

BILL ANALYSIS

C.S.H.B. 2157
By: Smithee
Insurance
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Article 21.28 of the Texas Insurance Code provides for receivership proceedings to rehabilitate or liquidate an insurer. In a receivership, the insurer's assets are collected and distributed to its creditors under the supervision of a court. When a receivership is initiated, the court appoints the Commissioner of Insurance as the receiver. The Receiver can appoint a special deputy receiver to administer the receivership.

Article 21.28 was enacted in 1952. Many of its essential components have not been comprehensively revised since 1955. In 1978, the National Association of Insurance Commissioners ("NAIC") adopted a receivership model act. This model act has been updated by an NAIC working group over the last 3 years. Interested parties, including insurance trade associations and guaranty funds, have been involved in the drafting process.

HB 2157 adopts the draft NAIC Insurer Receivership Model Act. The model contains procedures that are designed to protect the interest of policyholders, claimants and creditors by improving the efficiency of insurance receiverships. The adoption of this model will clarify the law, minimize uncertainty and litigation, and promote cooperation in multi-state receiverships. The bill also gives the Commissioner of Insurance additional authority to act sooner to take control of a failed insurer.

The Committee Substitute adopts recent revisions to the model act adopted by the NAIC working group; adds contracting requirements that currently exist in article 21.28, and incorporates changes to article 21.28-C to harmonize with the model act.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1 Amends Title 1, Insurance Code by adding Chapter 21A, INSURER RECEIVERSHIP ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 21A.001. Construction and Purpose. Provides that the chapter does not limit the powers granted under other provisions of the law, is cumulative and in addition to other laws, and is liberally construed to achieve its purpose. Provides that the purpose of the chapter is to protect the interests of insureds, claimants, creditors and the public. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.002. Conflicts of Law. Provides that this chapter and related laws governing guaranty associations are construed together in a consistent manner, and prevail in event of a conflict. (Note: this is similar to the provision currently contained in article 21.28, §16.)

Sec. 21A.003 Persons Covered. Provides a comprehensive list of persons, corporations, associations, or entities that are subject to delinquency proceedings. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.004. Definitions. Provides definitions for terms used in the chapter. *Committee Substitute changes: editorial clarifications. The definition for the term “insolvent” is amended to include a failure to maintain capital requirements.*

Sec. 21A.005. Jurisdiction and Venue. Provides that a delinquency proceeding must be filed in a district court in Travis County. *Committee Substitute changes: editorial clarifications. Clarifies jurisdiction of the receivership court to resolve a guaranty association’s obligations under a plan of rehabilitation.*

Sec. 21A.006. Exemption from Fees. Exempts the receiver from paying any filing, recording, transcript, or authenticating fees.

Sec. 21A.007. Notice and Hearing on Matters Submitted by the Receiver for Receivership Court Approval. Establishes requirements for notice to interested parties, and procedures for hearings of matters submitted by to the receivership court for approval. *Committee Substitute changes: editorial clarifications.*

Sec.21A.008. Injunctions and Orders. Provides that the receivership court may issue orders, including stays or injunctions, to carry out the provisions of the act. Provides that the filing of a receivership petition acts as a stay against certain actions against the insurer and its assets. *Committee Substitute changes: editorial clarifications. The last sentence of Subsection D has been deleted to avoid a conflict with article 21.28-C of the Insurance Code.*

Sec, 21A.009. Statutes of Limitations. Provides for limitation periods for actions brought by the receiver. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.010. Cooperation of Officers, Owners, and Employees. Requires that those acting on behalf of an insurer in receivership cooperate with the receiver or commissioner, and provides for penalties for a violation of orders. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.011 Actions by and against the Receiver. Addresses applicability of defenses to actions brought by the receiver. Subsection (f) provides that the receiver is not considered a governmental entity for the purpose of any state law permitting the award of fees against a state agency. (Note: Subsection (f) is similar to the article 21.28, §2(l).) *Committee Substitute changes: editorial clarifications, and changes related to treatment of obligations under bonds. (Note: Sec. 21A.011 was contained in Sec.21A.012 in the original bill).*

Sec. 21A.012. Unrecorded Obligations and Defenses of Affiliates. Provides requirements for documentation related to obligations of affiliates of an insurer. *Committee Substitute changes: editorial clarifications. (Note: Sec. 21A.012 was contained in Sec. 21A.203) in the original bill.*

Sec. 21A.013. Executory Contracts. Allows the receiver to assume or reject any executory contract or unexpired lease. *Committee Substitute changes: Provision now applies to any type of receivership (e.g., rehabilitation), and is not restricted to liquidations. Subsection (e) provides for the filing of claims for contracts that are rejected. (Note Sec. 21A.013 was contained in Sec. 21A.155 in the original bill.)*

