

ACT 93

H.B. NO. 2471

A Bill for an Act Relating to the Hawaii Insurance Guaranty Association.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 431:16-102, Hawaii Revised Statutes, is amended to read as follows:

**“§431:16-102 Purpose.** The purpose of this part is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and, to [avoid] the extent provided in this part, to minimize financial loss to claimants or policyholders because of the insolvency of an insurer[, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers].”

SECTION 2. Section 431:16-103, Hawaii Revised Statutes, is amended to read as follows:

**“§431:16-103 Scope.** This part shall apply to all types of direct insurance, but shall not [be applicable] apply to the following:

- (1) Life, annuity, health, or disability insurance;
- (2) Mortgage guaranty, financial guaranty, or any other forms of insurance offering protection against investment risks;
- (3) Fidelity or surety bonds, or any other bonding obligations;

- (4) Credit [life or credit disability] insurance[;], vendors' single interest insurance, collateral protection insurance, or any similar insurance protecting the interests of a creditor arising out of a creditor-debtor transaction;
- (5) Insurance of warranties or service contracts[;], including insurance that provides for the repair, replacement, or service of goods or property, for indemnification for the repair, replacement, or service for the operational or structural failure of the goods or property due to a defect in materials, artisanship, or normal wear and tear, or for reimbursement for the liability incurred by the issuer of agreements or service contracts that provide those benefits;
- (6) Title insurance;
- (7) Ocean marine insurance; [and]
- (8) Any transaction or combination of transactions between a person[,] (including affiliates of [such] the person[,]) and an insurer[,] (including affiliates of [such] the insurer[, which]) that involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk[.]; or
- (9) Any insurance provided by or guaranteed by government."

SECTION 3. Section 431:16-104, Hawaii Revised Statutes, is amended to read as follows:

**"§431:16-104 Construction.** This [code] part shall be [liberally] construed to effect the purpose under section 431:16-102 which will constitute an aid and guide to interpretation."

SECTION 4. Section 431:16-105, Hawaii Revised Statutes, is amended to read as follows:

**"§431:16-105 Definitions.** As used in this [code:] part:

[(1) Affiliate] "Affiliate" means a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year [next] immediately preceding the date the insurer becomes an insolvent insurer.

[(2) Association] "Association" means the Hawaii [Insurance Guaranty Association] insurance guaranty association created under section 431:16-106.

[(3) Claimant] "Claimant" means any insured making a first-party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.

[(4) Control] "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten per cent or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.

[(5) Covered claim means] "Covered claim":

- (1) Means an unpaid claim, including one for unearned premiums, submitted by a claimant, [which] that arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to

which this part applies issued by an insurer, if [such] the insurer becomes an insolvent insurer after July 1, [1988] 2000, and:

- (A) The claimant or insured is a resident of this State at the time of the insured event[.]; provided that for entities other than an individual, the residence of a claimant [or], insured, or policyholder is the state in which its principal place of business is located at the time of the insured event; or
- [(B) The property from which the claim arises is permanently located in this State.

Covered claim shall not include any amount awarded as punitive or exemplary damages; sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.]

(B) The claim is a first party claim for damage to property with a permanent location in this State; and

(2) Shall not include:

- (A) Any amount awarded as punitive or exemplary damages;
- (B) Any amount sought as a return of premium under any retrospective rating plan;
- (C) Any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries, reinsurance recoveries, contribution, indemnification, or otherwise;
- (D) Any first party claims by an insured whose net worth exceeds \$25,000,000 on December 31 of the year prior to the year in which the insurer becomes an insolvent insurer; provided that an insured's net worth on that date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries as calculated on a consolidated basis; or
- (E) Any first party claims by an insured who is an affiliate of the insolvent insurer.

[(6) Insolvent insurer] "Insolvent insurer" means an insurer licensed to transact insurance in this State, either at the time the policy was issued or when the insured event occurred, and [determined to be insolvent by a court of competent jurisdiction.] against whom a final order of liquidation has been entered after the effective date of this Act with a finding of insolvency by a court of competent jurisdiction in the insurer's state of domicile.

