

1-1 By: Carona S.B. No. 1192
1-2 (In the Senate - Filed March 12, 2003; March 19, 2003, read
1-3 first time and referred to Committee on State Affairs;
1-4 May 13, 2003, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 5, Nays 0; May 13, 2003,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1192 By: Nelson

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

1-10 relating to the operation of the Texas Property and Casualty
1-11 Insurance Guaranty Association.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Subdivisions (8) and (9), Section 5, Article
1-14 21.28-C, Insurance Code, are amended to read as follows:

1-15 (8) "Covered claim" means an unpaid claim of an
1-16 insured or third-party liability claimant that arises out of and is
1-17 within the coverage and not in excess of the applicable limits of an
1-18 insurance policy to which this Act applies, issued or assumed
1-19 (whereby an assumption certificate is issued to the insured) by an
1-20 insurer licensed to do business in this state, if that insurer
1-21 becomes an impaired insurer and the third-party claimant or
1-22 liability claimant or insured is a resident of this state at the
1-23 time of the insured event, or the claim is a first-party claim for
1-24 damage to property that is permanently located in this state. A
1-25 corporation or other entity that is not an individual is considered
1-26 to be a resident of the state in which the entity's principal place
1-27 of business is located. "Covered claim" shall also include
1-28 unearned premiums, but in no event shall a covered claim for
1-29 unearned premiums exceed \$25,000. Individual covered claims
1-30 (including any and all derivative claims by more than one person
1-31 which arise from the same occurrence, which shall be considered
1-32 collectively as a single claim under this Act) shall be limited to
1-33 \$300,000, except that the association shall pay the full amount of
1-34 any covered claim arising out of a workers' compensation claim made
1-35 under a workers' compensation policy. "Covered claim" shall not
1-36 include any amount sought as a return of premium under a
1-37 retrospective rating plan or any amount due any reinsurer, insurer,
1-38 self-insurer, insurance pool, [or] underwriting association,
1-39 self-insured governmental entity, or self-insurance pool or joint
1-40 insurance fund created by one or more political subdivisions under
1-41 Chapter 791, Government Code, or Chapter 504, Labor Code, as
1-42 subrogation recoveries, reinsurance recoveries, contribution,
1-43 indemnification, or otherwise, and the insured of an impaired
1-44 insurer is not liable, and the reinsurer, insurer, self-insurer,
1-45 insurance pool, underwriting association, self-insured
1-46 governmental entity, or self-insurance pool or joint insurance fund
1-47 created by one or more political subdivisions under Chapter 791,
1-48 Government Code, or Chapter 504, Labor Code, is not entitled to sue
1-49 or continue a suit against that insured, for any subrogation
1-50 recovery, reinsurance recovery, contribution, or indemnity
1-51 [asserted by a reinsurer, insurer, insurance pool, or underwriting
1-52 association] to the extent of the applicable liability limits of
1-53 the policy written and issued to the insured by the insolvent
1-54 insurer. "Covered claim" shall not include supplementary payment
1-55 obligations, including adjustment fees and expenses, attorney's
1-56 fees and expenses, court costs, interest and penalties, and
1-57 interest and bond premiums incurred prior to the determination that
1-58 an insurer is an impaired insurer under this Act. "Covered claim"
1-59 shall not include any prejudgment or postjudgment interest that
1-60 accrues subsequent to the determination that an insurer is an
1-61 impaired insurer under this Act. "Covered claim" shall not include
1-62 any claim for recovery of punitive, exemplary, extracontractual, or
1-63 bad-faith damages, whether sought as a recovery against the

2-1 insured, insurer, guaranty association, receiver, special deputy
 2-2 receiver, or commissioner, awarded in a court judgment against an
 2-3 insured or insurer. Notwithstanding any other provision of this
 2-4 Act, the association's liability for shareholder derivative
 2-5 actions or other claims for economic loss incurred by a claimant in
 2-6 the claimant's capacity as a shareholder under an insurance policy
 2-7 placed in force on or after January 1, 1992, is limited to \$300,000
 2-8 for each policy, inclusive of defense costs, regardless of the
 2-9 number of claimants under each policy. "Covered claim" shall not
 2-10 include, and the association shall not have any liability to an
 2-11 insured or third-party liability claimant, for its failure to
 2-12 settle a liability claim within the limits of a covered claim under
 2-13 this Act. With respect to a covered claim for unearned premiums,
 2-14 both persons who were residents of this state at the time the policy
 2-15 was issued and persons who are residents of this state at the time
 2-16 the company is found to be an impaired insurer shall be considered
 2-17 to have covered claims under this Act. If the impaired insurer has
 2-18 insufficient assets to pay the expenses of administering the
 2-19 receivership or conservatorship estate, that portion of the
 2-20 expenses of administration incurred in the processing and payment
 2-21 of claims against the estate shall also be a covered claim under
 2-22 this Act.

