

BILL ANALYSIS

C.S.H.B. 4338
By: Smithee
Insurance
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Weaknesses in the existing regulatory system have been brought to the forefront during the current economic downturn. Several title insurance agents have failed, leaving files in the middle of closing, offices and file storage facilities padlocked, and Texas Department of Insurance (TDI) staff uncertain whether to place the agent into receivership or into the hands of the Texas Title Insurance Guaranty Association. On the last day of July 2009, one of the largest independent title insurance companies in Texas was shut down by its out-of-state owners with no warning to its underwriters, employees, customers, or landlords, or the department. The department had just completed an escrow audit of the agent and was reasonably certain that there were no shortages in the escrow account. This belief prevented the department from referring the case to the Guaranty Association. Because of the size of the agent and the fact that the department and the association were also involved with other failed agents, the resources of the department were stretched very thin, and the department and the agent's underwriters were forced to devise a system to deal with the files that were in various stages of closing with upwards of \$12 million needing to be funded.

While extraordinary efforts by TDI staff and the underwriters allowed this failed agent's customers to have their transactions closed, existing liens paid, and documents recorded all with no known loss of funds, it became apparent that changes to the title insurance act were needed to head off similar problems in the future. However, the out-of-state owner of the agent placed it in bankruptcy in another state. Since current Texas law does not specify that funds owed to an agent's underwriter or another agent for providing title evidence or closing services be held in trust by the agent, neither the underwriters nor the numerous agents that sold information to the failed agent are likely to receive a cent of their money. At least holding the money in trust moves the underwriter and other agents into a more secure position. This bill allows the commissioner of insurance more flexibility in handling impaired title insurance agents and companies.

C.S.H.B. 4338 provides a mechanism for TDI, as the receiver for an impaired agent or the title insurance companies for which the agent was licensed, to have improved access to the agent's files and provides for the confidentiality of the information contained in such files. The bill allows TDI to obtain information about the possible insolvency of a title insurance agent, places the funds derived from a division of premium between an agent and an underwriter or another agent into a trust, and requires all abstract plants to cover a period beginning not later than January 1, 1979. The bill increases the educational requirements for title insurance agents and their management personnel and specifies the entities that can provide such education. The bill establishes a staggered period during which many title insurance agents and direct operations must reach a certain level of minimum capitalization based on the population of the county or counties for which the agent is licensed.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the commissioner of insurance in SECTIONS 12, 13, 14 and 15 of this bill.

ANALYSIS

C.S.H.B. 4338 amends the Insurance Code to include in Texas Department of Insurance (TDI) requirements relating to an abstract plant under the Texas Title Insurance Act that an abstract plant cover a period beginning not later than January 1, 1979. The bill establishes that an abstract plant that exists on September 1, 2009, but that does not on that date cover a period beginning not later than January 1, 1979, is not required to comply with this provision before January 1, 2014. The bill adds the protection of consumers served by agents to the purposes of the Texas Title Insurance Guaranty Act. The bill amends the deadline by which the commissioner of insurance is required to notify the Texas Title Insurance Guaranty Association of the existence of an impaired title insurance company to include the third day after the date on which the commissioner learns the title insurance company is impaired. The bill authorizes the association to advance money necessary to pay the expenses of administering the supervision, rehabilitation, or, as determined by the court, other insolvency of an impaired title insurance company or impaired agent, under certain conditions. The bill removes the \$5 limit placed on a policy guaranty fee and adds to claims that are required to be paid from such fees only and not from assessments the expenses incurred in complying with the additional duties of the association and administrative expenses with respect to the estate of an impaired agent. The bill includes in the payment for which a guaranty fee is authorized to be used the expenses related to an examination conducted by TDI or the association and removes from such payments certain agent review expenses. The bill clarifies that an unpaid claim is a covered claim if the title insurance company that issued the policy or assumed the policy under an assumption certificate is an impaired title insurance company that has been placed in receivership or conservatorship.