[(7) Member insurer] "Member insurer" means any person who:

- [(A)] (1) Writes any kind of insurance to which this part applies under section 431:16-103, including the exchange of reciprocal or inter-insurance contracts; and
- [(B)] (2) Is licensed to transact insurance in this State.

An insurer shall cease to be a member insurer effective on the day following the termination or expiration of its certificate of authority to transact the kinds of insurance to which this part applies. However, the insurer shall remain liable as a member insurer for any and all obligations, including obligations for assessments levied either prior to or after the termination or expiration of its certificate of authority, even though the insurer became insolvent before the termination or expiration of its certificate of authority.

[(8) Net direct written premiums] "Net direct written premiums" means direct gross premiums written in this State on insurance policies to which this part applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. Net direct written premiums [does] do not include premiums on contracts between insurers or reinsurers.

[(9) Person] “Person” means any individual, corporation, partnership, association, or voluntary organization.”

SECTION 5. Section 431:16-106, Hawaii Revised Statutes, is amended to read as follows:

“**§431:16-106 Creation of association.** [(a)]<sup>1</sup> There is created a nonprofit unincorporated legal entity to be known as the Hawaii [Insurance Guaranty Association.] insurance guaranty association. All insurers defined as member insurers in section [431:16-105(7)] 431:16-105 shall be and remain members of the association as a condition of their authority to transact the business of insurance in this State. The association shall perform its function under a plan of operation established and approved under section 431:16-109 and shall exercise its powers through a board of directors established under section 431:16-107.

[(b) All meetings and records of the board of directors shall be open to all member insurers except for those meetings and records pertaining to the solvency, liquidation, rehabilitation, or conservation of any member insurer deemed confidential. A member insurer shall provide written designation of its representative or representatives to the board meetings.]”

SECTION 6. Section 431:16-107, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The board of directors of the association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the commissioner. Vacancies on the board shall be filled for the remaining period of the term by a majority vote of the remaining board members subject to the approval of the commissioner. [If no members are selected within sixty days after July 1, 1988, the commissioner may appoint the initial members of the board of directors.]”

SECTION 7. Section 431:16-108, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The association shall:

- (1) Be obligated to the extent of the covered claims existing prior to the [determination of insolvency, which the insolvent insurer would have been legally obligated to pay but for its insolvency,] order of liquidation and arising within thirty days after the [determination of insolvency,] order of liquidation, or before the policy expiration date if less than thirty days after the [determination,] order of liquidation, or before the insured replaces the policy or causes its cancellation, if the [insurer] insured does so within thirty days of the [determination, but the obligation shall include only that amount of each covered claim which is less than \$300,000, except that the association shall pay the full amount of any covered claim arising out of a workers’ compensation policy.] order of liquidation. The obligation shall be satisfied by paying to the claimant an amount as follows:

- (A) The full amount of a covered claim for benefits under a workers’ compensation insurance coverage;
- (B) An amount not exceeding \$10,000 per policy for a covered claim for the return of unearned premium; or
- (C) An amount not exceeding \$300,000 per claim for all other covered claims.

In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the stated policy limit of the insolvent insurer under the policy from which the claim arises[;]. Notwithstanding any other provisions of this part, a covered claim shall not include a claim filed with the association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. Any obligation of the association to defend an insured shall cease upon the association's payment or tender of an amount equal to the lesser of the association's covered claim obligation limit or the applicable policy limit;

- (2) Be deemed the insurer, but only to the extent of its obligation on covered claims and to that extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent[;], including but not limited to the right to pursue and retain salvage and subrogation recoverable on covered claim obligations to the extent paid by the association;
- (3) Assess insurers amounts necessary to pay the obligations of the association under [subsection (a)] paragraph (1) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, and the cost of examinations under section 431:16-113, and other expenses authorized by this part. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year bears to the net direct written premiums of all member insurers for the preceding calendar year. Each member insurer shall be notified of the assessment not later than thirty days before it is due. No member insurer may be assessed in any year an amount greater than two per cent of that member insurer's net direct written premiums for the preceding calendar year. If the maximum assessment, together with the other assets of the association, does not provide in any one year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The association shall pay claims in any order that it may deem reasonable, including the payment of claims as they are received from the claimants or in groups or categories of claims. The association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. However, during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when the payment will not reduce capital or surplus below required minimums. Payments shall be refunded to those companies receiving larger assessments by virtue of the deferment, or at the election of the companies, credited against future assessments. Each member insurer may set off against any assessment payments authorized by the administrator of the association to be made on covered claims and expenses incurred in the payment of the claims by the member insurer;
- (4) Investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims and may review settlements, releases, and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which [such] the settlements,

