

By: Smithee

H.B. No. 2834

A BILL TO BE ENTITLED

AN ACT

relating to insurer receivership.

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

SECTION 1. Sections 443.005(a) and (e), Insurance Code, are amended to read as follows:

(a) Except as authorized by Section 203(e)(3), Pub. L. No. 111-203, a [A] delinquency proceeding may not be commenced under this chapter by a person other than the commissioner, and a court does not have jurisdiction to entertain, hear, or determine any delinquency proceeding commenced by any other person.

(e) If, on motion of any party, the receivership court finds that any action, as a matter of substantial justice, should be tried in a forum outside this state, the receivership court may enter an appropriate order to stay further proceedings on the action in this state. Except as to claims against the estate, nothing in this chapter deprives a party of any contractual right to pursue arbitration. A party in arbitration may bring a claim or counterclaim against the estate, but the claim or counterclaim is subject to this chapter [~~Section 443.209~~].

SECTION 2. Section 443.0135, Insurance Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a) Except as provided by Subsection (c), the [The] receiver shall use a competitive bidding process in the selection of any

1 special deputies appointed under Section 443.102 or 443.154. The
2 process must include procedures to promote the participation of
3 historically underutilized businesses that have been certified by
4 the comptroller under Section 2161.061, Government Code.

5 (c) In the event of an emergency, the receiver may appoint a
6 special deputy without soliciting competitive bids. For the
7 purposes of this subsection, an emergency exists if:

8 (1) a court has made a determination described by
9 Section 202(a)(1)(A)(iv)(I), Pub. L. No. 111-203; or

10 (2) the receiver concludes that the competitive
11 bidding process would delay the appointment of a special deputy and
12 that the delay could be hazardous to the insurer's policyholders or
13 creditors or the general public.

14 SECTION 3. Section 443.052(a), Insurance Code, is amended
15 to read as follows:

16 (a) Except as authorized by Section 203(e)(3), Pub. L. No.
17 111-203, any [Any] formal delinquency proceeding against a person
18 shall be commenced by filing a petition in the name of the
19 commissioner or department.

20 SECTION 4. Section 443.057, Insurance Code, is amended to
21 read as follows:

22 Sec. 443.057. GROUNDS FOR CONSERVATION, REHABILITATION, OR
23 LIQUIDATION. A [~~The commissioner may file with a court in this state~~
24 ~~a]~~ petition with respect to an insurer domiciled in this state or an
25 unauthorized insurer for an order of rehabilitation or liquidation
26 may be filed on any one or more of the following grounds:

27 (1) the insurer is impaired;

1 (2) the insurer is insolvent;

2 (3) the insurer is about to become insolvent, with
3 "about to become insolvent" being defined as reasonably anticipated
4 that the insurer will not have liquid assets to meet its next 90
5 days' current obligations;

6 (4) the insurer has neglected or refused to comply
7 with an order of the commissioner to make good within the time
8 prescribed by law any deficiency, whenever its capital and minimum
9 required surplus, if a stock company, or its surplus, if a company
10 other than stock, has become impaired;

11 (5) the insurer, its parent company, its subsidiaries,
12 or its affiliates have converted, wasted, or concealed property of
13 the insurer or have otherwise improperly disposed of, dissipated,
14 used, released, transferred, sold, assigned, hypothecated, or
15 removed the property of the insurer;

16 (6) the insurer is in a condition such that it could
17 not meet the requirements for organization and authorization as
18 required by law, except as to the amount of the original surplus
19 required of a stock company under Title 6, and except as to the
20 amount of the surplus required of a company other than a stock
21 company in excess of the minimum surplus required to be maintained;

22 (7) the insurer, its parent company, its subsidiaries,
23 or its affiliates have concealed, removed, altered, destroyed, or
24 failed to establish and maintain books, records, documents,
25 accounts, vouchers, and other pertinent material adequate for the
26 determination of the financial condition of the insurer by
27 examination under Chapter 401 or has failed to properly administer

1 claims or maintain claims records that are adequate for the
2 determination of its outstanding claims liability;