C.S.H.B. 4338 specifies that the provision prohibiting an impaired title insurance company from issuing a new or renewal insurance policy until certain criteria are met applies if the company is released from the supervision, rehabilitation, or other proceeding, in addition to a conservatorship or receivership, in which the company was found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due. The bill prohibits an agent, on release from the supervision, rehabilitation, or other proceeding, in addition to a conservatorship or receivership, in which the agent was found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due, subject to dischargeability, from acting as an agent, rather than prohibiting the agent from issuing a new or renewal insurance policy, until the agent has repaid in full the amount of guaranty fees paid by the association.

C.S.H.B. 4338 establishes additional duties of the association that are applicable, at the commissioner's discretion and regardless of whether there are covered claims against an agent, to any agent that is designated by the commissioner as an impaired agent or that is placed under an order of supervision, conservatorship, rehabilitation, or liquidation or is otherwise found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due. The bill authorizes the commissioner, at the commissioner's discretion, to require the association, at the association's expense and on behalf of the impaired agent, to close real estate transactions, disburse escrow funds, pay existing liens against real property, record documents, and issue final title insurance policies.

C.S.H.B. 4338 includes in the information that is required to be stated on a completed title insurance agent's license application that the proposed agent has unencumbered assets in excess of liabilities, exclusive of the value of the abstract plants, as required under the bill's provisions. The bill requires an agent applying for an initial license to provide evidence that the agent and its management personnel have successfully completed a professional training program as established by these provisions and requires the program to have been completed within one year preceding the date of the application. The bill requires the commissioner to adopt by rule such a program for a title insurance agent and the agent's management personnel and establishes requirements for and parameters of the program. The bill specifies the types of entities that are

required to offer a training program. The bill exempts from the professional training requirement an individual who has held in Texas for at least five years a position as management personnel with a title insurance agent, or a comparable position, as determined under rules adopted by the commissioner.

C.S.H.B. 4338 authorizes a title insurance company to provide information to, or receive information from, the commissioner about a financial matter that would reasonably call into question the solvency of an agent that the company appointed. The bill prohibits an entity, other than the title insurance company appointing the agent, from requesting or receiving such information from the commissioner. The bill requires each title insurance agent, on a quarterly basis, to provide TDI with a copy of the agent's quarterly withholding tax report furnished by the agent to the U.S. Internal Revenue Service. The bill requires the agent also to provide to TDI proof of the payment. The bill requires an agent that does not have employees, on a quarterly basis, to certify to TDI that there has not been a material change in the agent's financial condition. The bill includes the information provided to or received from the commissioner under these provisions as privileged communication, not subject to disclosure under state public information laws, and specifies that these provisions are not applicable to a document, record, or statement required to be made or disclosed to TDI under state insurance laws. The bill authorizes the commissioner by rule to prescribe the types of information that are privileged.

C.S.H.B. 4338 requires an agent to maintain unencumbered assets in excess of liabilities, exclusive of the value of abstract plants, of specified amounts that are based on the population of the county in which the agent maintains its principal office, unless the commissioner establishes different amounts by rule. The bill exempts from this requirement an agent that maintains its principal office in a county with a population of less than 10,000, except as provided by the commissioner by rule, and requires an agent that maintains a principal office in more than one county to meet the asset standards for the largest county for which the agent will hold a license. The bill authorizes an agent to elect to maintain unencumbered assets as required by these provisions or to place a deposit with TDI as allowed by provisions authorizing certain deposits in lieu of a bond by a title insurance agent or direct operation. The bill establishes that an agent that holds a license on September 1, 2009, and has held the license for at least three years on that date is not required to comply with the requirements to maintain unencumbered assets on September 1, 2009, but is required to increase the unencumbered assets held by the agent, or make and increase the required deposit, until the agent is in compliance with the required capitalization amounts in accordance with the schedule established by the bill's provisions. The bill specifies that provisions relating to an agent's unencumbered assets expire September 2, 2018. The bill establishes that the funds held by a title insurance agent that are owed to a title insurance company, another title insurance agent, or a direct operation arising from a division of premium, whether as determined under rules adopted by the commissioner or by agreement among the parties, are considered to be held in trust for the title insurance company, other title insurance agent, or direct operation. The bill establishes that provisions regarding the division of premium held in trust do not require, and the commissioner is prohibited from requiring by rule, that those funds be held in a separate account or be subject to an audit of TDI.