Sec. 21A.0135. Contracts for Special Deputies. Requires competitive bids for SDR contracts. Requires the Receiver to implement procedures to promote the participation of historically underutilized business, and requires SDRs to develop a subcontractng plan for historically underutilized business. *Committee Substitute changes: this is a new provision added in the Committee Substitute, which is based on article 21.28, §2.*

Sec. 21A.014. Immunity and Indemnification of the Receiver. Provides immunity to the receiver, assistants and contractors for actions or omissions, except for intentional misconduct. Allows for indemnification for the receiver and assistants. *Committee Substitute changes: editorial clarifications. (Note: Sec. 21A.014 was contained in Sec.21A.013 in the original bill.)*

Sec. 21A.015. Approval and Payment of Expenses. Provides process for approval and payment of expenses of the receivership. *Committee Substitute changes: editorial clarifications, changes requirements for reporting the Receiver's expenses to the Court . (Note: Sec. 21A.015 was contained in Sec.21A.014 in the original bill.)*

Sec. 21A.016. Financial Reporting. Provides timeframes for filing financial reports to the receivership court and filings and formats for reports by the guaranty associations to the liquidator. *Committee Substitute changes: adds minimum standards for reporting and filing requirements. (Note: Sec. 21A.016 was contained in Sec.21A.015 in the original bill.)*

Sec.21A.017. Records. Vests the receiver with title to all books and records; gives the receiver authority to certify the records. Also exempts the records from Chapter 552, Government Code. (Note: this exemption is similar to the provision currently contained in article 21.28, §11.) *Committee Substitute changes: adds requirements for the release of records to the Receiver or Guaranty Association. (Note: Sec. 21A.017 was contained in Sec.21A.016 in the original bill.)*

Sec. 21A.018-21A.050 Reserved for Expansion

SUBCHAPTER B. PROCEEDINGS PRIOR TO RECEIVERSHIP ORDER

Sec. 21A.051. Receivership Court's Seizure Order. Provides that the receivership court may issue an *ex parte* seizure order without notice of hearing, which allows the seizure of an insurer for a limited duration. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.052. Commencement of Formal Delinquency Proceeding. Defines grounds a petition for formal delinquency proceedings. *Committee Substitute changes: editorial clarifications; changes to notice requirements.*

Sec. 21A.053. Summons and Summary Hearing. Provides for summary hearings by the court on receivership petitions.

Sec. 21A.054. Proceedings for Expedited Trial; Continuances, Discovery, Evidence. Provides that the receivership court expedite receivership hearings, and grant continuances only in extreme circumstances. Also allows for limited discovery. *Committee Substitute changes: editorial clarifications*

Sec. 21A.055. Decisions and Appeals. Provides timetable for entry of judgment, and procedures for appeals.

Sec. 21A.056. Confidentiality. Establishes confidentiality of all proceedings for a seizure order, and defines conditions for making such records public. Also permits sharing of information with other state insurance departments or guaranty associations where the confidentiality of those records can be maintained. *Committee Substitute changes: includes procedures for reporting of workers compensation claims from TWCC.*

Sec. 21A.057. Grounds for Conservation, Rehabilitation, or Liquidation. Defines the grounds under which the commissioner may petition the court to conserve, rehabilitate, or liquidate a domestic insurer, an alien insurer domiciled in the state, or an unauthorized insurer. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.058. Entry of Order. States that the receivership court shall grant the petition and issue the order, if commissioner establishes the grounds provided in Sec. 21A.057. *Committee Substitute changes: deletes reference to conservation orders.*

SUBCHAPTER C. REHABILITATION

Sec. 21A.101. Rehabilitation Orders. Provides for the requirements and contents of a rehabilitation order. *Committee Substitute changes: deletes requirement for notices to guaranty associations.*

Sec. 21A.102. Powers and Duties of the Rehabilitator. Gives the rehabilitator authority to direct and manage the insurer, to hire and discharge employees, and to deal with the property and business of the insurer. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.103. Filing of Rehabilitation Plans. Provides that the rehabilitator shall file a rehabilitation plan with the receivership court, and defines provisions that a plan must contain. *Committee Substitute changes: editorial clarifications, changes certain provisions regarding rehabilitation plans involving a life insurer.*