3 (8) at any time after the issuance of an order under
4 Section 404.003 or Chapter 441, or at the time of instituting any
5 proceeding under this chapter, it appears to the commissioner that,
6 upon good cause shown, it would not be in the best interest of the
7 policyholders, creditors, or the public to proceed with the conduct
8 of the business of the insurer;

9 (9) the insurer is in a condition such that the further
10 transaction of business would be hazardous financially, according
11 to Subchapter A, Chapter 404, or otherwise, to its policyholders,
12 creditors, or the public;

13 (10) there is reasonable cause to believe that there
14 has been embezzlement from the insurer, wrongful sequestration or
15 diversion of the insurer's property, forgery or fraud affecting the
16 insurer, or other illegal conduct in, by, or with respect to the
17 insurer that, if established, would endanger assets in an amount
18 threatening the solvency of the insurer;

19 (11) control of the insurer is in a person who is:

20 (A) dishonest or untrustworthy; or

21 (B) so lacking in insurance company managerial
22 experience or capability as to be hazardous to policyholders,
23 creditors, or the public;

24 (12) any person who in fact has executive authority in
25 the insurer, whether an officer, manager, general agent, director,
26 trustee, employee, shareholder, or other person, has refused to be
27 examined under oath by the commissioner concerning the insurer's

1 affairs, whether in this state or elsewhere or if examined under
2 oath, refuses to divulge pertinent information reasonably known to
3 the person; and after reasonable notice of the fact, the insurer has
4 failed promptly and effectively to terminate the employment and
5 status of the person and all the person's influence on management;

6 (13) after demand by the commissioner under Chapter
7 401 or under this chapter, the insurer has failed promptly to make
8 available for examination any of its own property, books, accounts,
9 documents, or other records, or those of any subsidiary or related
10 company within the control of the insurer or of any person having
11 executive authority in the insurer, so far as they pertain to the
12 insurer;

13 (14) without first obtaining the written consent of
14 the commissioner, the insurer has transferred, or attempted to
15 transfer, in a manner contrary to Chapter 823 or any law relating to
16 bulk reinsurance, substantially its entire property or business, or
17 has entered into any transaction the effect of which is to merge,
18 consolidate, or reinsure substantially its entire property or
19 business in or with the property or business of any other person;

20 (15) the insurer or its property has been or is the
21 subject of an application for the appointment of a receiver,
22 trustee, custodian, conservator, sequestrator, or similar
23 fiduciary of the insurer or its property otherwise than as
24 authorized under the insurance laws of this state;

25 (16) within the previous five years, the insurer has
26 wilfully and continuously violated its charter, articles of
27 incorporation or bylaws, any insurance law of this state, or any

1 valid order of the commissioner;

2 (17) the insurer has failed to pay within 60 days after
3 the due date any obligation to any state or political subdivision of
4 a state or any judgment entered in any state, if the court in which
5 the judgment was entered had jurisdiction over the subject matter,
6 except that nonpayment is not a ground until 60 days after any good
7 faith effort by the insurer to contest the obligation has been
8 terminated, whether it is before the commissioner or in the courts;

9 (18) the insurer has systematically engaged in the
10 practice of reaching settlements with and obtaining releases from
11 claimants, and then unreasonably delayed payment, failed to pay the
12 agreed-upon settlements, or systematically attempted to compromise
13 with claimants or other creditors on the ground that it is
14 financially unable to pay its claims or obligations in full;

15 (19) the insurer has failed to file its annual report
16 or other financial report required by statute within the time
17 allowed by law;

18 (20) the board of directors or the holders of a
19 majority of the shares entitled to vote, or a majority of those
20 individuals entitled to the control of those entities specified by
21 Section 443.003, request or consent to rehabilitation or
22 liquidation under this chapter;

23 (21) the insurer does not comply with its domiciliary
24 state's requirements for issuance to it of a certificate of
25 authority, or its certificate of authority has been revoked by its
26 state of domicile; ~~[or]~~

27 (22) when authorized by department rules; or

1 (23) a court has made a determination described by
2 Section 202(a)(1)(A)(iv)(I), Pub. L. No. 111-203.

