

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 Chapters 921 and 1284, Acts of the 77th Legislature,  
18 Regular 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 (d) [~~(c)~~] In consultation with the Texas Department of  
15 Human Services, the commissioner shall, by rule, adopt minimum  
16 rating standards for for-profit nursing homes and for-profit  
17 assisted living facilities that must be met before a for-profit  
18 nursing home or for-profit assisted living facility may obtain  
19 coverage through the association. The standards must promote the  
20 highest practical level of care for residents of those nursing  
21 homes and assisted living facilities.

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

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

26 (1) "Health care" includes any medical or health care  
27 service, including an examination, treatment, medical diagnosis,

1 or evaluation, and care provided in an inpatient, outpatient, or  
2 residential setting.

3 (2) "Health care facility" means a facility providing  
4 health care, other than a facility described by Section 2(6) of this  
5 article.

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

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

10 (B) is not licensed to provide health care but  
11 provides health care under the direction or supervision of a  
12 licensed individual.

13 (b) After notice and opportunity for hearing, the  
14 commissioner may:

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

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

22 (c) A health care practitioner or facility designated under  
23 Subsection (b) of this section is entitled to receive coverage  
24 provided under this article in accordance with Article 5.15-1 of  
25 this code in the same manner as other health care providers  
26 described by Section 2 of this article and Section 2, Article  
27 5.15-1, of this code.

1       (d) The commissioner's order may indicate whether a health  
2 care practitioner or facility designated under Subsection (b) of  
3 this section is included under the policyholder's stabilization  
4 reserve fund established under Section 4A or 4B of this article or  
5 whether a separate policyholder's stabilization reserve fund is  
6 created. A separate policyholder's stabilization reserve fund  
7 established under this subsection operates in the same manner as a  
8 stabilization reserve fund created under Section 4B of this  
9 article.

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

13           (1) Subject to Subdivision (6) of this subsection, the  
14 rates, rating plans, rating rules, rating classification,  
15 territories, and policy forms applicable to the insurance written  
16 by the association and statistics relating thereto shall be subject  
17 to Subchapter B of Chapter 5 of the Insurance Code, as amended,  
18 giving due consideration to the past and prospective loss and  
19 expense experience for medical professional liability insurance  
20 within and without this state of all of the member companies of the  
21 association, trends in the frequency and severity of losses, the  
22 investment income of the association, and such other information as  
23 the commissioner may require; provided, that if any article of the  
24 above subchapter is in conflict with any provision of this Act, this  
25 Act shall prevail. For purposes of this article, rates, rating  
26 plans, rating rules, rating classifications, territories, and  
27 policy forms for for-profit nursing homes and for-profit assisted

1 living facilities are subject to the requirements of Article 5.15-1  
2 of this code to the same extent as not-for-profit nursing homes and  
3 not-for-profit assisted living facilities.

4 (3) Any deficit sustained by the association with  
5 respect to physicians and health care providers, other than  
6 for-profit and not-for-profit nursing homes and assisted living  
7 facilities, or by for-profit and not-for-profit nursing homes and  
8 assisted living facilities in any one year shall be recouped,  
9 pursuant to the plan of operation and the rating plan then in  
10 effect, by one or more of the following procedures in this sequence:

11 First, a contribution from the policyholder's  
12 stabilization reserve fund for physicians and health care  
13 providers, other than for-profit and not-for-profit nursing homes  
14 and assisted living facilities, established under Section 4A of  
15 this article or from the stabilization reserve fund for for-profit  
16 and not-for-profit nursing homes and assisted living facilities,  
17 established under Section 4B of this article, as appropriate, until  
18 the respective fund is exhausted;

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

21 Third, an assessment upon the members pursuant to  
22 Section 5(b) of this article. To the extent a member has paid one or  
23 more assessments and has not received reimbursement from the  
24 association in accordance with Subdivision (5) of this subsection,  
25 a credit against premium taxes under Article 4.10 of this code, as  
26 amended, shall be allowed. The tax credit shall be allowed at a  
27 rate of 20 percent per year for five successive years following the

1 year in which said deficit was sustained and at the option of the  
2 insurer may be taken over an additional number of years.

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

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

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

23 (b) Each policyholder shall pay annually into the  
24 stabilization reserve fund a charge, the amount of which shall be  
25 established annually by advisory directors chosen by health care  
26 providers, other than for-profit and not-for-profit nursing homes  
27 and assisted living facilities, and physicians eligible for



1 insurance in the association in accordance with the plan of  
2 operation. The charge shall be in proportion to each premium  
3 payment due for liability insurance through the association. Such  
4 charge shall be separately stated in the policy, but shall not  
5 constitute a part of premiums or be subject to premium taxation,  
6 servicing fees, acquisition costs, or any other such charges.

