WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 434

FISCAL NOTE

BY SENATORS GAUNCH AND BOSO

[Introduced February 24, 2017; Referred

to the Committee on Banking and Insurance; and then

to the Committee on the Judiciary]

A BILL to amend and reenact §33-26-2, §33-26-3, §33-26-4, §33-26-5, §33-26-8, §33-26-9, §33-26-10, §33-26-11, §33-26-12, §33-26-13, §33-26-14 and §33-26-18 of the Code of West Virginia, 1931, as amended, all relating to West Virginia Insurance Guaranty Association Act; modifying scope and construction of act; adding and amending definitions; clarifying and adding powers, duties and rights of association; modifying provisions concerning effect of paid claims, exhaustion of coverage, prevention of insolvencies and stay of proceedings; changing due date of annual financial report; limiting covered claims; expanding association's right to recover and be reimbursed; providing for confidentiality of financial information; and exempting certain reports and recommendations from Freedom of Information Act.

Be it enacted by the Legislature of West Virginia:

That §33-26-2, §33-26-3, §33-26-4, §33-26-5, §33-26-8, §33-26-9, §33-26-10, §33-26-11, §33-26-12, §33-26-13, §33-26-14 and §33-26-18 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 26. WEST VIRGINIA GUARANTY ASSOCIATION ACT.

§33-26-2. Purpose.

The purpose of this article 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 article, 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~~ permit an association to assess the cost of ~~such~~ this protection among insurers.

§33-26-3. Scope.

This article applies to all kinds of direct insurance ~~except life, title, surety, disability, credit, mortgage guaranty and ocean marine insurance.~~ but shall not be applicable to the following:

(1) Life, annuity, health or disability insurance;

(2) Mortgage guaranty, financial guaranty or other forms of insurance offering protection

against investment risks;

(3) Fidelity or surety bonds, or any other bonding obligations;

(4) Credit insurance, vendors' single interest insurance or 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, indemnification for repair, replacement or service for the operational or structural failure of the goods or property due to a defect in materials, workmanship or normal wear and tear, or provides reimbursement for the liability incurred by the issuer of agreements or service contracts that provide such benefits;

(6) Title insurance;

(7) Ocean marine insurance;

(8) Any transaction or combination of transactions between a person, including affiliates of such person, and an insurer, including affiliates of the insurer, which involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk; or

(9) Any insurance provided by or guaranteed by a government entity or agency.

§33-26-4. Construction.

This article shall be ~~liberally~~ construed to effect the purpose under section two of this article which shall constitute an aid and guide to interpretation.

§33-26-5. Definitions.

As used in this article:

(1) "Account" means any one of the three accounts created by section six of this article.

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

(3) "Affiliate of the insolvent insurer" 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 prior to the date the insurer becomes an insolvent insurer.

~~(2)~~ (4) "Association" means the West Virginia Insurance Guaranty Association created under section six of this article.

(5) "Association similar to the association" means any guaranty association, security fund or other insolvency mechanism that affords protection similar to that of the association. The term shall also include any property and casualty insolvency mechanism that obtains assessments or other contributions from insurers on a preinsolvency basis.

(6) "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.

~~(3)~~ (7) "Commissioner" means the Insurance Commissioner of West Virginia.

(8) "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 a person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent 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.

~~(4) "Covered claim" means an unpaid claim, including one for unearned premiums other than retrospective premiums or other premiums subject to adjustment after the date of liquidation, which arises out of and is within the coverage of an insurance policy to which this article applies and which policy is in force at the time of the occurrence giving rise to the unpaid claims if the insurer issuing the policy becomes an insolvent insurer after the effective date of this article and the claimant or insured is a resident of this state at the time of the insured occurrence, or the~~

~~property from which the claim arises is permanently located in this state. "Covered claim" does not include: (i) Any amount in excess of the applicable limits of coverage provided by an insurance policy to which this article applies; nor (ii) any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise from an insolvent insurer or the insured of an insolvent insurer to the extent of coverage under the insured's policy.~~

(9) (A) "Covered claim" means an unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this article applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this article and:

(i) 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, insured or policyholder is the state in which its principal place of business is located at the time of the insured event; or

(ii) The claim is a first party claim for damage to property with a permanent location in this state.