3 SECTION 5. Section 443.058, Insurance Code, is amended to
4 read as follows:

5 Sec. 443.058. ENTRY OF ORDER. If [~~the commissioner~~
6 ~~establishes~~] any of the grounds provided in Section 443.057 are
7 established, the receivership court shall grant the petition and
8 issue the order of rehabilitation or liquidation requested in the
9 petition.

10 SECTION 6. Section 443.102, Insurance Code, is amended by
11 adding Subsection (f) to read as follows:

12 (f) The rehabilitator may exercise all powers:

13 (1) possessed on August 31, 2005, by a receiver
14 appointed for the purpose of rehabilitating an insurer; or

15 (2) conferred on a rehabilitator after that date by
16 the laws of this state that are not inconsistent with this chapter.

17 SECTION 7. Section 443.154(i), Insurance Code, is amended
18 to read as follows:

19 (i) The liquidator may, subject to Subsection (y) [~~(x)~~],
20 acquire, hypothecate, encumber, lease, improve, sell, transfer,
21 abandon, or otherwise dispose of or deal with any property of the
22 estate at its market value or upon terms and conditions that are
23 fair and reasonable. The liquidator also has the power to execute,
24 acknowledge, and deliver any and all deeds, assignments, releases,
25 and other instruments necessary or proper to effectuate any sale of
26 property or other transaction in connection with the liquidation.

27 SECTION 8. Section 443.211(b), Insurance Code, is amended

1 to read as follows:

2 (b) Except as provided by Subsection (a), any reinsurance
3 shall be payable to the receiver under a policy reinsured by the
4 assuming insurer on the basis of claims:

5 (1) allowed under Section 443.253; or [~~and~~]

6 (2) paid under:

7 (A) Chapter 462, 463, or 2602; or

8 (B) the guaranty associations of other states.

9 SECTION 9. Section 443.253(e), Insurance Code, is amended
10 to read as follows:

11 (e) A judgment or order against an insured or the insurer
12 entered after the date of the initial filing of a successful
13 petition for receivership, or within 120 days before the initial
14 filing of the petition, or [~~and~~] a judgment or order against an
15 insured or the insurer entered at any time by default or by
16 collusion need not be considered as evidence of liability or of the
17 amount of damages.

18 SECTION 10. Section 443.301, Insurance Code, is amended to
19 read as follows:

20 Sec. 443.301. PRIORITY OF DISTRIBUTION. The priority of
21 payment of distributions on unsecured claims must be in accordance
22 with the order in which each class of claims is set forth in this
23 section. Every claim in each class shall be paid in full, or
24 adequate funds retained for their payment, before the members of
25 the next class receive payment, and all claims within a class must
26 be paid substantially the same percentage of the amount of the
27 claim. Except as provided by Subsections (a)(2), (a)(3), (i), and

1 (k), subclasses may not be established within a class. No claim by
2 a shareholder, policyholder, or other creditor shall be permitted
3 to circumvent the priority classes through the use of equitable
4 remedies. The order of distribution of claims shall be:

5 (a) Class 1. (1) The costs and expenses of administration
6 expressly approved or ratified by the liquidator, including the
7 following:

8 (A) the actual and necessary costs of preserving
9 or recovering the property of the insurer;

10 (B) reasonable compensation for all services
11 rendered on behalf of the administrative supervisor or receiver;

12 (C) any necessary filing fees;

13 (D) the fees and mileage payable to witnesses;

14 (E) unsecured loans obtained by the receiver; and

15 (F) expenses, if any, approved by the
16 rehabilitator of the insurer and incurred in the course of the
17 rehabilitation that are unpaid at the time of the entry of the order
18 of liquidation.