Sec. 21A.104. Termination of Rehabilitation. Establishes conditions for terminating the rehabilitation, moving for liquidation, or restoring the insurer to possession of its property and control of the business. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.105. Coordination with Guaranty Associations. Provides for information sharing with guaranty associations to ensure an orderly transition to liquidation. *Committee Substitute changes: Requires the receiver to advise potentially obligated guaranty associations of the entry of a rehabilitation order. Adds Subsection (e), providing that the list of information enumerated in the section is not exclusive. Title changed from Orderly Transition to Liquidation.*

SECTION 21A.106-21A.150 Reserved for Expansion

SUBCHAPTER D. LIQUIDATION

Sec. 21A.151. Liquidation Orders. Provides for the requirements and contents of a liquidation order. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.152. Continuance of Coverage. Establishes timeframes for continuation of insurance coverage by an insurer in liquidation. Provides for the cancellation of certain reinsurance contracts. *Committee Substitute changes: editorial clarifications; also includes the insertion of the word “not” that was omitted in Subsection (f).*

Sec. 21A.153. Sale or Dissolution of the Insurer’s Corporate Entity. Authorizes the receiver to sell the insurer’s corporate entity or charter and its licenses, with court approval, and describes steps for dissolution of the charter if not sold. *Committee Substitute changes: editorial clarifications; provides that this section applies notwithstanding the entry of a liquidation order.*

Sec. 21A.154. Powers of the Liquidator. Describes liquidator’s authority to retain assistants, appoint deputies, and take action on behalf of the insurer. *Committee Substitute changes: editorial clarifications; adds provisions related to transfer of obligations under surety bonds.*

Sec. 21A.155. Notice to Creditors and Others. Establishes how notice of the liquidation order shall be given and to whom it shall be given, and defines contents of such notice. *Committee Substitute changes: editorial clarifications. Subsection (b), which relates to notices in ancillary receiverships, is deleted due to elimination of ancillary receiverships. Subsection (f) is added to provide for notices to TWCC. (Note: Sec. 21A.155 was contained in Sec.21A.156 in the original bill.)*

Sec.21A.156. Duties of Agents. Compels agents of the insurer to provide information in their records related to any policy issued by the insurer, and establishes penalties for failure to comply. *Committee Substitute changes: editorial clarifications. (Note: Sec. 21A.156 was contained in Sec.21A.157 in the original bill.)*

Section 21A.157-21A.200 Reserved for Expansion

SUBCHAPTER E. ASSET RECOVERY

Sec.21A.201. Turnover of Assets. Establishes procedures for the liquidator to make demand for the insurer's funds or property; and recover costs and expenses to recover the funds or property. *Committee Substitute changes: editorial clarifications; Subsection (e), which provides the requirements of a judgment entered under this section, is deleted.*

Sec. 21A.202. Recovery from Affiliates. Gives the liquidator the right to seek recovery of any asset transferred to or for the benefit of an affiliate if the transfer was made within five years of receivership, and permits the liquidator to recover costs and expenses including attorney's fees incurred in obtaining the asset. *Committee Substitute changes: editorial clarifications; Subsection (c), which provides the requirements of a judgment entered under this section, is deleted.*

Sec. 21A.203. Unauthorized Post-Petition Transfers. Invalidates certain preferential post receivership transfers. *(Note: Sec. 21A.203 was contained in Sec.21A.204 in the original bill.*

Sec. 21A.204. Voidable Preferences and Liens. Defines conditions under which the receiver may avoid a preference. *Committee Substitute changes: editorial clarifications; deletes provisions related to the burden of proof in a case brought under this section and requirements for a judgment entered under this section. (Note: Sec. 21A.204 was contained in Sec.21A.205 in the original bill.*

Sec. 21A.205. Fraudulent Transfers and Obligations. Allows the receiver to avoid any transfer of an interest of the insurer made within two years before the filing of the receivership petition if fraud was involved, or if the insurer received less than a reasonable equivalent value. *Committee Substitute changes: editorial clarifications; deletes provisions related to the burden of proof in a case brought under this section. (Note: Sec. 21A.205 was contained in Sec.21A.206 in the original bill.)*

Sec. 21A.206. Receiver as Lien Creditor. Authorizes the receiver avoid transfers or liens upon property or incurred obligations that the insurer may have avoided. *(Note: Sec. 21A.206 was contained in Sec.21A.207 in the original bill.)*

Sec. 21A.207. Liability of Transferee. Permits the receiver to recover the property or its value from a transferee, and defines conditions under which recovery is not allowed. *Committee Substitute changes: editorial clarifications; additional remedies provided in the event that a transfer is voided. Title changed from Effect of Avoidance of Transfers in original bill. (Note: Sec. 21A.207 was contained in Sec.21A.208 in the original bill.)*