(B) "Covered claim" shall not include:

(i) Any amount awarded as punitive or exemplary damages;

(ii) Any amount sought as a return of premium under any retrospective rating plan;

(iii) Any amount due any reinsurer, insurer, insurance pool, underwriting association, health maintenance organization, hospital plan corporation, professional health service corporation or self-insurer as subrogation recoveries, reinsurance recoveries, contribution, indemnification or otherwise. No such claim for any amount due any reinsurer, insurer, insurance pool, underwriting association, health maintenance organization, hospital plan corporation or self-insurer may be asserted against a person insured under a policy issued by an insolvent insurer other than to the extent such claim exceeds the association obligation limitations set forth in section eight of this article;

(iv) Any first party claim by an insured whose net worth exceeds $25 million on December 31 of the year next preceding the date the insurer becomes an insolvent insurer: *Provided*, That an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis: *Provided, however*, That this exclusion shall not apply to any claim for benefits under a workers' compensation insurance policy required by chapter twenty-three of this code;

(v) Any third party claim relating to a policy of an insured whose net worth exceeds $25 million on December 31 of the year next preceding the date the insurer becomes an insolvent insurer: *Provided,* That an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis: *Provided*, *however,* That this exclusion shall not apply to:

(I) Third party claims against the insured where the insured has applied for or consented to the appointment of a receiver, trustee or liquidator for all or a substantial part of its assets, filed a voluntary petition in bankruptcy, filed a petition or an answer seeking a reorganization or arrangement with creditors or to take advantage of any insolvency law, or if an order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor, adjudicating the insured bankrupt or insolvent or approving a petition seeking reorganization of the insured or of all or substantial part of its assets; or

(II) Any claim for benefits under a workers' compensation insurance policy required by chapter twenty-three of this code;

(vi) Any claim that would otherwise be a covered claim but is an obligation to, or on behalf of a, person who has a net worth greater than that allowed by the insurance guaranty association law of the state of residence of the claimant at the time specified by such law and which association has denied coverage to that claimant on that basis: *Provided,* That this exclusion shall not apply to any claim for benefits under a workers' compensation insurance policy required by chapter twenty-three of this code;

(vii) Any first party claims by an insured which is an affiliate of the insolvent insurer;

(viii) Any fee or other amount relating to goods or services sought by, or on behalf of, any attorney or other provider of goods or services retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent;

(ix) Any fee or other amount sought by, or on behalf of, any attorney or other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any claim, covered or otherwise, against the association; or

(x) Any claims for interest.

~~(5) "Insolvent insurer" means an insurer:~~

~~(A) Licensed to transact insurance in this state either at the time the policy was issued or when the insured event occurred; and~~

~~(B) Against whom an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction in the insurer's state of domicile or of this state.~~

(10) "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 against whom a final order of liquidation has been entered with a finding of insolvency by a court of competent jurisdiction in the insurer's state of domicile.

~~(6)~~(11) "Member insurer" means any person who~~: (A) Writes~~ writes any kind of insurance to which this article applies under section three of this article, including farmers' mutual fire insurance companies and the exchange of reciprocal or interinsurance contracts~~;~~, and ~~(B) Is~~ 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 license to transact the kinds of insurance to which this article applies, however the insurer shall remain liable as a member insurer for any and all obligations, including obligations for assessments levied prior to the termination or expiration of the insurer's license and assessments levied after the termination or expiration, which relate to any insurer which became an insolvent insurer prior to the termination or expiration

of the insurer's license.

~~(7)~~ (12) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this article applies, less return premiums on the policies and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

~~(8)~~ (13) "Person" ~~includes an individual, company, insurer, association, organization, society, reciprocal, partnership, syndicate, business trust, corporation or any other legal entity~~ means any individual or legal entity, including governmental entities.

~~(9)~~ (14) "Receiver" means receiver, liquidator, rehabilitator or conservator as the context may require.