7 (c) The stabilization reserve fund shall be collected and  
8 administered by the association and shall be treated as a liability  
9 of the association along with and in the same manner as premium and  
10 loss reserves. The fund shall be valued annually by the board of  
11 directors as of the close of the last preceding year.

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

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

1 (e) The stabilization reserve fund shall be credited with  
2 all stabilization reserve fund charges collected from physicians  
3 and health care providers, other than for-profit and not-for-profit  
4 nursing homes and assisted living facilities, and shall be charged  
5 with any deficit sustained by physicians and health care providers,  
6 other than for-profit and not-for-profit nursing homes and assisted  
7 living facilities, from the prior year's operation of the  
8 association.

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

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

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

17 SECTION 9. Subsections (a), (b), (d), (e), and (h), Section  
18 4B, Article 21.49-3, Insurance Code, are amended to read as  
19 follows:

20 (a) There is hereby created a stabilization reserve fund for  
21 for-profit and not-for-profit nursing homes and assisted living  
22 facilities that shall be administered as provided in this section  
23 and in the plan of operation of the association. The stabilization  
24 reserve fund created by this section is separate and distinct from  
25 the policyholder's stabilization reserve fund for physicians and  
26 health care providers, other than for-profit and not-for-profit  
27 nursing homes and assisted living facilities, created by Section 4A

1 of this article.

2 (b) Each policyholder shall pay annually into the  
3 stabilization reserve fund a charge, the amount of which shall be  
4 established annually by advisory directors chosen by for-profit and  
5 not-for-profit nursing homes and assisted living facilities  
6 eligible for insurance in the association in accordance with the  
7 plan of operation. The charge shall be in proportion to each  
8 premium payment due for liability insurance through the  
9 association. The charge shall be separately stated in the policy,  
10 but shall not constitute a part of premiums or be subject to premium  
11 taxation, servicing fees, acquisition costs, or any other similar  
12 charges.

13 (d) Collections of the stabilization reserve fund charge  
14 shall continue only until such time as the net balance of the  
15 stabilization reserve fund is not less than the projected sum of  
16 premiums for for-profit and not-for-profit nursing homes and  
17 assisted living facilities to be written in the year following the  
18 valuation date.

19 (e) The stabilization reserve fund shall be credited with  
20 all stabilization reserve fund charges collected from for-profit  
21 and not-for-profit nursing homes and assisted living facilities and  
22 the net earnings on liability insurance policies issued to  
23 for-profit and not-for-profit nursing homes and assisted living  
24 facilities and shall be charged with any deficit sustained by  
25 for-profit and not-for-profit nursing homes and assisted living  
26 facilities from the prior year's operation of the association.

27 (h) Notwithstanding Section 11 of this article, on

1 termination of the stabilization reserve fund established under  
2 this section, all assets of the fund shall be transferred to the  
3 general revenue fund to be appropriated for purposes related to  
4 ensuring the kinds of liability insurance coverage that may be  
5 provided by the association under this article for for-profit and  
6 not-for-profit nursing homes and assisted living facilities.

7 SECTION 10. Section 4C, Article 21.49-3, Insurance Code, is  
8 amended by amending Subsections (a) and (c) and adding Subsection  
9 (d-1) to read as follows:

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

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

23 (d-1) This section applies only to the liability of the  
24 association for exemplary damages under an insurance policy  
25 delivered, issued for delivery, or renewed by the association to a  
26 for-profit or not-for-profit assisted living facility on or after  
27 September 1, 2003, and applies only to coverage provided under the

1 policy for any portion of the term of the policy that occurs before  
2 January 1, 2006. This section applies only to the liability of the  
3 association for exemplary damages with respect to a claim for which  
4 a notice of loss or notice of occurrence was made, or should have  
5 been made, in accordance with the terms of the policy, on or after  
6 September 1, 2003, but before January 1, 2006.

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

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

1 assessment per policyholder in the applicable group shall not  
2 exceed the annual premium for the liability policy most recently in  
3 effect. Subject to such maximum limitation, each policyholder in  
4 the applicable group shall be assessed for that portion of the  
5 deficit reflecting the proportion which the earned premium on the  
6 policies of such policyholder bears to the total earned premium for  
7 all policies of the association in the applicable group in the two  
8 most recently completed calendar years.

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

11 Sec. 1. LEGISLATIVE FINDING; PURPOSE. The legislature  
12 finds that the issuance of bonds to provide a method to raise funds  
13 to provide professional liability insurance through the  
14 association for nursing homes and assisted living facilities in  
15 this state is for the benefit of the public and in furtherance of a  
16 public purpose.

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

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

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

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

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

27 SECTION 14. This Act takes effect September 1, 2003.

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 421 passed the Senate on March 27, 2003, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendment on May 14, 2003, by a viva-voce vote.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 421 passed the House, with amendment, on May 1, 2003, by a non-record vote.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor