

By: Smithee

H.B. No. 1408

A BILL TO BE ENTITLED

AN ACT

1
2 relating to dispute resolution for certain claims arising under
3 insurance policies issued by the Fair Access to Insurance
4 Requirements (FAIR) Plan Association; authorizing fees.

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

6 SECTION 1. Section 2211.003, Insurance Code, is amended by
7 adding Subsection (c) to read as follows:

8 (c) Subsection (a) does not apply to a person who is
9 required to resolve a dispute under Subchapter D-1.

10 SECTION 2. Subchapter A, Chapter 2211, Insurance Code, is
11 amended by adding Section 2211.004 to read as follows:

12 Sec. 2211.004. CERTAIN CONDUCT IN DISPUTE RESOLUTION
13 PROHIBITED. (a) For purposes of this section, "presiding officer"
14 includes a judge, mediator, arbitrator, appraiser, or panel member.

15 (b) If a person insured under this chapter is assigned to
16 act as presiding officer to preside over or resolve a dispute
17 involving the association and another person insured under this
18 chapter, the presiding officer shall, not later than the seventh
19 day after the date of assignment, give written notice to the
20 association and to each other party to the dispute, or the
21 association's or other party's attorney, that the presiding officer
22 is insured under this chapter.

23 (c) In a proceeding with respect to which the commissioner
24 has authority to designate the presiding officer, the association

1 or other party that receives notice under Subsection (b) may file
2 with the commissioner a written objection to the assignment of the
3 presiding officer to the dispute. The written objection must
4 contain the factual basis on which the association or other party
5 objects to the assignment.

6 (d) The commissioner shall assign a different presiding
7 officer to the dispute if, after reviewing the objection filed
8 under Subsection (c), the commissioner determines that the
9 presiding officer originally assigned to the dispute has a direct
10 financial or personal interest in the outcome of the dispute.

11 (e) The association or another party must file an objection
12 under Subsection (c) not later than the earlier of:

13 (1) the seventh day after the date the association or
14 other party receives actual notice that the presiding officer is
15 insured under this chapter; or

16 (2) the seventh day before the date of the first
17 proceeding concerning the dispute.

18 (f) The commissioner may, on a showing of good cause, extend
19 the deadline to file an objection under Subsection (e).

20 SECTION 3. Subchapter D, Chapter 2211, Insurance Code, is
21 amended by adding Section 2211.158 to read as follows:

22 Sec. 2211.158. REQUIRED POLICY PROVISIONS: DEADLINE FOR
23 FILING CLAIM; NOTICE CONCERNING RESOLUTION OF CERTAIN DISPUTES.

24 (a) An insurance policy issued by the association must:

25 (1) require an insured to file a claim under the policy
26 not later than the first anniversary of the date on which the damage
27 to property that is the basis of the claim occurs; and

1 (2) contain, in boldface type, a conspicuous notice
2 concerning the resolution of disputes under the policy, including:

3 (A) the processes and deadlines for appraisal
4 under Section 2211.174 and alternative dispute resolution under
5 Section 2211.175;

6 (B) the binding effect of appraisal under Section
7 2211.174; and

8 (C) the necessity of complying with the
9 requirements of Subchapter D-1 to seek relief, including judicial
10 relief.

11 (b) The commissioner, on a showing of good cause by a person
12 insured under this chapter, may extend the one-year period
13 described by Subsection (a)(1) for a period not to exceed 180 days.

14 SECTION 4. Chapter 2211, Insurance Code, is amended by
15 adding Subchapter D-1 to read as follows:

16 SUBCHAPTER D-1. CLAIMS: SETTLEMENT AND DISPUTE RESOLUTION

17 Sec. 2211.171. DEFINITIONS. In this subchapter:

18 (1) "Association policy" means an insurance policy
19 issued by the association.

20 (2) "Claim" means a request for payment under an
21 association policy. The term also includes any other claim against
22 the association, or an agent or representative of the association,
23 relating to an insured loss, under any theory or cause of action of
24 any kind, regardless of the theory under which the claim is
25 asserted, the cause of action brought, or the type of damages
26 sought.

27 (3) "Claimant" means a person who makes a claim.

1 Sec. 2211.172. EXCLUSIVE REMEDIES AND LIMITATION ON AWARD.

2 (a) This subchapter provides the exclusive remedies for a claim
3 against the association, including an agent or representative of
4 the association.

5 (b) Subject to Section 2211.176, the association may not be
6 held liable for any amount other than covered losses payable under
7 the terms of the association policy.

8 (c) The association, or an agent or representative of the
9 association, may not be held liable for damages under Chapter 17,
10 Business & Commerce Code, or, except as otherwise specifically
11 provided by this chapter, under any provision of any law providing
12 for additional damages, punitive damages, or a penalty.

13 Sec. 2211.173. FILING OF CLAIM; CLAIM PROCESSING. (a)

14 Subject to Section 2211.158(b), an insured must file a claim under
15 an association policy not later than the first anniversary of the
16 date on which the damage to property that is the basis of the claim
17 occurs.

18 (b) The claimant may submit written materials, comments,
19 documents, records, and other information to the association
20 relating to the claim. If the claimant fails to submit information
21 in the claimant's possession that is necessary for the association
22 to determine whether to accept or reject a claim, the association
23 may, not later than the 30th day after the date the claim is filed,
24 request in writing the necessary information from the claimant.

25 (c) The association shall, on request, provide a claimant
26 reasonable access to all information relevant to the determination
27 of the association concerning the claim. The claimant may copy the

1 information at the claimant's own cost or may request the
2 association to provide a copy of all or part of the information to
3 the claimant. The association may charge a claimant the actual cost
4 incurred by the association in providing a copy of information
5 under this section, excluding any amount for labor involved in
6 making any information or copy of information available to a
7 claimant.

8 (d) Unless the applicable 60-day period described by this
9 subsection is extended by the commissioner under Section 2211.180,
10 not later than the later of the 60th day after the date the
11 association receives a claim or the 60th day after the date the
12 association receives information requested under Subsection (b),
13 the association shall provide the claimant, in writing,
14 notification that:

15 (1) the association has accepted coverage for the
16 claim in full;

17 (2) the association has accepted coverage for the
18 claim in part and has denied coverage for the claim in part; or

19 (3) the association has denied coverage for the claim
20 in full.

21 (e) In a notice described by Subsection (d)(1), the
22 association must inform the claimant of the amount of loss the
23 association will pay and of the time limit to request appraisal
24 under Section 2211.174.

25 (f) In a notice described by Subsection (d)(2) or (3), the
26 association must inform the claimant of, as applicable:

27 (1) the portion of the loss for which the association

1 accepts coverage and the amount of loss the association will pay;

2 (2) the portion of the loss for which the association
3 denies coverage and a detailed summary of the manner in which the
4 association determined not to accept coverage for that portion of
5 the claim; and

6 (3) the time limit to:

7 (A) request appraisal under Section 2211.174 of
8 the portion of the loss for which the association accepts coverage;
9 and

10 (B) provide notice of intent to bring an action
11 as required by Section 2211.175.

12 (g) In addition to the notice required under Subsection
13 (d)(2) or (3), the association shall provide a claimant with a form
14 on which the claimant may provide the association notice of intent
15 to bring an action as required by Section 2211.175.

16 Sec. 2211.1731. PAYMENT OF CLAIM. (a) Except as provided
17 by Subsection (b), if the association notifies a claimant under
18 Section 2211.173(d)(1) or (2) that the association has accepted
19 coverage for a claim in full or has accepted coverage for a claim in
20 part, the association shall pay the accepted claim or accepted
21 portion of the claim not later than the 10th day after the date
22 notice is made.

23 (b) If payment of the accepted claim or accepted portion of
24 the claim is conditioned on the performance of an act by the
25 claimant, the association shall pay the claim not later than the
26 10th day after the date the act is performed.

27 Sec. 2211.174. DISPUTES CONCERNING AMOUNT OF ACCEPTED

1 COVERAGE. (a) If the association accepts coverage for a claim in
2 full and a claimant disputes only the amount of loss the association
3 will pay for the claim, or if the association accepts coverage for a
4 claim in part and a claimant disputes the amount of loss the
5 association will pay for the accepted portion of the claim, the
6 claimant may request from the association a detailed summary of the
7 manner in which the association determined the amount of loss the
8 association will pay.

9 (b) If a claimant disputes the amount of loss the
10 association will pay for a claim or a portion of a claim, the
11 claimant, not later than the 60th day after the date the claimant
12 receives the notice described by Section 2211.173(d)(1) or (2), may
13 demand appraisal in accordance with the terms of the association
14 policy.

15 (c) If a claimant, on a showing of good cause and not later
16 than the 15th day after the expiration of the 60-day period
17 described by Subsection (b), requests in writing that the 60-day
18 period be extended, the association may grant an additional 30-day
19 period in which the claimant may demand appraisal.

20 (d) If a claimant demands appraisal under this section:

21 (1) the appraisal must be conducted as provided by the
22 association policy; and

23 (2) the claimant and the association are responsible
24 in equal shares for paying any costs incurred or charged in
25 connection with the appraisal, including a fee charged under
26 Subsection (e).

27 (e) If a claimant demands appraisal under this section and

1 the appraiser retained by the claimant and the appraiser retained
2 by the association are able to agree on an appraisal umpire to
3 participate in the resolution of the dispute, the appraisal umpire
4 is the umpire chosen by the two appraisers. If the appraiser
5 retained by the claimant and the appraiser retained by the
6 association are unable to agree on an appraisal umpire to
7 participate in the resolution of the dispute, the commissioner
8 shall select an appraisal umpire from a roster of qualified umpires
9 maintained by the department. The department may:

10 (1) require appraisers to register with the department
11 as a condition of being placed on the roster of umpires; and

12 (2) charge a reasonable registration fee to defray the
13 cost incurred by the department in maintaining the roster and the
14 commissioner in selecting an appraisal umpire under this
15 subsection.

16 (f) Except as provided by Subsection (g), the appraisal
17 decision is binding on the claimant and the association as to the
18 amount of loss the association will pay for a fully accepted claim
19 or the accepted portion of a partially accepted claim and is not
20 appealable or otherwise reviewable. A claimant that does not
21 demand appraisal before the expiration of the periods described by
22 Subsections (b) and (c) waives the claimant's right to contest the
23 association's determination of the amount of loss the association
24 will pay with reference to a fully accepted claim or the accepted
25 portion of a partially accepted claim.

26 (g) A claimant or the association may, not later than the
27 second anniversary of the date of an appraisal decision, file an

1 action in a district court in the county in which the loss that is
2 the subject of the appraisal occurred to vacate the appraisal
3 decision and begin a new appraisal process if:

4 (1) the appraisal decision was obtained by corruption,
5 fraud, or other undue means;

6 (2) the rights of the claimant or the association were
7 prejudiced by:

8 (A) evident partiality by an appraisal umpire;

9 (B) corruption in an appraiser or appraisal
10 umpire; or

11 (C) misconduct or wilful misbehavior of an
12 appraiser or appraisal umpire; or

13 (3) an appraiser or appraisal umpire:

14 (A) exceeded the appraiser's or appraisal
15 umpire's powers;

16 (B) refused to postpone the appraisal after a
17 showing of sufficient cause for the postponement;

18 (C) refused to consider evidence material to the
19 claim; or

20 (D) conducted the appraisal in a manner that
21 substantially prejudiced the rights of the claimant or the
22 association.

23 (h) Except as provided by Subsection (g), a claimant may not
24 bring an action against the association with reference to a claim
25 for which the association has accepted coverage in full.

26 Sec. 2211.175. DISPUTES CONCERNING DENIED COVERAGE. (a)

27 If the association denies coverage for a claim in part or in full

1 and the claimant disputes that determination, the claimant, not
2 later than the expiration of the limitations period described by
3 Section 2211.177(a), but after the date the claimant receives the
4 notice described by Section 2211.173(d)(2) or (3), must provide the
5 association with notice that the claimant intends to bring an
6 action against the association concerning the partial or full
7 denial of the claim.

8 (b) If a claimant provides notice of intent to bring an
9 action under Subsection (a), the association may require the
10 claimant, as a prerequisite to filing the action against the
11 association, to submit the dispute to alternative dispute
12 resolution by mediation or moderated settlement conference, as
13 provided by Chapter 154, Civil Practice and Remedies Code. A
14 claimant that does not provide notice of intent to bring an action
15 before the expiration of the period described by Subsection (a)
16 waives the claimant's right to contest the association's partial or
17 full denial of coverage and is barred from bringing an action
18 against the association concerning the denial of coverage.

19 (c) The association must request alternative dispute
20 resolution of a dispute described by Subsection (b) not later than
21 the 60th day after the date the association receives from the
22 claimant notice of intent to bring an action.

23 (d) Alternative dispute resolution under this section must
24 be completed not later than the 60th day after the date a request
25 for alternative dispute resolution is made under Subsection (c).
26 The 60-day period described by this subsection may be extended by
27 the commissioner by rule in accordance with Section 2211.180 or by

1 the association and a claimant by mutual consent.

2 (e) If the claimant is not satisfied after completion of
3 alternative dispute resolution, or if alternative dispute
4 resolution is not completed before the expiration of the 60-day
5 period described by Subsection (d) or any extension under that
6 subsection, the claimant may bring an action against the
7 association in a district court in the county in which the loss that
8 is the subject of the coverage denial occurred. An action brought
9 under this subsection shall be presided over by a judge appointed by
10 the judicial panel on multidistrict litigation designated under
11 Section 74.161, Government Code. A judge appointed under this
12 section must be an active judge, as defined by Section 74.041,
13 Government Code, who is a resident of the county in which the loss
14 that is the basis of the disputed denied coverage occurred or of a
15 county adjacent to the county in which that loss occurred.

16 (f) If a claimant brings an action against the association
17 concerning a partial or full denial of coverage, the court shall
18 abate the action until the notice of intent to bring an action has
19 been provided and, if requested by the association, the dispute has
20 been submitted to alternative dispute resolution, in accordance
21 with this section.

22 (g) A moderated settlement conference under this section
23 may be conducted by a panel consisting of one or more impartial
24 third parties.

25 (h) If the association requests mediation under this
26 section, the claimant and the association are responsible in equal
27 shares for paying any costs incurred or charged in connection with

1 the mediation.

2 (i) If the association requests mediation under this
3 section, and the claimant and the association are able to agree on a
4 mediator, the mediator is the mediator agreed to by the claimant and
5 the association. If the claimant and the association are unable to
6 agree on a mediator, the commissioner shall select a mediator from a
7 roster of qualified mediators maintained by the department. The
8 department may:

9 (1) require mediators to register with the department
10 as a condition of being placed on the roster; and

11 (2) charge a reasonable registration fee to defray the
12 cost incurred by the department in maintaining the roster and the
13 commissioner in selecting a mediator under this section.

14 (j) The commissioner shall establish rules to implement
15 this section, including provisions for expediting alternative
16 dispute resolution, facilitating the ability of a claimant to
17 appear with or without counsel, establishing qualifications
18 necessary for mediators to be placed on the roster maintained by the
19 department under Subsection (i), and providing that formal rules of
20 evidence shall not apply to the proceedings.

21 Sec. 2211.176. ISSUES BROUGHT TO SUIT; LIMITATIONS ON
22 RECOVERY. (a) The only issues a claimant may raise in an action
23 brought against the association under Section 2211.175 are:

24 (1) whether the association's denial of coverage was
25 proper; and

26 (2) the amount of the damages described by Subsection
27 (b) to which the claimant is entitled, if any.

1 (b) Except as provided by Subsections (c) and (d), a
2 claimant that brings an action against the association under
3 Section 2211.175 may recover only:

4 (1) the covered loss payable under the terms of the
5 association policy less, if applicable, the amount of loss already
6 paid by the association for any portion of a covered loss for which
7 the association accepted coverage;

8 (2) prejudgment interest from the first day after the
9 date specified in Section 2211.1731 by which the association was or
10 would have been required to pay an accepted claim or the accepted
11 portion of a claim, at the prejudgment interest rate provided in
12 Subchapter B, Chapter 304, Finance Code; and

13 (3) court costs and reasonable and necessary
14 attorney's fees.

15 (c) Nothing in this chapter, including Subsection (b), may
16 be construed to limit the consequential damages, or the amount of
17 consequential damages, that a claimant may recover under common law
18 in an action against the association.

19 (d) A claimant that brings an action against the association
20 under Section 2211.175 may, in addition to the covered loss
21 described by Subsection (b)(1) and any consequential damages
22 recovered by the claimant under common law, recover damages in an
23 amount not to exceed the aggregated amount of the covered loss
24 described by Subsection (b)(1) and the consequential damages
25 recovered under common law if the claimant proves by clear and
26 convincing evidence that the association mishandled the claimant's
27 claim to the claimant's detriment by intentionally:

1 (1) failing to meet the deadlines or timelines
2 established under this subchapter without good cause, including the
3 applicable deadline established under Section 2211.1731 for
4 payment of an accepted claim or the accepted portion of a claim;

5 (2) failing to provide the notice required under
6 Section 2211.173(d);

7 (3) rejecting a claim without conducting a reasonable
8 investigation with respect to the claim; or

9 (4) denying coverage for a claim in part or in full if
10 the association's liability has become reasonably clear as a result
11 of the association's investigation with respect to the portion of
12 the claim that was denied.

13 (e) For purposes of Subsection (d), "intentionally" means
14 actual awareness of the facts surrounding the act or practice
15 listed in Subsection (d)(1), (2), (3), or (4), coupled with the
16 specific intent that the claimant suffer harm or damages as a result
17 of the act or practice. Specific intent may be inferred from
18 objective manifestations that the association acted intentionally
19 or from facts that show that the association acted with flagrant
20 disregard of the duty to avoid the acts or practices listed in
21 Subsection (d)(1), (2), (3), or (4).

22 Sec. 2211.177. LIMITATIONS PERIOD. (a) Notwithstanding
23 any other law, a claimant that brings an action against the
24 association under Section 2211.175 must bring the action not later
25 than the second anniversary of the date on which the person receives
26 a notice described by Section 2211.173(d)(2) or (3).

27 (b) This section is a statute of repose and controls over

1 any other applicable limitations period.

2 Sec. 2211.178. CONSTRUCTION WITH OTHER LAW. (a) To the
3 extent of any conflict between a provision of this subchapter and
4 any other law, the provision of this subchapter prevails.

5 (b) Notwithstanding any other law, the association may not
6 bring an action against a claimant, for declaratory or other
7 relief, before the 180th day after the date an appraisal under
8 Section 2211.174, or alternative dispute resolution under Section
9 2211.175, is completed.

10 Sec. 2211.179. RULEMAKING. (a) The commissioner shall
11 adopt rules regarding the provisions of this subchapter, including
12 rules concerning:

13 (1) qualifications and selection of appraisers for the
14 appraisal procedure and mediators for the mediation process;

15 (2) procedures and deadlines for the payment and
16 handling of claims by the association as well as the procedures and
17 deadlines for a review of a claim by the association; and

18 (3) any other matters regarding the handling of claims
19 that are not inconsistent with this subchapter.

20 (b) All rules adopted by the commissioner under this section
21 shall promote the fairness of the process, protect the rights of
22 aggrieved policyholders, and ensure that policyholders may
23 participate in the claims review process without the necessity of
24 engaging legal counsel.

25 Sec. 2211.180. COMMISSIONER EXTENSION OF DEADLINES. (a)
26 The commissioner, on a showing of good cause, may by rule extend any
27 deadline established under this subchapter.

1 (b) For the purposes of Subsection (a), "good cause"
2 includes military deployment.

3 Sec. 2211.181. OMBUDSMAN PROGRAM. (a) The department
4 shall establish an ombudsman program to provide information and
5 educational programs to assist persons insured under this chapter
6 with the claim processes under this subchapter.

7 (b) Not later than March 1 of each year, the department
8 shall prepare and submit to the commissioner a budget for the
9 ombudsman program, including approval of all expenditures incurred
10 in administering and operating the program. The commissioner shall
11 adopt or modify and adopt the budget not later than April 1 of the
12 year in which the budget is submitted.

13 (c) Not later than May 1 of each year, the association shall
14 transfer to the ombudsman program money in an amount equal to the
15 amount of the budget adopted under Subsection (b). The ombudsman
16 program, not later than April 30 of each year, shall return to the
17 association any unexpended funds that the program received from the
18 association in the previous year.

19 (d) The department shall, not later than 60 days after the
20 date of a catastrophic event, as defined by the commissioner for the
21 purposes of this subsection, prepare and submit an amended budget
22 to the commissioner for approval and report to the commissioner the
23 approximate number of claimants eligible for ombudsman services.
24 The commissioner shall adopt rules as necessary to implement an
25 amended budget submitted under this section, including rules
26 regarding the transfer of additional money from the association to
27 the program.