(15) "Self-insurer" means a person that covers its liability through a qualified individual or group self-insurance program or any other formal program created for the specific purpose of covering liabilities typically covered by insurance.

§33-26-8. Powers and duties of the association.

~~(1)~~ (a) The association shall:

~~(a) Is obligated to the extent of the covered claims existing prior to the determination of insolvency, and for those claims arising within thirty days after the determination of insolvency, but the obligation only includes that amount of each covered claim which is in excess of one hundred dollars and is less than three hundred thousand dollars: Provided, That neither of these monetary limits applies to obligations arising out of covered workers' compensation claims. In no event is the association obligated to a policyholder or claimant in an amount in excess of the obligations of the insolvent insurer under the policy from which the claim arises. Notwithstanding any other provision of this article, a covered claim does not include any claim filed with the guaranty fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. A default judgment or stipulated judgment against the insolvent insurer, or against the insured of an insolvent insurer, is not binding against the association.~~

~~(b) Is the insurer to the extent of its obligation on the covered claims and to such extent has all rights, duties, defenses and obligations of the insolvent insurer as if the insurer had not become insolvent.~~

(1) Be obligated to pay covered claims existing prior to the final order of liquidation, that arise within thirty days after the final order of liquidation or before the policy expiration date if such expiration date is less than thirty days after the final order of liquidation, or that arise before the insured replaces the policy or causes its cancellation, if the insured does so within thirty days of the final order of liquidation. This 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 policy: *Provided*, That any covered claim for deliberate intention, including any action pursuant to section two, article four, chapter twenty-three of this code, shall not exceed $300,000 per claim.

(B) An amount not exceeding $10,000 per policy for a covered claim for the return of unearned premium.

(C) An amount not exceeding $300,000 per claim for all other covered claims: *Provided,* That for purposes of this limitation, all claims of any kind whatsoever arising out of, or related to, bodily injury or death to any one person shall constitute a single claim, regardless of the number of claims made, or the number of claimants.

In no event shall the association be obligated to pay a claimant an amount in excess of the obligation of the insolvent insurer under the policy or coverage from which the claim arises. Notwithstanding any other provisions of this article, a covered claim shall not include a claim filed with the association after the earlier of: (i) Twenty-five months after the date of the final order of liquidation; or (ii) 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 on a covered claim shall cease upon the association's: (i) Payment, either by settlement releasing the insured or on a judgment, of an amount equal to the lesser of the association's covered claim obligation limit or the applicable policy limit; or (ii) tender of such amount.

(2) Be deemed the insurer only to the extent of its obligation on the covered claims and to such extent, subject to the limitations provided in this article, 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 paid covered claim obligations. The association shall not be deemed the insolvent insurer for any purpose relating to the issue of whether the association is amenable to the personal jurisdiction of the courts of any state.

~~(c) Shall allocate~~ (3) Allocate claims paid and expenses incurred among the three accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligations of the association under subdivision ~~(a)~~(1) of this subsection subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of ~~examinations under~~ preparing any reports specified in section thirteen of this article and other expenses authorized by this article. 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 prior to the assessment on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the ~~preceding~~ calendar year prior to the assessment on the kinds of insurance in the account: *Provided*, That farmers mutual insurance companies that do not issue workers' compensation insurance policies may not be assessed to pay for the obligations of the association payable from the workers' compensation insurance account. 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 one year on any account an amount greater than two percent of that member insurer's net direct written premiums for the

~~preceding~~ calendar year preceding the assessment on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon after that as funds become available. The association shall pay claims in any order that it deems reasonable, including the payment of claims as they are received from the claimant 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 the 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: *Provided*, That 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. The payments shall be refunded to those companies receiving larger assessments by virtue of such deferment, or at the election of any such company, credited against future assessments. ~~Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.~~

~~(d) Shall investigate~~ (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 the settlements, releases and judgments may be properly contested~~ The association shall have the right to appoint and to direct legal counsel retained under liability insurance policies for the defense of covered claims.

~~(e) Shall notify persons as the commissioner directs under subsection (2), section ten of this article.~~

(5) Notify claimants in this state as deemed necessary by the commissioner and upon the commissioner's request, to the extent records are available to the association.