19 (2) The reasonable expenses of a guaranty association,
20 including overhead, salaries and other general administrative
21 expenses allocable to the receivership to include administrative
22 and claims handling expenses and expenses in connection with
23 arrangements for ongoing coverage, other than expenses incurred in
24 the performance of duties under Section 462.002(3), 463.108,
25 463.111, 463.113, 463.353, or 2602.113 or similar duties under the
26 statute governing a similar organization in another state. In the
27 case of the Texas Property and Casualty Insurance Guaranty

1 Association and other property and casualty guaranty associations,
2 the expenses shall include loss adjustment expenses, including
3 adjusting and other expenses and defense and cost containment
4 expenses. In the event that there are insufficient assets to pay
5 all of the costs and expenses of administration under Subsection
6 (a)(1) and the expenses of a guaranty association, the costs and
7 expenses under Subsection (a)(1) shall have priority over the
8 expenses of a guaranty association. In this event, the expenses of
9 a guaranty association shall be paid on a pro rata basis after the
10 payment of costs and expenses under Subsection (a)(1) in full.

11 (3) For purposes of Subsection (a)(1)(E), any
12 unsecured loan obtained by the receiver, unless by its terms it
13 otherwise provides, has priority over all other costs of
14 administration. Absent agreement to the contrary, all claims in
15 this subclass share pro rata.

16 (4) Except as expressly approved by the receiver, any
17 expenses arising from a duty to indemnify the directors, officers,
18 or employees of the insurer are excluded from this class and, if
19 allowed, are Class 5 claims.

20 (b) Class 2. (1) All claims under policies of insurance,
21 including third-party claims, claims under nonassessable policies
22 for unearned premium, claims of obligees and, subject to the
23 discretion of the receiver, completion contractors under surety
24 bonds and surety undertakings other than bail bonds, mortgage or
25 financial guaranties, or other forms of insurance offering
26 protection against investment risk, claims by principals under
27 surety bonds and surety undertakings for wrongful dissipation of

1 collateral by the insurer or its agents, and claims incurred during
2 the extension of coverage provided for in Section 443.152.

3 (2) All other claims incurred in fulfilling the
4 statutory obligations of a guaranty association not included in
5 Class 1, including indemnity payments on covered claims and, in the
6 case of the Life, Accident, Health, and Hospital Service Insurance
7 Guaranty Association or another life and health guaranty
8 association, all claims as a creditor of the impaired or insolvent
9 insurer for all payments of and liabilities incurred on behalf of
10 covered claims or covered obligations of the insurer and for the
11 funds needed to reinsure those obligations with a solvent insurer.

12 (3) Claims for benefits under a health care plan
13 issued by a health maintenance organization.

14 (4) Claims under insurance policies or contracts for
15 benefits issued by an unauthorized insurer.

16 (5) Notwithstanding any provision of this chapter, the
17 following claims are excluded from Class 2 priority:

18 (A) [~~(1)~~] obligations of the insolvent insurer
19 arising out of reinsurance contracts;

20 (B) [~~(2)~~] obligations, excluding unearned premium
21 claims on policies other than reinsurance agreements, incurred
22 after:

23 (i) [~~(A)~~] the expiration date of the
24 insurance policy;

25 (ii) [~~(B)~~] the policy has been replaced by
26 the insured or canceled at the insured's request; or

27 (iii) [~~(C)~~] the policy has been canceled as

1 provided by this chapter;

2 (C) [~~3~~] obligations to insurers, insurance
3 pools, or underwriting associations and their claims for
4 contribution, indemnity, or subrogation, equitable or otherwise;

5 (D) [~~4~~] any claim that is in excess of any
6 applicable limits provided in the insurance policy issued by the
7 insurer;

8 (E) [~~5~~] any amount accrued as punitive or
9 exemplary damages unless expressly covered under the terms of the
10 policy;

11 (F) [~~6~~] tort claims of any kind against the
12 insurer and claims against the insurer for bad faith or wrongful
13 settlement practices; and

14 (G) [~~7~~] claims of the guaranty associations
15 for assessments not paid by the insurer, which must be paid as
16 claims in Class 5.

17 (c) Class 3. Claims of the federal government not included
18 in Class 2 [~~3~~].