- releases, and judgments may be properly contested[;]. The association may appoint or substitute and direct legal counsel retained under liability insurance policies for the defense of covered claims;
- (5) Notify the persons as the commissioner directs under section 431:16-110(b)(1);
  - (6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the commissioner, but the designation may be declined by a member insurer;
  - (7) Reimburse each servicing facility for obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the association and [shall] pay the other expenses of the association authorized by this [code;] part; and
  - (8) Have the authority, notwithstanding sections 431:10C-110 and 431:10C-111, to cancel all policies issued by an insolvent insurer. [All] Covered claims under these policies shall be [covered] paid by the association in an amount not to exceed the [state] stated policy limit of the insolvent insurer under the policy from which the claim arises[.], or as provided under paragraph (1)(A) to (C), whichever is less.”

SECTION 8. Section 431:16-109, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

- “(c) The plan of operation shall:
- (1) Establish the procedures whereby all the powers and duties of the association under section 431:16-108 [will] shall be performed;
  - (2) Establish procedures for handling assets of the association;
  - (3) Establish procedures for the disposition of liquidating dividends or other moneys received from the estate of the insolvent insurer;
  - [(3)] (4) Establish the amount and method of reimbursing members of the board of directors under section 431:16-107(c);
  - [(4)] (5) Establish procedures by which claims may be filed with the association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the association or its agent and a list of the claims shall be periodically submitted to the association or similar organization in another state by the receiver or liquidator;
  - [(5)] (6) Establish regular places and times for meetings of the board of directors;
  - [(6)] (7) Establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors;
  - [(7)] (8) Provide that any member insurer aggrieved by any final action or decision of the association may appeal to the commissioner within thirty days after the action or decision;
  - [(8)] (9) Establish the procedures whereby selections for the board of directors will be submitted to the commissioner; and
  - [(9)] (10) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.”

SECTION 9. Section 431:16-110, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

“(a) The commissioner shall:

- (1) Notify the association of the existence of an insolvent insurer not later than three days after the commissioner receives notice of the determi-

nation of the insolvency. The association shall be entitled to a copy of a complaint seeking an order of liquidation with a finding of insolvency against a member company at the same time that the complaint is filed with a court of competent jurisdiction.

- (2) Upon request of the board of directors, provide the association with a statement of the net direct written premiums of each member insurer.”

2. By amending subsection (c) to read:

“(c) Any final action or order of the commissioner under this [code] part shall be subject to judicial review by the circuit court of the first judicial circuit.”

SECTION 10. Section 431:16-111, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

“(a) Any person recovering under this [code] part shall be deemed to have assigned the person’s rights under the policy to the association to the extent of the person’s recovery from the association. Every insured or claimant seeking the protection of this part shall cooperate with the association to the same extent as [such] that person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except [such] any causes of action [as] that the insolvent insurer would have had if [such] those sums had been paid by the insolvent insurer and except as provided in subsection (b). In the case of an insolvent insurer operating as an assessable mutual company on a plan with assessment liability, payments of claims of the association shall not operate to reduce the liability of the insureds to the receiver, liquidator, or statutory successor for unpaid assessment.”

2. By amending subsection (c) to read:

“(c) The association and a similar organization in another state shall be recognized as claimants in the liquidation of an insolvent insurer for any amounts paid by them on covered claims as determined under this part or similar laws in other states and shall receive dividends and any other distributions at the priority set forth in section 431:15-332. The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by determinations of covered claim eligibility under this part and by settlements of [covered] claims by the association or a similar organization in another state[.] to the extent the determinations or settlements satisfy obligations of the association. The receiver shall not be bound in any way by the determinations or settlements to the extent there remains a claim against the insolvent insurer. The court having jurisdiction shall grant such claims priority equal to that to which the claimant would have been entitled in the absence of this part against the assets of the insolvent insurer.”

