

1-1 By: Carona S.B. No. 1433
1-2 (In the Senate - Filed March 10, 2011; March 22, 2011, read
1-3 first time and referred to Committee on Business and Commerce;
1-4 April 13, 2011, reported favorably by the following vote: Yeas 9,
1-5 Nays 0; April 13, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to insurer receivership.

1-9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-10 SECTION 1. Subsections (a) and (e), Section 443.005,
1-11 Insurance Code, are amended to read as follows:

1-12 (a) Except as authorized by Section 203(e)(3), Pub. L. No.
1-13 111-203, a [A] delinquency proceeding may not be commenced under
1-14 this chapter by a person other than the commissioner, and a court
1-15 does not have jurisdiction to entertain, hear, or determine any
1-16 delinquency proceeding commenced by any other person.

1-17 (e) If, on motion of any party, the receivership court finds
1-18 that any action, as a matter of substantial justice, should be tried
1-19 in a forum outside this state, the receivership court may enter an
1-20 appropriate order to stay further proceedings on the action in this
1-21 state. Except as to claims against the estate, nothing in this
1-22 chapter deprives a party of any contractual right to pursue
1-23 arbitration. A party in arbitration may bring a claim or
1-24 counterclaim against the estate, but the claim or counterclaim is
1-25 subject to this chapter ~~[Section 443.209]~~.

1-26 SECTION 2. Section 443.0135, Insurance Code, is amended by
1-27 amending Subsection (a) and adding Subsection (c) to read as
1-28 follows:

1-29 (a) Except as provided by Subsection (c), the [The] receiver
1-30 shall use a competitive bidding process in the selection of any
1-31 special deputies appointed under Section 443.102 or 443.154. The
1-32 process must include procedures to promote the participation of
1-33 historically underutilized businesses that have been certified by
1-34 the comptroller under Section 2161.061, Government Code.

1-35 (c) In the event of an emergency, the receiver may appoint a
1-36 special deputy without soliciting competitive bids. For the
1-37 purposes of this subsection, an emergency exists if:

1-38 (1) a court has made a determination described by
1-39 Section 202(a)(1)(A)(iv)(I), Pub. L. No. 111-203; or

1-40 (2) the receiver concludes that the competitive
1-41 bidding process would delay the appointment of a special deputy and
1-42 that the delay could be hazardous to the insurer's policyholders or
1-43 creditors or the general public.

1-44 SECTION 3. Subsection (a), Section 443.052, Insurance Code,
1-45 is amended to read as follows:

1-46 (a) Except as authorized by Section 203(e)(3), Pub. L. No.
1-47 111-203, any [Any] formal delinquency proceeding against a person
1-48 shall be commenced by filing a petition in the name of the
1-49 commissioner or department.

1-50 SECTION 4. Section 443.057, Insurance Code, is amended to
1-51 read as follows:

1-52 Sec. 443.057. GROUND FOR CONSERVATION, REHABILITATION, OR
1-53 LIQUIDATION. A [The commissioner may file with a court in this
1-54 state-a] petition with respect to an insurer domiciled in this state
1-55 or an unauthorized insurer for an order of rehabilitation or
1-56 liquidation may be filed on any one or more of the following
1-57 grounds:

- 1-58 (1) the insurer is impaired;
1-59 (2) the insurer is insolvent;
1-60 (3) the insurer is about to become insolvent, with
1-61 "about to become insolvent" being defined as reasonably anticipated
1-62 that the insurer will not have liquid assets to meet its next 90
1-63 days' current obligations;
1-64 (4) the insurer has neglected or refused to comply

with an order of the commissioner to make good within the time prescribed by law any deficiency, whenever its capital and minimum required surplus, if a stock company, or its surplus, if a company other than stock, has become impaired;

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

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

(7) the insurer, its parent company, its subsidiaries, or its affiliates have concealed, removed, altered, destroyed, or failed to establish and maintain books, records, documents, accounts, vouchers, and other pertinent material adequate for the determination of the financial condition of the insurer by examination under Chapter 401 or has failed to properly administer claims or maintain claims records that are adequate for the determination of its outstanding claims liability;