(6) (A) Have the right to review and contest as set forth in this subsection settlements, releases, compromises, waivers and judgments to which the insolvent insurer or its insureds were parties prior to the entry of the final order of liquidation. In an action to enforce settlements, releases and judgments to which the insolvent insurer or its insureds were parties prior to the entry of the final order of liquidation, the association shall have the right to assert the following defenses, in addition to the defenses available to the insurer:

(i) The association is not bound by a settlement, release, compromise or waiver executed by an insured or the insurer, or any judgment entered against an insured or the insurer by consent or through a failure to exhaust all appeals, if the settlement, release, compromise, waiver or judgment was:

(I) Executed or entered within one hundred twenty days prior to the entry of a final order of liquidation and the insured or the insurer did not use reasonable care in entering into the settlement, release, compromise, waiver or judgment, or did not pursue all reasonable appeals of an adverse judgment; or

(II) Executed by or taken against an insured or the insurer based on default, fraud, collusion or the insurer's failure to defend.

(ii) If a court of competent jurisdiction finds that the association is not bound by a settlement, release, compromise, waiver or judgment for the reasons described in subparagraph (i), paragraph (A), subdivision (6) of this subsection, the settlement, release, compromise, waiver or judgment shall be set aside and the association shall be permitted to defend any covered claim on the merits. The settlement, release, compromise, waiver or judgment may not be considered as evidence of liability or damages in connection with any claim brought against the association or any other party under this article.

(iii) The association shall have the right to assert any statutory defenses or other defenses or rights of offset against any settlement, release, compromise or waiver executed by an insured or the insurer, or any judgment taken against the insured or the insurer.

(B) As to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend, the association, either on its own behalf or on behalf of an insured may apply to have the judgment, order, decision, verdict or finding set aside by the same court or administrator that entered the judgment, order, decision, verdict or finding and shall be permitted to defend the claim on the merits.

~~(f) Shall handle~~ (7) 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.

~~(g) Shall reimburse~~ (8) 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 article.

(9) Establish procedures for requesting financial information from insureds and claimants on a confidential basis for purposes of applying sections of this article concerning the net worth of first and third-party claimants, subject to such information being shared with any other association similar to the association and the liquidator for the insolvent company on the same confidential basis. If the insured or claimant refuses to provide the requested financial information and an auditor's certification of the same where requested and available, the association may deem the net worth of the insured or claimant to be in excess of $25 million at the relevant time.

~~(2)~~ (b) The association may:

~~(a)~~ (1) Employ or retain persons that are necessary to handle claims and perform other duties of the association.

~~(b)~~ (2) Borrow funds necessary to effect the purposes of this article in accord with the plan of operation.

~~(c)~~ (3) Sue or be sued, and the power to sue includes the power and right to intervene as a party as a matter of right before any court in this state that has jurisdiction over an insolvent insurer as defined by this article.

~~(d)~~ (4) Negotiate and become a party to contracts that are necessary to carry out the purpose of this article.

~~(e)~~ (5) Perform other acts that are necessary or proper to effectuate the purpose of this article.

~~(f)~~ (6) Refund to the member insurers in proportion to the contribution of each member insurer to an account that amount by which the assets of the account exceed the liabilities, if, at the end of any calendar year, the board of directors finds that the assets of the association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year.

§33-26-9. Plan of operation.

~~(1)~~ (a) The association shall:

~~(a)~~ (1) Submit to the commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable and equitable administration of the association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the commissioner.

~~(b)~~ (2) If the association fails to submit a suitable plan of operation within ninety days following the effective date of this article or if at any time thereafter the association fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this article. Such rules shall continue in force until modified by the commissioner or superseded by a plan submitted by the association and approved by the commissioner. All such rules shall be promulgated in accordance with the provisions of chapter twenty-nine-a of this code.

~~(2)~~ (b) All member insurers shall comply with the plan of operation.

~~(3)~~ (c) The plan of operation shall:

~~(a)~~ (1) Establish the procedures whereby all the powers and duties of the association under section eight of this article will be performed.