SECTION 11. Section 431:16-112, Hawaii Revised Statutes, is amended to read as follows:

“**§431:16-112 [Nonduplication of recovery.] Exhaustion of other coverage.** (a) Any person having a claim against an insurer whether or not the insurer is a member insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first the person’s rights under [such] the policy. Any amount payable on a covered claim under this part shall be reduced by the amount of any recovery under [such] the insurance policy. If there are any other policies issued by an insolvent insurer applicable to the covered claim, then all such policies must first be exhausted before any claim can be deemed a covered claim subject to being covered by the association.

[(b) Any person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim, shall be required to exhaust first the person's right under such program. Any amount payable on a covered claim under this part shall be reduced by the amount of any recovery under such insurance or program.

(c) (b) Any person having a claim [which] that may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, except that if the claim is a first-party claim for damage to property with a permanent location, the person shall seek recovery first from the association of the location of the property[, and if it is]. For a workers' compensation claim, the person shall seek recovery first from the association of the residence of the claimant. Any recovery under this part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent."

SECTION 12. Section 431:16-113, Hawaii Revised Statutes, is amended to read as follows:

**"§431:16-113 Prevention of insolvencies.** To aid in the detection and prevention of insurer insolvencies: [(a) The board of directors may, upon majority vote:

- (1) Make recommendations to the commissioner for the detection and prevention of insurer insolvencies; and
- (2) Respond to requests by the commissioner to discuss and make recommendations regarding the status of any member insurer whose financial condition may be determined by the commissioner to be hazardous to policyholders or the public. Such recommendations shall not be considered public documents.
- (3) The board of directors may, upon majority vote, request that the commissioner order an examination of any member insurer which the board in good faith believes may be in a financial condition hazardous to the policyholders or the public. Within thirty days of the receipt of such request, the commissioner shall begin the examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by such persons as the commissioner designates. The cost of such examination shall be paid by the association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors prior to its release to the public, but this shall not preclude the commissioner from reporting to the board of directors when the commissioner has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public. The commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the commissioner but it shall not be open to public inspection prior to the release of the examination report to the public.

(b) The board of directors may, at the conclusion of any domestic insurer insolvency in which the association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the association and submit such report to the commissioner.]



- (1) The board of directors, upon majority vote, may make recommendations to the commissioner on matters generally related to improving or enhancing regulation for solvency; and
- (2) At the conclusion of any domestic insurer insolvency in which the association was obligated to pay covered claims, the board of directors may prepare a report on the history and causes of the insolvency, based on the information available to the association, and submit the report to the commissioner.”

SECTION 13. Section 431:16-116, Hawaii Revised Statutes, is amended to read as follows:

“**§431:16-116 Immunity.** There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the association or its agents or employees, the board of directors, any person serving as an alternate or substitute representative of any director, or the commissioner or the commissioner’s representatives for any action taken or any failure to act by them in the performance of their powers and duties under this part.”

SECTION 14. Section 431:16-117, Hawaii Revised Statutes, is amended to read as follows:

“**§431:16-117 Stay of proceedings.** (a) All proceedings in which the insolvent insurer is a party, or is obligated to defend a party in any court in this State, subject to waiver by the association in specific cases involving covered claims, shall be stayed for up to six months, and [such] any additional time thereafter as may be determined by the court, from the date the insolvency is determined or an ancillary proceeding is instituted in the State, whichever is later, to permit proper defense by the association of all pending causes of action. As to any covered claims arising from a judgment or under any decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured, the association, either on its own behalf or on behalf of [such] the insured, may apply to have such judgment, order, decision, verdict, or finding set aside by the same court, administrator, or other entity that made [such] the judgment, order, decision, verdict, or finding and shall be permitted to defend [such] the claim on the merits.

(b) The liquidator, receiver, or statutory successor of an insolvent insurer covered by this part shall permit access by the board or its authorized representative to [such of] the insolvent insurer’s claim records[, and may permit access to such other records which] that are necessary for the board in carrying out its functions under this part with regard to covered claims. In addition, the liquidator, receiver, or statutory successor shall provide the board or its representative with copies of [such] those records upon the request by the board and at the expense of the board.”

SECTION 15. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 16. This Act shall take effect upon its approval.

(Approved May 16, 2000.)

**Note**

1. So in original.