Sec. 21A.208. Claims of Holders of Void or Voidable Rights. Provides that a claim cannot be allowed if the creditor has obtained a preference, unless the preferential transfer has been surrendered. *Committee Substitute changes: provision applies to any type of receivership (e.g., rehabilitation), and is not restricted to liquidations. (Note: Sec. 21A.208 was contained in Sec.21A.209 in the original bill.)*

Sec. 21A.209 Setoffs. Describes the circumstances under which setoffs may be permitted. *Committee Substitute changes: this section is replaced by retaining current law (article 21.28, §3 (f)-(g)). (Note: Sec. 21A.209 was contained in Sec.21A.210 in the original bill.)*

Sec. 21A.210. Assessments. Establishes procedures for determining assessments for assessable policies. *Committee Substitute changes: editorial clarifications and revised notice requirements. Provision applies to any type of receivership (e.g., a rehabilitation), and is not restricted to liquidations. (Note: Sec. 21A.210 was contained in Sec.21A.211 in the original bill.)*

Sec. 21A.211. Reinsurer's Liability. Provides procedures for treatment of reinsurance contracts. *Committee Substitute changes: With the exception of Subsection (g) (3), this section is replaced by retaining current law (article 21.28, § Sec. 10).*

Sec. 21A.212. Recovery of Premiums Owed. Establishes procedures for collecting premiums due from insureds, agents, third-parties, or premium finance companies, and

establishes penalties for violations. *Committee Substitute changes: editorial clarifications; provision applies to any type of receivership (e.g., a rehabilitation), and is not restricted to liquidations. (Note: Sec. 21A.212 was contained in Sec.21A.214 in the original bill. Sec. 21A.212 in the original bill, entitled Life and Health Reinsurance, was deleted in its entirety, and all subsequent provisions were renumbered accordingly. Effect of the deletion is that current law controls the collection of reinsurance proceeds.)*

Sec. 21A.213. Administration of Deductible Agreements and Policyholder Obligations. Provides for treatment of policyholder obligations under deductible agreements and handling of collateral under such agreements. *Committee Substitute changes: new section.*

Sections 21A.214-21A.250 Reserved for Expansion

SUBCHAPTER F. CLAIMS.

Sec. 21A.251. Filing of Claims. Provides that the last date for filing proofs of claim is 18 months after entry of the liquidation order, unless extended by the receivership court, and establishes exceptions for late claims. *Committee Substitute changes: editorial clarifications; allows for deadline to submit late claims.*

Sec. 21A.252. Proof of Claim. Defines items that must be included in proofs of claim filed with the receiver, including certain provisions related to claims filed by guaranty associations.

Sec. 21A.253. Allowance of Claims. Establishes procedures for the review and evaluation of claims, and notice to affected reinsurers. Permits disallowance of “de minimus” claims. *Committee Substitute changes: editorial clarifications; changes 30 day appeal period to 45 day period, and provides procedures for claims for the termination of a lease. (Note: provisions related to the definition of contingent and unliquidated claims are moved to Sec. 21A.255. Adds subsection (m), providing for the handling of claims that are fully covered by a guaranty association.*

Sec. 21A.254. Claims under Occurrence Policies. Permits filing of claims under occurrence policies. *Committee Substitute changes: editorial clarifications; provides requirements for claims under bonds.*

Sec. 21A.255. Allowance of Contingent and Unliquidated Claims. Establishes procedures for the allowance of contingent and unliquidated claims. *Committee Substitute changes: editorial clarifications; adds provisions related to the definition of contingent and unliquidated claims. Certain provisions regarding allowance of unliquidated claims are deleted.*

Sec.21A.256. Special Provisions for Third-Party Claims. Provides for allowance of third-party claims against an insured, and the payment of distributions upon the resolution of the claim by the third-party. *Committee Substitute changes: editorial clarifications; adds provisions regarding the effect of waiver under this section on claims by a guaranty association.*

Sec.21A.257. Disputed Claims. Establishes procedures for disputing the receiver’s action on a claim.

Sec. 21A.258. Liquidator’s Recommendations to the Receivership Court. Provides procedure for presenting settled or allowed claims to the receivership court for approval.

Sec.21A.259. Claims of Codebtors. Permits the filing of a claim on behalf of a person liable to a claimant if the claimant did not timely file a proof of claim.

