

1-1 By: Carona S.B. No. 421
1-2 (In the Senate - Filed February 10, 2003; February 17, 2003,
1-3 read first time and referred to Committee on State Affairs;
1-4 March 20, 2003, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 9, Nays 0; March 20, 2003,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 421 By: Nelson

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to coverage of assisted living facilities under
1-11 professional liability insurance and the Texas Medical Liability
1-12 Insurance Underwriting Association.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Subdivision (2), Section 2, Article 5.15-1,
1-15 Insurance Code, is amended to read as follows:

1-16 (2) "Health care provider" means any person,
1-17 partnership, professional association, corporation, facility, or
1-18 institution licensed or chartered by the State of Texas to provide
1-19 health care as a registered nurse, hospital, dentist, podiatrist,
1-20 chiropractor, optometrist, pharmacist, veterinarian,
1-21 not-for-profit kidney dialysis center, blood bank that is a
1-22 nonprofit corporation chartered to operate a blood bank and which
1-23 is accredited by the American Association of Blood Banks,
1-24 for-profit nursing home or not-for-profit nursing home, for-profit
1-25 assisted living facility or not-for-profit assisted living
1-26 facility, or an officer, employee, or agent of any of them acting in
1-27 the course and scope of his employment, or a health care
1-28 practitioner or facility that the commissioner, in accordance with
1-29 Section 3B(b), Article 21.49-3, of this code, determines is
1-30 eligible for coverage under this article.

1-31 SECTION 2. Section 8, Article 5.15-1, Insurance Code, is
1-32 amended to read as follows:

1-33 Sec. 8. EXEMPLARY DAMAGES UNDER MEDICAL PROFESSIONAL
1-34 LIABILITY INSURANCE. No policy of medical professional liability
1-35 insurance issued to or renewed for a health care provider or
1-36 physician in this state may include coverage for exemplary damages
1-37 that may be assessed against the health care provider or physician;
1-38 provided, however, that the commissioner may approve an endorsement
1-39 form that provides for coverage for exemplary damages to be used on
1-40 a policy of medical professional liability insurance issued to a
1-41 hospital, as the term "hospital" is defined in this article, or to a
1-42 for-profit or not-for-profit nursing home or assisted living
1-43 facility.

1-44 SECTION 3. Subdivision (6), Section 2, Article 21.49-3,
1-45 Insurance Code, is amended to read as follows:

1-46 (6) "Health care provider" means:

1-47 (A) any person, partnership, professional
1-48 association, corporation, facility, or institution duly licensed
1-49 or chartered by the State of Texas to provide health care as defined
1-50 in Section 1.03(a)(2), Medical Liability and Insurance Improvement
1-51 Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), as:

1-52 (i) a registered nurse, hospital, dentist,
1-53 podiatrist, pharmacist, chiropractor, or optometrist;

1-54 (ii) a for-profit or not-for-profit nursing
1-55 home;

1-56 (iii) a radiation therapy center that is
1-57 independent of any other medical treatment facility and which is
1-58 licensed by the Texas Department of Health in that agency's
1-59 capacity as the Texas Radiation Control Agency pursuant to the
1-60 provisions of Chapter 401, Health and Safety Code, and which is in
1-61 compliance with the regulations promulgated under that chapter;

1-62 (iv) a blood bank that is a nonprofit
1-63 corporation chartered to operate a blood bank and which is

2-1 accredited by the American Association of Blood Banks;

2-2 (v) a nonprofit corporation which is
2-3 organized for the delivery of health care to the public and which is
2-4 certified under Chapter 162, Occupations Code; ~~[or]~~

2-5 (vi) a health center as defined by 42 U.S.C.
2-6 Section 254b, as amended; or

2-7 (vii) a for-profit or not-for-profit
2-8 assisted living facility; or

2-9 (B) an officer, employee, or agent of an entity
2-10 listed in Paragraph (A) of this subdivision acting in the course and
2-11 scope of that person's employment.

