fund charges collected from~~
3 ~~policyholders and shall be charged with any deficit from the prior~~
4 ~~year's operation of the association.]~~

5 SECTION 8. The heading of Section 4B, Article 21.49-3,
6 Insurance Code, is amended to read as follows:

7 Sec. 4B. STABILIZATION RESERVE FUND FOR FOR-PROFIT AND
8 NOT-FOR-PROFIT NURSING HOMES AND ASSISTED LIVING FACILITIES.

9 SECTION 9. Subsections (a), (b), (d), (e), and (h), Section
10 4B, Article 21.49-3, Insurance Code, are amended to read as
11 follows:

12 (a) There is hereby created a stabilization reserve fund for
13 for-profit and not-for-profit nursing homes and assisted living
14 facilities that shall be administered as provided in this section
15 and in the plan of operation of the association. The stabilization
16 reserve fund created by this section is separate and distinct from
17 the policyholder's stabilization reserve fund for physicians and
18 health care providers, other than for-profit and not-for-profit
19 nursing homes and assisted living facilities, created by Section 4A
20 of this article.

21 (b) Each policyholder shall pay annually into the
22 stabilization reserve fund a charge, the amount of which shall be
23 established annually by advisory directors chosen by for-profit and
24 not-for-profit nursing homes and assisted living facilities
25 eligible for insurance in the association in accordance with the
26 plan of operation. The charge shall be in proportion to each
27 premium payment due for liability insurance through the

1 association. The charge shall be separately stated in the policy,
2 but shall not constitute a part of premiums or be subject to premium
3 taxation, servicing fees, acquisition costs, or any other similar
4 charges.

5 (d) Collections of the stabilization reserve fund charge
6 shall continue only until such time as the net balance of the
7 stabilization reserve fund is not less than the projected sum of
8 premiums for for-profit and not-for-profit nursing homes and
9 assisted living facilities to be written in the year following the
10 valuation date.

11 (e) The stabilization reserve fund shall be credited with
12 all stabilization reserve fund charges collected from for-profit
13 and not-for-profit nursing homes and assisted living facilities and
14 the net earnings on liability insurance policies issued to
15 for-profit and not-for-profit nursing homes and assisted living
16 facilities and shall be charged with any deficit sustained by
17 for-profit and not-for-profit nursing homes and assisted living
18 facilities from the prior year's operation of the association.

19 (h) Notwithstanding Section 11 of this article, on
20 termination of the stabilization reserve fund established under
21 this section, all assets of the fund shall be transferred to the
22 general revenue fund to be appropriated for purposes related to
23 ensuring the kinds of liability insurance coverage that may be
24 provided by the association under this article for for-profit and
25 not-for-profit nursing homes and assisted living facilities.

26 SECTION 10. Section 4C, Article 21.49-3, Insurance Code, is
27 amended by amending Subsections (a) and (c) and adding Subsection

1 (d-1) to read as follows:

2 (a) The association is not liable for exemplary damages
3 under a professional liability insurance policy that covers a
4 for-profit or [~~and~~] not-for-profit nursing home or assisted living
5 facility and that excludes coverage for exemplary damages awarded
6 in relation to a covered claim awarded under Chapter 41, Civil
7 Practice and Remedies Code, or any other law. This subsection
8 applies without regard to the application of the common law theory
9 of recovery commonly known in Texas as the "Stowers Doctrine." This
10 subsection does not affect the application of that doctrine to the
11 liability of the association for compensatory damages.

12 (c) This section does not prohibit a for-profit or
13 not-for-profit nursing home or assisted living facility from
14 purchasing a policy to cover exemplary damages.

15 (d-1) This section applies only to the liability of the
16 association for exemplary damages under an insurance policy
17 delivered, issued for delivery, or renewed by the association to a
18 for-profit or not-for-profit assisted living facility on or after
19 September 1, 2003, and applies only to coverage provided under the
20 policy for any portion of the term of the policy that occurs before
21 January 1, 2006. This section applies only to the liability of the
22 association for exemplary damages with respect to a claim for which
23 a notice of loss or notice of occurrence was made, or should have
24 been made, in accordance with the terms of the policy, on or after
25 September 1, 2003, but before January 1, 2006.

26 SECTION 11. Subsection (a), Section 5, Article 21.49-3,
27 Insurance Code, is amended to read as follows:

1 (a) Each policyholder within the group of physicians and
2 health care providers, other than for-profit and not-for-profit
3 nursing homes and assisted living facilities, or within the group
4 of for-profit and not-for-profit nursing homes and assisted living
5 facilities shall have contingent liability for a proportionate
6 share of any assessment of policyholders in the applicable group
7 made under the authority of this article. Whenever a deficit, as
8 calculated pursuant to the plan of operation, is sustained with
9 respect to the group of physicians and health care providers, other
10 than for-profit and not-for-profit nursing homes and assisted
11 living facilities, or the group of for-profit and not-for-profit
12 nursing homes and assisted living facilities in any one year, its
13 directors shall levy an assessment only upon those policyholders in
14 the applicable group who held policies in force at any time within
15 the two most recently completed calendar years in which the
16 association was issuing policies preceding the date on which the
17 assessment was levied. The aggregate amount of the assessment
18 shall be equal to that part of the deficit not recouped from the
19 applicable stabilization reserve fund. The maximum aggregate
20 assessment per policyholder in the applicable group shall not
21 exceed the annual premium for the liability policy most recently in
22 effect. Subject to such maximum limitation, each policyholder in
23 the applicable group shall be assessed for that portion of the
24 deficit reflecting the proportion which the earned premium on the
25 policies of such policyholder bears to the total earned premium for
26 all policies of the association in the applicable group in the two
27 most recently completed calendar years.

1 SECTION 12. Section 1, Article 21.49-3d, Insurance Code, is
2 amended to read as follows:

3 Sec. 1. LEGISLATIVE FINDING; PURPOSE. The legislature
4 finds that the issuance of bonds to provide a method to raise funds
5 to provide professional liability insurance through the
6 association for nursing homes and assisted living facilities in
7 this state is for the benefit of the public and in furtherance of a
8 public purpose.

9 SECTION 13. Subsection (a), Section 3, Article 21.49-3d,
10 Insurance Code, is amended to read as follows:

11 (a) On behalf of the association, the Texas Public Finance
12 Authority shall issue revenue bonds to:

13 (1) fund the stabilization reserve fund for for-profit
14 and not-for-profit nursing homes and assisted living facilities
15 established under Section 4B, Article 21.49-3 of this code;

16 (2) pay costs related to issuance of the bonds; and

17 (3) pay other costs related to the bonds as may be
18 determined by the board.

19 SECTION 14. Subsection (c), Section 3A, Article 21.49-3,
20 Insurance Code, as added by Chapter 921, Acts of the 77th
21 Legislature, Regular Session, 2001, is repealed.

22 SECTION 15. This Act takes effect September 1, 2003.