Sec. 21A.260. Secured Creditor’s Claims. Provides procedures to determine the value of security held by a secured creditor and credit the secured claim. *Committee Substitute changes: Adds provisions regarding surety claims.*

Sec. 21A.261. Qualified Financial Contracts. Provides that a person may not be prohibited from exercising a contractual right to terminate, liquidate, or close out any netting agreement or qualified financial contract, and describes the receiver's actions in such transactions. *Committee Substitute changes: change in internal cross reference.*

Sec. 21A.262-21A.300 Reserved for Expansion

SUBCHAPTER G. DISTRIBUTIONS

Sec. 21A.301. Priority of Distributions. Establishes classes for determining the priority of distributions on unsecured claims. *Committee Substitute changes: editorial clarifications; adds provisions regarding bond claims.*

Sec. 21A.302. Partial and Final Distributions of Assets. Establishes the procedures for interim and final distributions on claims. *Committee Substitute changes: provides for continuation of workers compensation claims.*

Sec.21A.303. Early Access Disbursements. Establishes timing for early access payments to guaranty associations. *Committee Substitute changes: editorial clarifications.*

Sec. 21A.304. Unclaimed and Withheld Funds. Provides for procedures to handle any unclaimed funds after the final distribution. *Committee Substitute changes: editorial clarifications; Sec. 21A.305 of original bill, providing for general receivership expenditures, is now included in Sec. 21A.304.*

Sec. 21A.305-21A.350 Reserved for Expansion

SUBCHAPTER H. DISCHARGE

Sec.21A.351. Condition on Release from Delinquency Proceedings. Prohibits an insurer released from receivership from continuing in business unless guaranty associations are repaid.

Sec. 21A.352 Termination of Proceedings. Provides for the termination of the proceeding and discharge of the liquidator. *Committee Substitute changes: editorial clarifications. Subsection (b) of original bill, permitting third parties to apply for a termination order, and providing penalties related to such a filing, is deleted.*

Sec.21A.353. Reopening Liquidation. Provides for the reopening of the liquidation for good cause, such as the discovery of additional assets.

Sec.21A.354. Disposition of Records During and after Termination of Liquidation. Provides procedures for destroying unneeded records and maintenance of any retained records. *Committee Substitute changes: editorial clarifications.*

Sec.21A.355. External Audit of Receiver's Books. Permits the receivership court to order audits.

Sec.21A.356-21A.400 Reserved for Expansion

SUBCHAPTER I. INTERSTATE RELATIONS

Sec. 21A.401. Conservation of Property of Foreign Insurers. Describes actions which the commissioner may take with respect to foreign insurers. *Committee Substitute changes: editorial clarifications; adds provisions consistent with article 21.28-C and 21.28-D of the Insurance Code related to enforcement of stays and triggering of guaranty associations.*

Sec. 21A.402. Domiciliary Receivers Appointed in Other States. Provides that this state will give full faith and credit to other receivership laws and orders of other state receivership courts when an insurer is placed in receivership. *Committee Substitute changes: editorial clarifications; provides for treatment of special deposits.*

SECTION 2 Amends article 21.28-C § 3(a), Insurance Code to clarify the scope of the policies excluded from coverage by the guaranty association.

SECTION 3. Amends article 21.28-C § 5 (8), Insurance Code to clarify the exclusion of claims by insurers from the definition of a “covered claim”.

SECTION 4. Amends article 21.28-C § 8, Insurance Code by deleting certain language in Subsection (d), dealing with the investigation and adjustment of claims, and adding Subsection (i), giving the guaranty association specific authority to bring suit against various parties to obtain custody and control of claims records and related data, files and reports.

SECTION 5. Amends article 21.28-C § 10 (g), Insurance Code to establish venue in Travis County for all suits by or against the guaranty association.

SECTION 6. Amends article 21.28-C § 11 (b), Insurance Code to clarify the guaranty association’s authority to recover any covered claims and costs of defense.

SECTION 7. Amends article 21.28-C § 11A, Insurance Code to clarify the net worth exclusion, and provide procedures for requesting financial information.

SECTION 8. Amends article 21.28-C § 17 (a), Insurance Code to clarify that the statute of limitation is not tolled during a stay in the receivership proceedings.

SECTION 9. Repeals Article 21.28.

SECTION 10. Changes in the law will apply to pending receiverships, and all receiverships initiated after the effective date of the Act. Litigation related to a receivership filed before the effective date of the Act is governed by the law in effect at the time the lawsuit was filed, and such law continues in effect for that purpose.

SECTION 11 Makes the Act effective September 1, 2005.

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

The Committee Substitute adopts recent revisions to the model act adopted by the NAIC working group; adds contracting requirements that currently exist in article 21.28, and incorporates changes to article 21.28-C to harmonize with the model act.