2-12 SECTION 4. Section 3A, Article 21.49-3, Insurance Code, as
2-13 amended by Chapter 1284, Acts of the 77th Legislature, Regular
2-14 Session, 2001, is amended to read as follows:

2-15 Sec. 3A. ELIGIBILITY FOR COVERAGE. (a) The commissioner
2-16 [board] shall establish by order the categories of physicians and
2-17 health care providers who are eligible to obtain coverage from the
2-18 association and may, from time to time, revise its order to include
2-19 or exclude from eligibility particular categories of such
2-20 physicians and health care providers.

2-21 (b) If a category of physicians or health care providers has
2-22 been excluded from eligibility to obtain coverage from the
2-23 association, the commissioner [board] may determine, after notice
2-24 of at least 10 days and a hearing, that medical liability insurance
2-25 is not available. On that determination, the category of
2-26 physicians or health care providers is eligible to obtain insurance
2-27 coverage from the association.

2-28 (c) A for-profit or not-for-profit nursing home or assisted
2-29 living facility not otherwise eligible under this section for
2-30 coverage from the association is eligible for coverage if the
2-31 nursing home or assisted living facility demonstrates, in
2-32 accordance with the requirements of the association, that the
2-33 nursing home or assisted living facility made a verifiable effort
2-34 to obtain coverage from authorized insurers and eligible surplus
2-35 lines insurers and was unable to obtain substantially equivalent
2-36 coverage and rates.

2-37 SECTION 5. Article 21.49-3, Insurance Code, is amended by
2-38 adding Section 3B to read as follows:

2-39 Sec. 3B. ELIGIBILITY OF OTHER HEALTH CARE PRACTITIONERS AND
2-40 FACILITIES. (a) In this section:

2-41 (1) "Health care" includes any medical or health care
2-42 service, including an examination, treatment, medical diagnosis,
2-43 or evaluation, and care provided in an inpatient, outpatient, or
2-44 residential setting.

2-45 (2) "Health care facility" means a facility providing
2-46 health care, other than a facility described by Section 2(6) of this
2-47 article.

2-48 (3) "Health care practitioner" means an individual,
2-49 other than an individual described by Section 2(6) of this article,
2-50 who:

2-51 (A) is licensed to provide health care; or
2-52 (B) is not licensed to provide health care but
2-53 provides health care under the direction or supervision of a
2-54 licensed individual.

2-55 (b) After notice and opportunity for hearing, the
2-56 commissioner may:

2-57 (1) determine that appropriate liability insurance
2-58 coverage written by insurers authorized to engage in business in
2-59 this state is not reasonably available to a type of health care
2-60 practitioner or health care facility; and

2-61 (2) by order designate that type of health care
2-62 practitioner or health care facility to be included as a health care
2-63 provider eligible to receive coverage under this article.

2-64 (c) A health care practitioner or facility designated under
2-65 Subsection (b) of this section is entitled to receive coverage
2-66 provided under this article in accordance with Article 5.15-1 of
2-67 this code in the same manner as other health care providers
2-68 described by Section 2 of this article and Section 2, Article
2-69 5.15-1, of this code.

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

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

3-13 (1) Subject to Subdivision (6) of this subsection, the
 3-14 rates, rating plans, rating rules, rating classification,
 3-15 territories, and policy forms applicable to the insurance written
 3-16 by the association and statistics relating thereto shall be subject
 3-17 to Subchapter B of Chapter 5 of the Insurance Code, as amended,
 3-18 giving due consideration to the past and prospective loss and
 3-19 expense experience for medical professional liability insurance
 3-20 within and without this state of all of the member companies of the
 3-21 association, trends in the frequency and severity of losses, the
 3-22 investment income of the association, and such other information as
 3-23 the commissioner may require; provided, that if any article of the
 3-24 above subchapter is in conflict with any provision of this Act, this
 3-25 Act shall prevail. For purposes of this article, rates, rating
 3-26 plans, rating rules, rating classifications, territories, and
 3-27 policy forms for for-profit nursing homes and for-profit assisted
 3-28 living facilities are subject to the requirements of Article 5.15-1
 3-29 of this code to the same extent as not-for-profit nursing homes and
 3-30 not-for-profit assisted living facilities.