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

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

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

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

(A) dishonest or untrustworthy; or

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

(12) any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, director, trustee, employee, shareholder, or other person, has refused to be examined under oath by the commissioner concerning the insurer's affairs, whether in this state or elsewhere or if examined under oath, refuses to divulge pertinent information reasonably known to the person; and after reasonable notice of the fact, the insurer has failed promptly and effectively to terminate the employment and status of the person and all the person's influence on management;

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

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

(15) the insurer or its property has been or is the subject of an application for the appointment of a receiver,

trustee, custodian, conservator, sequestrator, or similar fiduciary of the insurer or its property otherwise than as authorized under the insurance laws of this state;

(16) within the previous five years, the insurer has wilfully and continuously violated its charter, articles of incorporation or bylaws, any insurance law of this state, or any valid order of the commissioner;

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

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

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

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

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

(22) when authorized by department rules; or
(23) a court has made a determination described by Section 202(a)(1)(A)(iv)(I), Pub. L. No. 111-203.

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

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

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

(f) The rehabilitator may exercise all powers:
(1) possessed on August 31, 2005, by a receiver appointed for the purpose of rehabilitating an insurer; or
(2) conferred on a rehabilitator after that date by the laws of this state that are not inconsistent with this chapter.

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

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

SECTION 8. Subsection (b), Section 443.211, Insurance Code, is amended to read as follows:

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

(1) allowed under Section 443.253; or ~~and~~
(2) paid under:
(A) Chapter 462, 463, or 2602; or
(B) the guaranty associations of other states.

SECTION 9. Subsection (e), Section 443.253, Insurance Code,

4-1 is amended to read as follows:

4-2 (e) A judgment or order against an insured or the insurer
 4-3 entered after the date of the initial filing of a successful
 4-4 petition for receivership, or within 120 days before the initial
 4-5 filing of the petition, or ~~and~~ a judgment or order against an
 4-6 insured or the insurer entered at any time by default or by
 4-7 collusion need not be considered as evidence of liability or of the
 4-8 amount of damages.

4-9 SECTION 10. Section 443.301, Insurance Code, is amended to
 4-10 read as follows:

4-11 Sec. 443.301. PRIORITY OF DISTRIBUTION. The priority of
 4-12 payment of distributions on unsecured claims must be in accordance
 4-13 with the order in which each class of claims is set forth in this
 4-14 section. Every claim in each class shall be paid in full, or
 4-15 adequate funds retained for their payment, before the members of
 4-16 the next class receive payment, and all claims within a class must
 4-17 be paid substantially the same percentage of the amount of the
 4-18 claim. Except as provided by Subsections (a)(2), (a)(3), (i), and
 4-19 (k), subclasses may not be established within a class. No claim by
 4-20 a shareholder, policyholder, or other creditor shall be permitted
 4-21 to circumvent the priority classes through the use of equitable
 4-22 remedies. The order of distribution of claims shall be:

4-23 (a) Class 1. (1) The costs and expenses of administration
 4-24 expressly approved or ratified by the liquidator, including the
 4-25 following:

4-26 (A) the actual and necessary costs of preserving
 4-27 or recovering the property of the insurer;

4-28 (B) reasonable compensation for all services
 4-29 rendered on behalf of the administrative supervisor or receiver;

4-30 (C) any necessary filing fees;

4-31 (D) the fees and mileage payable to witnesses;

4-32 (E) unsecured loans obtained by the receiver; and

4-33 (F) expenses, if any, approved by the
 4-34 rehabilitator of the insurer and incurred in the course of the
 4-35 rehabilitation that are unpaid at the time of the entry of the order
 4-36 of liquidation.