1 (e) The ombudsman program may provide to persons insured
2 under this chapter information and educational programs through:

- 3 (1) informational materials;
4 (2) toll-free telephone numbers;
5 (3) public meetings;
6 (4) outreach centers;
7 (5) the Internet; and
8 (6) other reasonable means.

9 (f) The ombudsman program is administratively attached to
10 the department. The department shall provide the staff, services,
11 and facilities necessary for the ombudsman program to operate,
12 including:

- 13 (1) administrative assistance and service, including
14 budget planning and purchasing;
15 (2) personnel services;
16 (3) office space; and
17 (4) computer equipment and support.

18 (g) The ombudsman program shall prepare and make available
19 to each person insured under this chapter information describing
20 the functions of the ombudsman program.

21 (h) The association, in the manner prescribed by the
22 commissioner by rule, shall notify each person insured under this
23 chapter concerning the operation of the ombudsman program.

24 (i) The commissioner may adopt rules as necessary to
25 implement this section.

26 SECTION 5. (a) Except as otherwise specifically provided
27 by this section, this Act applies only to an insurance policy that

1 is delivered, issued for delivery, or renewed by the Fair Access to
2 Insurance Requirements Plan Association on or after the 60th day
3 after the effective date of this Act. An insurance policy that is
4 delivered, issued for delivery, or renewed by the Fair Access to
5 Insurance Requirements Plan Association before the 60th day after
6 the effective date of this Act is governed by the law in effect
7 immediately before the effective date of this Act, and the former
8 law is continued in effect for that purpose.

9 (b) The deadline to file a claim under an insurance policy
10 delivered, issued for delivery, or renewed before the 60th day
11 after the effective date of this Act by the Fair Access to Insurance
12 Requirements Plan Association is governed by the law applicable to
13 the claim immediately before the effective date of this Act, and
14 that law is continued in effect for that purpose.

15 (c) If a person insured by the Fair Access to Insurance
16 Requirements Plan Association disputes the amount the association
17 will pay for a partially or fully accepted claim filed by the
18 person, Section 2211.174, Insurance Code, as added by this Act,
19 applies only if the insurance policy under which the claim is filed
20 is delivered, issued for delivery, or renewed on or after the 60th
21 day after the effective date of this Act.

22 (d) If a person insured by the Fair Access to Insurance
23 Requirements Plan Association disputes the amount the association
24 will pay for a partially or fully accepted claim filed by the person
25 and the insurance policy under which the claim is filed is
26 delivered, issued for delivery, or renewed before the 60th day
27 after the effective date of this Act:

1 (1) Section 2211.174, Insurance Code, as added by this
2 Act, does not apply to the resolution of the dispute; and

3 (2) notwithstanding any other provision of this Act,
4 the claimant must attempt to resolve the dispute through any
5 appraisal process contained in the association policy under which
6 the claim is filed before an action may be brought against the Fair
7 Access to Insurance Requirements Plan Association concerning the
8 claim.

9 (e) The person insured by the Fair Access to Insurance
10 Requirements Plan Association and the association may agree that an
11 appraisal conducted under Subsection (d)(2) of this section is
12 binding on the parties.

13 (f) An action brought against the association concerning a
14 claim described by Subsection (d) of this section shall be abated
15 until the appraisal process under Subsection (d)(2) of this section
16 is completed.

17 (g) Notwithstanding Sections 2211.175 and 2211.176,
18 Insurance Code, as added by this Act, Subsection (b) of this
19 section, or any other provision of this Act, Sections 2211.176(b),
20 (c), (d), and (e), Insurance Code, apply to any cause of action that
21 accrues against the Fair Access to Insurance Requirements Plan
22 Association on or after the effective date of this Act and the basis
23 of which is a claim filed under an insurance policy that is
24 delivered, issued for delivery, or renewed by the association,
25 regardless of the date on which the policy was delivered, issued for
26 delivery, or renewed.

27 SECTION 6. This Act takes effect immediately if it receives

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1 a vote of two-thirds of all the members elected to each house, as
2 provided by Section 39, Article III, Texas Constitution. If this
3 Act does not receive the vote necessary for immediate effect, this
4 Act takes effect September 1, 2013.