C.S.H.B. 4338 requires the annual audit of escrow accounts, unless the agent has elected to make a deposit with TDI of cash, letters of credit, or approved securities, to be accompanied by a certification by a certified public accountant that the agent has the appropriate unencumbered assets in excess of liabilities, exclusive of the value of its abstract plants. The bill requires the commissioner by rule to establish a procedure to be used by an agent and the agent's certified public accountant to determine the value of categories of assets and the method by which the required certification must be made. The bill makes those provisions applicable beginning with annual audits for the 2011 calendar year.

C.S.H.B. 4338 prohibits a title insurance agent from giving possession of the agent's guaranty file to any third party, including a landlord or storage facility, unless the third party accepts possession of the file subject to the right of access of the title insurance company involved in the

transaction that the file documents, whether the right of access exists by contract or other statutory basis, and agrees to maintain the confidentiality of nonpublic information in the agent's file according to state and federal laws that govern the agent. The bill requires the association, if the agent ceases operations without complying with rules adopted by the commissioner, to take possession of each guaranty file of the agent and make the file available to the title insurance company involved in the transaction that the file documents. The bill prohibits a title insurance company from entering into a new contract or agreement or amending an existing contract or agreement with an individual, firm, association, or corporation to act as the company's agent unless the contract or amendment contains a requirement that any lease, storage agreement, or other contract entered into by the agent that may relate to files maintained by the agent contain the specified language. The bill clarifies that in provisions relating to the possession of a guaranty file, a title insurance agent includes an agent owned in whole or in part by a title insurance company and includes a direct operation. The bill authorizes the commissioner by order, not later than September 30, 2009, to delay the implementation of these provisions if the commissioner determines that rules to implement the provisions are necessary to the effective administration of the provisions. The bill specifies that these provisions apply only to the conduct of a title insurance agent and a contract agreement executed or renewed by a title insurance agent on or after January 1, 2010, if the commissioner does not issue an order or on the effective date of rules adopted by the commissioner if the commissioner does issue an order. The bill provides that the conduct of a title insurance agent, and a contract or agreement executed or renewed by an agent, before the determined date are governed by the law as it existed immediately before the effective date of this bill, and that law is continued in effect for that purpose.

C.S.H.B. 4338 defines "unencumbered assets" and redefines the term "impaired title insurance company" to include a title insurance company that is placed by a court in Texas or another state under an order of supervision, conservatorship, rehabilitation, or liquidation; placed under an order of supervision or conservatorship; placed under an order of rehabilitation or liquidation; or otherwise found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due. The bill removes from that definition a title insurance company that is placed in temporary or permanent receivership under a court order based on a finding of insolvency or in conservatorship after the commissioner determines that the company is insolvent.

C.S.H.B. 4338 repeals Section 2602.153(c), Insurance Code, relating to the payment of administrative expenses from the guaranty fee account with respect to the estate of an impaired agent.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 4338 removes provisions in the original that authorize the commissioner to base a determination of the insolvency of a title insurance agent on generally accepted accounting principles, statutory principles, or other factors that the commissioner adopts by rule. The substitute removes provisions in the original relating to the grounds on which the commissioner is authorized to file a petition with a court when the commissioner determines that a title insurance agent is insolvent and revising the definition for "impaired agent." The substitute removes provisions in the original establishing requirements relating to the access to and storage of an agent's files and specifying that information a title insurance company provides to or receives from the commissioner about a financial matter or an audit, including certification of solvency, of a title insurance agent that the company appointed is not admissible in evidence in a court action or proceeding except under a subpoena issued by a court of record. The substitute removes provisions in the original authorizing the commissioner by rule to prescribe the

information an individual, firm, association, or corporation is required to hold and maintain to act as a title insurance agent.

C.S.H.B. 4338 instead establishes requirements relating to the possession of an impaired agent's guaranty file, authorizes the department to obtain information about the possible insolvency of a title insurance agent, places the funds derived from a division of premium between an agent and an underwriter or another agent into a trust, and requires an abstract plant to cover a period beginning not later than January 1, 1979. The substitute increases the educational requirements for title insurance agents and their management personnel and specifies the entities that can provide such education. The substitute establishes a staggered period during which title insurance agents and direct operations are required to reach a certain level of minimum capitalization based on the population of the county or counties for which the agent is licensed.