3-31 (3) Any deficit sustained by the association with
 3-32 respect to physicians and health care providers, other than
 3-33 for-profit and not-for-profit nursing homes and assisted living
 3-34 facilities, or by for-profit and not-for-profit nursing homes and
 3-35 assisted living facilities in any one year shall be recouped,
 3-36 pursuant to the plan of operation and the rating plan then in
 3-37 effect, by one or more of the following procedures in this sequence:

3-38 First, a contribution from the policyholder's
 3-39 stabilization reserve fund for physicians and health care
 3-40 providers, other than for-profit and not-for-profit nursing homes
 3-41 and assisted living facilities, established under Section 4A of
 3-42 this article or from the stabilization reserve fund for for-profit
 3-43 and not-for-profit nursing homes and assisted living facilities,
 3-44 established under Section 4B of this article, as appropriate, until
 3-45 the respective fund is exhausted;

3-46 Second, an assessment upon the policyholders
 3-47 pursuant to Section 5(a) of this article;

3-48 Third, an assessment upon the members pursuant to
 3-49 Section 5(b) of this article. To the extent a member has paid one or
 3-50 more assessments and has not received reimbursement from the
 3-51 association in accordance with Subdivision (5) of this subsection,
 3-52 a credit against premium taxes under Article 4.10 of this code, as
 3-53 amended, shall be allowed. The tax credit shall be allowed at a
 3-54 rate of 20 percent per year for five successive years following the
 3-55 year in which said deficit was sustained and at the option of the
 3-56 insurer may be taken over an additional number of years.

3-57 (6) The rates applicable to professional liability
 3-58 insurance provided by the association that cover nursing homes and
 3-59 assisted living facilities that are not for profit must reflect a
 3-60 discount of 30 percent from the rates for the same coverage provided
 3-61 to others in the same category of insureds. The commissioner shall
 3-62 ensure compliance with this subdivision.

3-63 SECTION 7. Section 4A, Article 21.49-3, Insurance Code, as
 3-64 amended by Chapters 921 and 1284, Acts of the 77th Legislature,
 3-65 Regular Session, 2001, is reenacted and amended to read as follows:

3-66 Sec. 4A. POLICYHOLDER'S STABILIZATION RESERVE FUND FOR
 3-67 PHYSICIANS AND CERTAIN HEALTH CARE PROVIDERS [~~OTHER THAN FOR-PROFIT~~
 3-68 ~~AND NOT-FOR-PROFIT NURSING HOMES~~]. (a) There is hereby created a
 3-69 policyholder's stabilization reserve fund for physicians and

4-1 health care providers, other than for-profit and not-for-profit
 4-2 nursing homes and assisted living facilities, which shall be
 4-3 administered as provided herein and in the plan of operation of the
 4-4 association. The stabilization reserve fund created by this
 4-5 section is separate and distinct from the stabilization reserve
 4-6 fund for for-profit and not-for-profit nursing homes and assisted
 4-7 living facilities created by Section 4B of this article.

4-8 (b) Each policyholder shall pay annually into the
 4-9 stabilization reserve fund a charge, the amount of which shall be
 4-10 established annually by advisory directors chosen by health care
 4-11 providers, other than for-profit and not-for-profit nursing homes
 4-12 and assisted living facilities, and physicians eligible for
 4-13 insurance in the association in accordance with the plan of
 4-14 operation. The charge shall be in proportion to each premium
 4-15 payment due for liability insurance through the association. Such
 4-16 charge shall be separately stated in the policy, but shall not
 4-17 constitute a part of premiums or be subject to premium taxation,
 4-18 servicing fees, acquisition costs, or any other such charges.

4-19 (c) The stabilization reserve fund shall be collected and
 4-20 administered by the association and shall be treated as a liability
 4-21 of the association along with and in the same manner as premium and
 4-22 loss reserves. The fund shall be valued annually by the board of
 4-23 directors as of the close of the last preceding year.

4-24 (d) [~~Except as provided by Subsection (e) of this section,~~
 4-25 ~~collections~~] Collections of the stabilization reserve fund charge
 4-26 shall continue until such time as the net balance of the
 4-27 stabilization reserve fund is not less than the projected sum of
 4-28 premiums for physicians and health care providers, other than
 4-29 for-profit and not-for-profit nursing homes and assisted living
 4-30 facilities, to be written in the year following valuation date.

