

By: Carona

S.B. No. 421

A BILL TO BE ENTITLED

AN ACT

1
2 relating to coverage of assisted living facilities under
3 professional liability insurance and the Texas Medical Liability
4 Insurance Underwriting Association.

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

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

8 (2) "Health care provider" means any person,
9 partnership, professional association, corporation, facility, or
10 institution licensed or chartered by the State of Texas to provide
11 health care as a registered nurse, hospital, dentist, podiatrist,
12 chiropractor, optometrist, pharmacist, veterinarian,
13 not-for-profit kidney dialysis center, blood bank that is a
14 nonprofit corporation chartered to operate a blood bank and which
15 is accredited by the American Association of Blood Banks,
16 for-profit nursing home or not-for-profit nursing home, for-profit
17 assisted living facility or not-for-profit assisted living
18 facility, or an officer, employee, or agent of any of them acting in
19 the course and scope of his employment.

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

22 Sec. 8. EXEMPLARY DAMAGES UNDER MEDICAL PROFESSIONAL
23 LIABILITY INSURANCE. No policy of medical professional liability
24 insurance issued to or renewed for a health care provider or

1 physician in this state may include coverage for exemplary damages
2 that may be assessed against the health care provider or physician;
3 provided, however, that the commissioner may approve an endorsement
4 form that provides for coverage for exemplary damages to be used on
5 a policy of medical professional liability insurance issued to a
6 hospital, as the term "hospital" is defined in this article, or to a
7 for-profit or not-for-profit nursing home or assisted living
8 facility.

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

11 (6) "Health care provider" means:

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

17 (i) a registered nurse, hospital, dentist,
18 podiatrist, pharmacist, chiropractor, or optometrist;

19 (ii) a for-profit or not-for-profit nursing
20 home;

21 (iii) a radiation therapy center that is
22 independent of any other medical treatment facility and which is
23 licensed by the Texas Department of Health in that agency's
24 capacity as the Texas Radiation Control Agency pursuant to the
25 provisions of Chapter 401, Health and Safety Code, and which is in
26 compliance with the regulations promulgated under that chapter;

27 (iv) a blood bank that is a nonprofit

1 corporation chartered to operate a blood bank and which is
2 accredited by the American Association of Blood Banks;

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

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

8 (vii) a for-profit or not-for-profit
9 assisted living facility; or

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

13 SECTION 4. Section 3A(c), Article 21.49-3, Insurance Code,
14 as added by Chapter 921, Acts of the 77th Legislature, Regular
15 Session, 2001, is amended to read as follows:

16 (c) In consultation with the Texas Department of Human
17 Services, the commissioner shall, by rule, adopt minimum rating
18 standards for for-profit nursing homes and for-profit assisted
19 living facilities that must be met before a for-profit nursing home
20 or for-profit assisted living facility may obtain coverage through
21 the association. The standards must promote the highest practical
22 level of care for residents of those nursing homes and assisted
23 living facilities.

24 SECTION 5. Section 3A(c), Article 21.49-3, Insurance Code,
25 as added by Chapter 1284, Acts of the 77th Legislature, Regular
26 Session, 2001, is relettered as Subsection (d) and amended to read
27 as follows:

1 (d) [~~(e)~~] A for-profit or not-for-profit nursing home or
2 assisted living facility not otherwise eligible under this section
3 for coverage from the association is eligible for coverage if the
4 nursing home or assisted living facility demonstrates, in
5 accordance with the requirements of the association, that the
6 nursing home or assisted living facility made a verifiable effort
7 to obtain coverage from authorized insurers and eligible surplus
8 lines insurers and was unable to obtain substantially equivalent
9 coverage and rates.

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

12 (b)(1) Subject to Subdivision (6) of this subsection, the
13 rates, rating plans, rating rules, rating classification,
14 territories, and policy forms applicable to the insurance written
15 by the association and statistics relating thereto shall be subject
16 to Subchapter B of Chapter 5 of the Insurance Code, as amended,
17 giving due consideration to the past and prospective loss and
18 expense experience for medical professional liability insurance
19 within and without this state of all of the member companies of the
20 association, trends in the frequency and severity of losses, the
21 investment income of the association, and such other information as
22 the commissioner may require; provided, that if any article of the
23 above subchapter is in conflict with any provision of this Act, this
24 Act shall prevail. For purposes of this article, rates, rating
25 plans, rating rules, rating classifications, territories, and
26 policy forms for for-profit nursing homes and for-profit assisted
27 living facilities are subject to the requirements of Article 5.15-1

1 of this code to the same extent as not-for-profit nursing homes and
2 not-for-profit assisted living facilities.

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

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

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

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

1 insurer may be taken over an additional number of years.

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

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

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

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

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

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

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

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

27 (e) The stabilization reserve fund shall be credited with

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

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

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

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

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

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

27 (b) Each policyholder shall pay annually into the

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

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

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

25 (h) Notwithstanding Section 11 of this article, on
26 termination of the stabilization reserve fund established under
27 this section, all assets of the fund shall be transferred to the

1 general revenue fund to be appropriated for purposes related to
2 ensuring the kinds of liability insurance coverage that may be
3 provided by the association under this article for for-profit and
4 not-for-profit nursing homes and assisted living facilities.

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

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

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

21 (d-1) This section applies only to the liability of the
22 association for exemplary damages under an insurance policy
23 delivered, issued for delivery, or renewed by the association to a
24 for-profit or not-for-profit assisted living facility on or after
25 September 1, 2003, and applies only to coverage provided under the
26 policy for any portion of the term of the policy that occurs before
27 January 1, 2006. This section applies only to the liability of the

1 association for exemplary damages with respect to a claim for which
2 a notice of loss or notice of occurrence was made, or should have
3 been made, in accordance with the terms of the policy, on or after
4 September 1, 2003, but before January 1, 2006.

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

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

1 effect. Subject to such maximum limitation, each policyholder in
2 the applicable group shall be assessed for that portion of the
3 deficit reflecting the proportion which the earned premium on the
4 policies of such policyholder bears to the total earned premium for
5 all policies of the association in the applicable group in the two
6 most recently completed calendar years.

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

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

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

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

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

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

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

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