2-23 (9) "Impaired insurer" means:

2-24 (A) a member insurer that is placed in temporary
 2-25 or permanent receivership or liquidation under an order of a court
 2-26 of competent jurisdiction, including the courts of any other state,
 2-27 based on a finding of insolvency and that has been designated an
 2-28 impaired insurer by the commissioner; or

2-29 (B) a member insurer placed in conservatorship
 2-30 after it has been determined by the commissioner to be insolvent and
 2-31 that has been designated an impaired insurer by the commissioner.

2-32 SECTION 2. Subsections (a) and (d), Section 8, Article
 2-33 21.28-C, Insurance Code, are amended to read as follows:

2-34 (a) The association shall pay covered claims that exist
 2-35 before the designation of impairment or that arise within 30 days
 2-36 after the date of the designation of impairment, before the policy
 2-37 expiration date if the policy expiration date is within 30 days
 2-38 after the date of the designation of impairment, or before the
 2-39 insured replaces the policy or causes its cancellation if the
 2-40 insured does so within 30 days after the date of the designation.
 2-41 The obligation is satisfied by paying to the claimant the full
 2-42 amount of a covered claim for benefits. The association's
 2-43 liability is limited to the payment of covered claims. The
 2-44 association has no liability for any other claim or damages,
 2-45 including claims for recovery of attorney's fees, prejudgment or
 2-46 postjudgment interest, or penalties, extracontractual damages,
 2-47 multiple damages, or exemplary damages, or any other amount sought
 2-48 by or on behalf of any insured or claimant or any other provider of
 2-49 goods or services retained by any insured or claimant in connection
 2-50 with the assertion or prosecution of any claims, without regard to
 2-51 whether the claims are covered, against the insured or an impaired
 2-52 insurer, the impaired insurer, the guaranty association, the
 2-53 receiver, the special deputy receiver, the commissioner, or the
 2-54 liquidator. This subsection does not exclude the payment of
 2-55 workers' compensation benefits or other liabilities or penalties
 2-56 authorized by Title 5, Labor Code, arising from the association's
 2-57 processing and payment of workers' compensation benefits after the
 2-58 designation of impairment.

2-59 (d) The association shall investigate and adjust,
 2-60 compromise, settle, and pay covered claims to the extent of the
 2-61 association's obligation and deny all other claims. The
 2-62 association may review settlements, releases, and judgments to
 2-63 which the impaired insurer or its insureds were parties to
 2-64 determine the extent to which those settlements, releases, and
 2-65 judgments may be properly contested. Any judgment taken before the
 2-66 designation of impairment in which an insured under a liability
 2-67 policy or the insurer failed to exhaust all appeals, any judgment
 2-68 taken by default or consent against an insured or the impaired
 2-69 insurer, and any settlement, release, or judgment entered into by

3-1 the insured or the impaired insurer, is not binding on the
 3-2 association, and may not be considered as evidence of liability or
 3-3 of damages in connection with any claim brought against the
 3-4 association or any other party under this Act. Notwithstanding any
 3-5 other provision of this Act, a covered claim shall not include any
 3-6 claim filed with the guaranty association on a date that is later
 3-7 than ~~[after the later of the final date for filing claims against~~
 3-8 ~~the liquidator or receiver of an insolvent insurer or]~~ eighteen
 3-9 months after the date of the order of liquidation, except that a
 3-10 claim for workers' compensation benefits is governed by Title 5,
 3-11 Labor Code, and the applicable rules of the Texas Workers'
 3-12 Compensation Commission.

3-13 SECTION 3. Subsection (b), Section 11, Article 21.28-C,
 3-14 Insurance Code, is amended to read as follows:

3-15 (b) The association is entitled to recover from the
 3-16 following persons the amount of any covered claim and costs of
 3-17 defense paid on behalf of that person under this Act:

3-18 (1) any insured, other than an insured who is exempt
 3-19 from federal income tax under Section 501(a) of the Internal
 3-20 Revenue Code of 1986 (26 U.S.C. Section 501(a)) by being described
 3-21 by Section 501(c)(3) of that code, whose net worth on December 31 of
 3-22 the year next preceding the date the insurer becomes an impaired
 3-23 insurer exceeds \$50 million, provided that an insured's net worth
 3-24 on that date is considered to include the aggregate net worth of the
 3-25 insured and all the insured's parent, subsidiary, and affiliated
 3-26 companies as computed on a consolidated basis, and whose
 3-27 [liability] obligations under a liability [to other persons under
 3-28 a] policy or contract of insurance written, issued, and placed in
 3-29 force after January 1, 1992, are satisfied in whole or in part by
 3-30 payments made under this Act; and

3-31 (2) any person who is an affiliate of the impaired
 3-32 insurer and whose liability obligations to other persons are
 3-33 satisfied in whole or in part by payments made under this Act.