4-31 [~~(e) If in any fiscal year the incurred losses and defense~~
 4-32 ~~and cost-containment expenses from physicians or any single~~
 4-33 ~~category of health care provider result in a net underwriting loss~~
 4-34 ~~and exceed 25 percent of the stabilization reserve fund, as valued~~
 4-35 ~~for that year, the commissioner may by order direct the initiation~~
 4-36 ~~or continuation of the stabilization reserve fund charge for~~
 4-37 ~~physicians or that category of health care provider until the fund~~
 4-38 ~~recovers the amount by which those losses and cost-containment~~
 4-39 ~~expenses exceed 25 percent of the fund.]~~

4-40 (e) The stabilization reserve fund shall be credited with
 4-41 all stabilization reserve fund charges collected from physicians
 4-42 and health care providers, other than for-profit and not-for-profit
 4-43 nursing homes and assisted living facilities, and shall be charged
 4-44 with any deficit sustained by physicians and health care providers,
 4-45 other than for-profit and not-for-profit nursing homes and assisted
 4-46 living facilities, from the prior year's operation of the
 4-47 association.

4-48 [~~(f) The stabilization reserve fund shall be credited with~~
 4-49 ~~all stabilization reserve fund charges collected from~~
 4-50 ~~policyholders and shall be charged with any deficit from the prior~~
 4-51 ~~year's operation of the association.]~~

4-52 SECTION 8. The heading of Section 4B, Article 21.49-3,
 4-53 Insurance Code, is amended to read as follows:

4-54 Sec. 4B. STABILIZATION RESERVE FUND FOR FOR-PROFIT AND
 4-55 NOT-FOR-PROFIT NURSING HOMES AND ASSISTED LIVING FACILITIES.

4-56 SECTION 9. Subsections (a), (b), (d), (e), and (h), Section
 4-57 4B, Article 21.49-3, Insurance Code, are amended to read as
 4-58 follows:

4-59 (a) There is hereby created a stabilization reserve fund for
 4-60 for-profit and not-for-profit nursing homes and assisted living
 4-61 facilities that shall be administered as provided in this section
 4-62 and in the plan of operation of the association. The stabilization
 4-63 reserve fund created by this section is separate and distinct from
 4-64 the policyholder's stabilization reserve fund for physicians and
 4-65 health care providers, other than for-profit and not-for-profit
 4-66 nursing homes and assisted living facilities, created by Section 4A
 4-67 of this article.

4-68 (b) Each policyholder shall pay annually into the
 4-69 stabilization reserve fund a charge, the amount of which shall be

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

5-10 (d) Collections of the stabilization reserve fund charge
 5-11 shall continue only until such time as the net balance of the
 5-12 stabilization reserve fund is not less than the projected sum of
 5-13 premiums for for-profit and not-for-profit nursing homes and
 5-14 assisted living facilities to be written in the year following the
 5-15 valuation date.

5-16 (e) The stabilization reserve fund shall be credited with
 5-17 all stabilization reserve fund charges collected from for-profit
 5-18 and not-for-profit nursing homes and assisted living facilities and
 5-19 the net earnings on liability insurance policies issued to
 5-20 for-profit and not-for-profit nursing homes and assisted living
 5-21 facilities and shall be charged with any deficit sustained by
 5-22 for-profit and not-for-profit nursing homes and assisted living
 5-23 facilities from the prior year's operation of the association.

5-24 (h) Notwithstanding Section 11 of this article, on
 5-25 termination of the stabilization reserve fund established under
 5-26 this section, all assets of the fund shall be transferred to the
 5-27 general revenue fund to be appropriated for purposes related to
 5-28 ensuring the kinds of liability insurance coverage that may be
 5-29 provided by the association under this article for for-profit and
 5-30 not-for-profit nursing homes and assisted living facilities.

5-31 SECTION 10. Section 4C, Article 21.49-3, Insurance Code, is
 5-32 amended by amending Subsections (a) and (c) and adding Subsection
 5-33 (d-1) to read as follows:

5-34 (a) The association is not liable for exemplary damages
 5-35 under a professional liability insurance policy that covers a
 5-36 for-profit or [and] not-for-profit nursing home or assisted living
 5-37 facility and that excludes coverage for exemplary damages awarded
 5-38 in relation to a covered claim awarded under Chapter 41, Civil
 5-39 Practice and Remedies Code, or any other law. This subsection
 5-40 applies without regard to the application of the common law theory
 5-41 of recovery commonly known in Texas as the "Stowers Doctrine." This
 5-42 subsection does not affect the application of that doctrine to the
 5-43 liability of the association for compensatory damages.