4-37 (2) The reasonable expenses of a guaranty association,
 4-38 including overhead, salaries and other general administrative
 4-39 expenses allocable to the receivership to include administrative
 4-40 and claims handling expenses and expenses in connection with
 4-41 arrangements for ongoing coverage, other than expenses incurred in
 4-42 the performance of duties under Section 462.002(3), 463.108,
 4-43 463.111, 463.113, 463.353, or 2602.113 or similar duties under the
 4-44 statute governing a similar organization in another state. In the
 4-45 case of the Texas Property and Casualty Insurance Guaranty
 4-46 Association and other property and casualty guaranty associations,
 4-47 the expenses shall include loss adjustment expenses, including
 4-48 adjusting and other expenses and defense and cost containment
 4-49 expenses. In the event that there are insufficient assets to pay
 4-50 all of the costs and expenses of administration under Subsection
 4-51 (a)(1) and the expenses of a guaranty association, the costs and
 4-52 expenses under Subsection (a)(1) shall have priority over the
 4-53 expenses of a guaranty association. In this event, the expenses of
 4-54 a guaranty association shall be paid on a pro rata basis after the
 4-55 payment of costs and expenses under Subsection (a)(1) in full.

4-56 (3) For purposes of Subsection (a)(1)(E), any
 4-57 unsecured loan obtained by the receiver, unless by its terms it
 4-58 otherwise provides, has priority over all other costs of
 4-59 administration. Absent agreement to the contrary, all claims in
 4-60 this subclass share pro rata.

4-61 (4) Except as expressly approved by the receiver, any
 4-62 expenses arising from a duty to indemnify the directors, officers,
 4-63 or employees of the insurer are excluded from this class and, if
 4-64 allowed, are Class 5 claims.

4-65 (b) Class 2. (1) All claims under policies of insurance,
 4-66 including third-party claims, claims under nonassessable policies
 4-67 for unearned premium, claims of obligees and, subject to the
 4-68 discretion of the receiver, completion contractors under surety
 4-69 bonds and surety undertakings other than bail bonds, mortgage or

financial guaranties, or other forms of insurance offering protection against investment risk, claims by principals under surety bonds and surety undertakings for wrongful dissipation of collateral by the insurer or its agents, and claims incurred during the extension of coverage provided for in Section 443.152.

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

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

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

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

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

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

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

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

(iii) ~~[(C)]~~ the policy has been canceled as provided by this chapter;

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

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

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

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

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

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

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

(e) Class 5. Claims of other unsecured creditors not included in Classes 1 through 4, including claims under reinsurance contracts, claims of guaranty associations for assessments not paid by the insurer, and other claims excluded from Class 2.

(f) Class 6. Claims of any state or local governments, except those specifically classified elsewhere in this section. Claims of attorneys for fees and expenses owed them by an insurer for services rendered in opposing a formal delinquency proceeding. In order to prove the claim, the claimant must show that the insurer that is the subject of the delinquency proceeding incurred the fees and expenses based on its best knowledge, information, and belief, formed after reasonable inquiry, indicating opposition was in the best interests of the insurer, was well grounded in fact, and was warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law, and that opposition was not pursued for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

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

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

(i) Class 9. Surplus notes, capital notes or contribution notes or similar obligations, premium refunds on assessable policies, and any other claims specifically assigned to this class. Claims in this class are subject to any subordination agreements related to other claims in this class that existed before the entry of the liquidation order.

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

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

SECTION 11. Subsections (a) and (b), Section 443.303, Insurance Code, are amended to read as follows:

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

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

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

(b) Early access payments to guaranty associations must be made as soon as possible after the entry of a liquidation order and as frequently as possible after the entry of the order, but at least annually if distributable assets are available to be distributed to the guaranty associations, and must be in amounts consistent with this section. Amounts advanced to an affected guaranty association pursuant to this section shall be accounted for as advances against distributions to be made under Section 443.302. Where sufficient distributable assets are available, amounts advanced are not limited to the claims and expenses paid to date by the guaranty associations; however, the liquidator may not distribute distributable assets to the guaranty associations in excess of the anticipated entire claims of the guaranty associations falling within the priority classes of claims established in Sections 443.301(a) and (b) [~~443.301(b) and (c)~~].

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

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

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