19 (d) Class 4. Debts due employees for services or benefits
20 to the extent that the debts do not exceed \$5,000 or two months
21 salary, whichever is the lesser, and represent payment for services
22 performed within one year before the entry of the initial order of
23 receivership. This priority is in lieu of any other similar
24 priority that may be authorized by law as to wages or compensation
25 of employees.

26 (e) Class 5. Claims of other unsecured creditors not
27 included in Classes 1 through 4, including claims under reinsurance

1 contracts, claims of guaranty associations for assessments not paid
2 by the insurer, and other claims excluded from Class 2.

3 (f) Class 6. Claims of any state or local governments,
4 except those specifically classified elsewhere in this
5 section. Claims of attorneys for fees and expenses owed them by an
6 insurer for services rendered in opposing a formal delinquency
7 proceeding. In order to prove the claim, the claimant must show
8 that the insurer that is the subject of the delinquency proceeding
9 incurred the fees and expenses based on its best knowledge,
10 information, and belief, formed after reasonable inquiry,
11 indicating opposition was in the best interests of the insurer, was
12 well grounded in fact, and was warranted by existing law or a good
13 faith argument for the extension, modification, or reversal of
14 existing law, and that opposition was not pursued for any improper
15 purpose, such as to harass or to cause unnecessary delay or needless
16 increase in the cost of the litigation.

17 (g) Class 7. Claims of any state or local government for a
18 penalty or forfeiture, but only to the extent of the pecuniary loss
19 sustained from the act, transaction, or proceeding out of which the
20 penalty or forfeiture arose, with reasonable and actual costs
21 occasioned thereby. The balance of the claims must be treated as
22 Class 9 claims under Subsection (i).

23 (h) Class 8. Except as provided in Sections 443.251(b) and
24 (d), late filed claims that would otherwise be classified in
25 Classes 2 through 7.

26 (i) Class 9. Surplus notes, capital notes or contribution
27 notes or similar obligations, premium refunds on assessable

1 policies, and any other claims specifically assigned to this
2 class. Claims in this class are subject to any subordination
3 agreements related to other claims in this class that existed
4 before the entry of the liquidation order.

5 (j) Class 10. Interest on allowed claims of Classes 1
6 through 9, according to the terms of a plan proposed by the
7 liquidator and approved by the receivership court.

8 (k) Class 11. Claims of shareholders or other owners
9 arising out of their capacity as shareholders or other owners, or
10 any other capacity, except as they may be qualified in Class 2, 5,
11 or 10. Claims in this class are subject to any subordination
12 agreements related to other claims in this class that existed
13 before the entry of the liquidation order.

14 SECTION 11. Sections 443.303(a) and (b), Insurance Code,
15 are amended to read as follows:

16 (a) For purposes of this section, "distributable assets"
17 means all general assets of the liquidation estate less:

18 (1) amounts reserved, to the extent necessary and
19 appropriate, for the entire Section 443.301(a) expenses of the
20 liquidation through and after its closure; and

21 (2) to the extent necessary and appropriate, reserves
22 for distributions on claims other than those of the guaranty
23 associations falling within the priority classes of claims
24 established in Section 443.301(b) [~~443.301(c)~~].

25 (b) Early access payments to guaranty associations must be
26 made as soon as possible after the entry of a liquidation order and
27 as frequently as possible after the entry of the order, but at least

1 annually if distributable assets are available to be distributed to
2 the guaranty associations, and must be in amounts consistent with
3 this section. Amounts advanced to an affected guaranty
4 association pursuant to this section shall be accounted for as
5 advances against distributions to be made under Section
6 443.302. Where sufficient distributable assets are available,
7 amounts advanced are not limited to the claims and expenses paid to
8 date by the guaranty associations; however, the liquidator may not
9 distribute distributable assets to the guaranty associations in
10 excess of the anticipated entire claims of the guaranty
11 associations falling within the priority classes of claims
12 established in Sections 443.301(a) and (b) [~~443.301(b) and (c)~~].

13 SECTION 12. The changes in law made by this Act apply to a
14 receivership proceeding pending on the effective date of this Act
15 or initiated on or after the effective date of this Act.

16 SECTION 13. This Act takes effect September 1, 2011.