5-44 (c) This section does not prohibit a for-profit or
 5-45 not-for-profit nursing home or assisted living facility from
 5-46 purchasing a policy to cover exemplary damages.

5-47 (d-1) This section applies only to the liability of the
 5-48 association for exemplary damages under an insurance policy
 5-49 delivered, issued for delivery, or renewed by the association to a
 5-50 for-profit or not-for-profit assisted living facility on or after
 5-51 September 1, 2003, and applies only to coverage provided under the
 5-52 policy for any portion of the term of the policy that occurs before
 5-53 January 1, 2006. This section applies only to the liability of the
 5-54 association for exemplary damages with respect to a claim for which
 5-55 a notice of loss or notice of occurrence was made, or should have
 5-56 been made, in accordance with the terms of the policy, on or after
 5-57 September 1, 2003, but before January 1, 2006.

5-58 SECTION 11. Subsection (a), Section 5, Article 21.49-3,
 5-59 Insurance Code, is amended to read as follows:

5-60 (a) Each policyholder within the group of physicians and
 5-61 health care providers, other than for-profit and not-for-profit
 5-62 nursing homes and assisted living facilities, or within the group
 5-63 of for-profit and not-for-profit nursing homes and assisted living
 5-64 facilities shall have contingent liability for a proportionate
 5-65 share of any assessment of policyholders in the applicable group
 5-66 made under the authority of this article. Whenever a deficit, as
 5-67 calculated pursuant to the plan of operation, is sustained with
 5-68 respect to the group of physicians and health care providers, other
 5-69 than for-profit and not-for-profit nursing homes and assisted

6-1 living facilities, or the group of for-profit and not-for-profit
6-2 nursing homes and assisted living facilities in any one year, its
6-3 directors shall levy an assessment only upon those policyholders in
6-4 the applicable group who held policies in force at any time within
6-5 the two most recently completed calendar years in which the
6-6 association was issuing policies preceding the date on which the
6-7 assessment was levied. The aggregate amount of the assessment
6-8 shall be equal to that part of the deficit not recouped from the
6-9 applicable stabilization reserve fund. The maximum aggregate
6-10 assessment per policyholder in the applicable group shall not
6-11 exceed the annual premium for the liability policy most recently in
6-12 effect. Subject to such maximum limitation, each policyholder in
6-13 the applicable group shall be assessed for that portion of the
6-14 deficit reflecting the proportion which the earned premium on the
6-15 policies of such policyholder bears to the total earned premium for
6-16 all policies of the association in the applicable group in the two
6-17 most recently completed calendar years.

6-18 SECTION 12. Section 1, Article 21.49-3d, Insurance Code, is
6-19 amended to read as follows:

6-20 Sec. 1. LEGISLATIVE FINDING; PURPOSE. The legislature
6-21 finds that the issuance of bonds to provide a method to raise funds
6-22 to provide professional liability insurance through the
6-23 association for nursing homes and assisted living facilities in
6-24 this state is for the benefit of the public and in furtherance of a
6-25 public purpose.

6-26 SECTION 13. Subsection (a), Section 3, Article 21.49-3d,
6-27 Insurance Code, is amended to read as follows:

6-28 (a) On behalf of the association, the Texas Public Finance
6-29 Authority shall issue revenue bonds to:

6-30 (1) fund the stabilization reserve fund for for-profit
6-31 and not-for-profit nursing homes and assisted living facilities
6-32 established under Section 4B, Article 21.49-3 of this code;

6-33 (2) pay costs related to issuance of the bonds; and

6-34 (3) pay other costs related to the bonds as may be
6-35 determined by the board.

6-36 SECTION 14. Subsection (c), Section 3A, Article 21.49-3,
6-37 Insurance Code, as added by Chapter 921, Acts of the 77th
6-38 Legislature, Regular Session, 2001, is repealed.

6-39 SECTION 15. This Act takes effect September 1, 2003.

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