3-34 SECTION 4. Article 21.28-C, Insurance Code, is amended by
 3-35 adding Section 11A to read as follows:

3-36 Sec. 11A. NET WORTH EXCLUSION. (a) The association is not
 3-37 liable to pay a first-party claim of an insured whose net worth on
 3-38 December 31 of the year next preceding the date the insurer becomes
 3-39 an impaired insurer exceeds \$50 million.

3-40 (b) The net worth of an insured for purposes of this section
 3-41 includes the aggregate net worth of the insured and all the
 3-42 insured's parent, subsidiary, and affiliated companies computed on
 3-43 a consolidated basis.

3-44 (c) This section does not exclude the payment of a covered
 3-45 claim for workers' compensation benefits otherwise payable under
 3-46 this Act.

3-47 SECTION 5. Section 12, Article 21.28-C, Insurance Code, is
 3-48 amended to read as follows:

3-49 Sec. 12. NONDUPLICATION OF RECOVERY. (a) Any [A] person
 3-50 who has a claim [against an insurer] under [any provision in] an
 3-51 insurance policy, without regard to whether the policy is issued by
 3-52 a member insurer, other than a policy of an impaired insurer, that
 3-53 arises from the same facts, injury, or loss that gave rise to a
 3-54 claim against an impaired insurer or its insured, is required to
 3-55 first [is also a covered claim shall] exhaust [first] the person's
 3-56 rights under the policy, including any claim for indemnity or
 3-57 medical benefits under any workers' compensation, health,
 3-58 disability, uninsured motorist, personal injury protection,
 3-59 medical payment, liability, or other policy, and the right to
 3-60 defense under the policy. An amount payable as a covered claim
 3-61 under this Act is reduced by the full applicable limits of the other
 3-62 insurance policy and the association shall receive a full credit in
 3-63 the amount of the full applicable limits, except that a covered
 3-64 claim for workers' compensation benefits is subject only to
 3-65 reduction by a third-party liability recovery under Section
 3-66 417.002, Labor Code [The association shall have a credit or setoff
 3-67 against any amount of benefits which would otherwise be payable by
 3-68 the association to the claimant under this Act, in the amount of the
 3-69 claimant's recovery under any policy issued by an unimpaired

4-1 ~~insurer~~]. Subject to the provisions of Subsection (a-1) below, the
4-2 association's credit or setoff under this section shall be deducted
4-3 from damages incurred by the claimant, and the remaining sum shall
4-4 be the maximum amount payable by the association, except that the
4-5 association's liability shall not exceed \$300,000 [~~\$100,000~~] or the
4-6 limits of the policy under which the claim is made, whichever is
4-7 less. To the extent that the association's obligation is reduced by
4-8 the application of this subsection, the liability of the person
4-9 insured by the impaired insurer's policy for the claim is reduced in
4-10 the same amount.

4-11 (a-1) Notwithstanding Subsection (a) of this section, if a
4-12 claimant is seeking recovery of policy benefits that, but for the
4-13 insolvency of the impaired insurer, would be subject to lien or
4-14 subrogation by a workers' compensation insurer, health insurer or
4-15 any other insurer, whether impaired or not, then the association's
4-16 credit or offset shall be deducted from the damages incurred by the
4-17 claimant or the limits of the policy under which the claim is made,
4-18 whichever is less. In no event shall a claimant's recovery under
4-19 this Act result in a total recovery to the claimant that is greater
4-20 than that which would have resulted but for the insolvency of the
4-21 impaired insurer. Subject to Section 5(8) of this Act and Title 5,
4-22 Labor Code, a claim for workers' compensation benefits [~~claimant's~~
4-23 ~~recovery~~] under this Act may not result in a recovery to the
4-24 claimant that is less than that which would have resulted but for
4-25 the insolvency of the impaired insurer.

4-26 (b) A person who has a claim that may be recovered under more
4-27 than one insurance guaranty association or its equivalent shall
4-28 seek recovery first from the association of the place of residence
4-29 of the insured, except that if it is a first-party claim for damage
4-30 to property with a permanent location, the person shall seek
4-31 recovery first from the association of the location of the
4-32 property, and if it is a workers' compensation claim the person
4-33 shall seek recovery first from the association of the residence of
4-34 the claimant. The association shall have a credit or setoff against
4-35 any amount of benefits under this Act, in the amount of the
4-36 claimant's recovery from the guaranty association or equivalent.
4-37 Subject to the provisions of Subsection (b-1) below, the
4-38 association's credit or setoff under this Section shall be deducted
4-39 from the damages incurred by the claimant, and the remaining sum
4-40 shall be the maximum amount payable by the association, except that
4-41 the association's liability shall not exceed \$300,000 [~~\$100,000~~].

4-42 (b-1) Notwithstanding Subsection (b) of this section, if a
4-43 claimant is seeking recovery of policy benefits that, but for the
4-44 insolvency of the impaired insurer, would be subject to lien or
4-45 subrogation by a workers' compensation insurer, health insurer or
4-46 any other insurer, whether impaired or not, then the association's
4-47 credit or offset shall be deducted from the damages incurred by the
4-48 claimant or the limits of the policy under which the claim is made,
4-49 whichever is less. In no event shall a claimant's recovery under
4-50 this Act result in a total recovery to the claimant that is greater
4-51 than that which would have resulted but for the insolvency of the
4-52 impaired insurer. Subject to Section 5(8) of this Act and Title 5,
4-53 Labor Code, a claim for workers' compensation benefits [~~claimant's~~
4-54 ~~recovery~~] under this Act shall not result in a recovery to the
4-55 claimant that is less than that which would have resulted but for
4-56 the insolvency of the impaired insurer.

4-57 SECTION 6. Section 17, Article 21.28-C, Insurance Code, is
4-58 amended to read as follows:

4-59 Sec. 17. STAY OF PROCEEDINGS. (a) All proceedings in
4-60 which an impaired insurer is a party or is obligated to defend a
4-61 party in any court in this state, except proceedings directly
4-62 related to the receivership or instituted by the receiver, shall be
4-63 stayed as to all parties and for all purposes for six months and any
4-64 additional time thereafter as may be determined by the court from
4-65 the date of the designation of impairment or an ancillary
4-66 proceeding is instituted in the state, whichever is later, to
4-67 permit proper defense by [~~the receiver or~~] the association of all
4-68 pending causes of action. A deadline imposed under the Texas Rules
4-69 of Civil Procedure or the Texas Rules of Appellate Procedure is

5-1 tolled during the stay. The court in which the delinquency
5-2 proceeding is pending has exclusive jurisdiction regarding the
5-3 application, enforcement, and extension of the stay and may issue
5-4 injunctions or other similar orders to enforce the stay. If the
5-5 impaired insurer is not domiciled in this state, the commissioner
5-6 may bring an ancillary delinquency proceeding under Section 13,
5-7 Article 21.28 of this code, for the limited purpose of determining
5-8 the application, enforcement, and extension of the stay.

5-9 (b) As to any covered claims arising from a judgment under
5-10 any decision, verdict, or finding based on the default of the
5-11 impaired insurer or its failure to defend an insured, the
5-12 association either on its own behalf or on behalf of the insured
5-13 shall be entitled, upon application, to have the judgment, order,
5-14 decision, verdict, or finding set aside by the same court or
5-15 administrator that made the judgment, order, decision, verdict, or
5-16 finding and shall be permitted to defend the claim on the merits.
5-17 The receiver or statutory successor of an impaired insurer covered
5-18 by this Act shall permit access by the board or its authorized
5-19 representative to records of the impaired insurer as are necessary
5-20 for the board in carrying out its functions under this Act with
5-21 regard to covered claims. In addition, the receiver or statutory
5-22 successor shall provide the board or its representative with copies
5-23 of the records on request of the board and at the expense of the
5-24 board.

5-25 SECTION 7. Subsection (b), Section 25, Article 21.28-C,
5-26 Insurance Code, is amended to read as follows:

5-27 (b) This section does not apply to a conflict between this
5-28 Act and:

5-29 (1) Subtitle A, Title 5, Labor Code, except that this
5-30 Act controls with respect to subrogation rights of an insurance
5-31 carrier under Chapter 417, Labor Code, against an insured of an
5-32 impaired insurer or the association [the Texas Workers'
5-33 Compensation Act (Article 8308-1.01, et seq., Vernon's Texas Civil
5-34 Statutes)];

5-35 (2) Subchapter D, Chapter 5, of this code; or

5-36 (3) Article 5.76-2, 5.76-3, 5.76-4, or 5.76-5 of this
5-37 code.

5-38 SECTION 8. This Act applies only to a liquidation or
5-39 receivership of an impaired insurer that is begun on or after the
5-40 effective date of this Act.

5-41 SECTION 9. This Act takes effect immediately if it receives
5-42 a vote of two-thirds of all the members elected to each house, as
5-43 provided by Section 39, Article III, Texas Constitution. If this
5-44 Act does not receive the vote necessary for immediate effect, this
5-45 Act takes effect September 1, 2003.

5-46 * * * * *