~~(b)~~ (2) Establish procedures for handling assets of the association.

~~(c)~~ (3) Establish the amount and method of reimbursing members of the board of directors under section seven of this article.

~~(d)~~ (4) 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 of the insolvent insurer shall be deemed notice to the association or its agent and a list of such claims shall be periodically submitted to the association or similar organization in another state by the receiver~~

~~(e)~~ (5) Establish regular places and times for meetings of the board of directors.

~~(f)~~ (6) Establish procedures for records to be kept of all financial transactions of the association, its agents and the board of directors.

~~(g)~~ (7) Provide that any member insurer aggrieved by a final action or decision of the association may appeal to the commissioner within thirty days after the action or decision.

~~(h)~~ (8) Establish the procedures whereby selections for the board of directors will be submitted to the commissioner.

~~(i)~~ (9) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.

~~(4)~~ (d) The plan of operation may provide that any or all powers and duties of the association, except those under subdivision (3), subsection (a), and subdivision (2), subsection (b), section eight of this article are delegated to a corporation, association or other organization which performs or will perform functions similar to those of this association, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions

of the association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to a corporation, association or organization which extends protection not substantially less favorable and effective than that provided by this article.

§33-26-10. Duties and powers of commissioner.

~~(1)~~ (a) The commissioner shall:

~~(a)~~ (1) Notify the association of the existence of an insolvent insurer not later than three business days after he or she receives notice of the determination of the insolvency.

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

~~(2)~~ (b) The commissioner may:

~~(a)~~ (1) Require that the association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this article. Such notification shall be by mail at their last known address, where available, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient.

~~(b)~~ (2) Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the commissioner may levy a fine on any member insurer which fails to pay an assessment when due. Such fine shall not exceed five percent of the unpaid assessment per month, except that no fine shall be less than $100 per month.

~~(c)~~ (3) Revoke the designation of any servicing facility if he or she finds that claims are being handled unsatisfactorily.

~~(3)~~ (c) Any final order of the commissioner under this article shall be subject to judicial review as provided by section fourteen, article two of this chapter.

§33-26-11. Effect of paid claims.

~~(1)~~ (a) Any person recovering under this article shall be deemed to have assigned ~~his~~ the person's rights under the policy to the association to the extent of ~~his~~ the person's recovery from the association. Every insured or claimant seeking the protection of this article shall cooperate with the association to the same extent as such 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 causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer and except as provided in subsection (b) of this section. In the case of an insolvent insurer operating on a plan whereby insurance policies with assessment liability have been issued to insureds, payments of claims by the association shall not operate to reduce the liability of such insureds to the receiver, liquidator or statutory successor for unpaid assessments.

~~(2)~~ (b) The association shall have the right to recover from the following persons all amounts paid by the association on behalf of such person, whether for indemnity or defense or otherwise:

(1) Any insured whose net worth on December 31 of the year immediately preceding the date the insurer becomes an insolvent insurer exceeds $25 million: *Provided,* That an insured's net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its subsidiaries and affiliates as calculated on a consolidated basis: *Provided*, *however,* That this provision shall not apply to any claim for benefits under a workers' compensation insurance policy required by chapter twenty-three of this code; and

(2) Any person who is an affiliate of the insolvent insurer.

(c) The association and any association similar to the association in another state shall be recognized as claimants in the liquidation of an insolvent insurer for any amounts paid by them on covered claims obligations as determined under this article or similar laws in other states and shall receive dividends and any other distributions at the priority set forth in the section nineteen-

a, article ten of this chapter. The receiver, liquidator or statutory successor of an insolvent insurer shall be bound by determinations of covered claim eligibility under this article and by settlements of ~~covered~~ claims made by the association or a similar organization in another state~~, subject to the approval of the court having jurisdiction of the receivership~~. 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 article, against the assets of the insolvent insurer. The expenses of the association or similar organization in handling claims shall be accorded the same priority as the receiver's expenses.

~~(3)~~ (d) The association shall periodically file with the receiver or the liquidator of the insolvent insurer statements of the covered claims paid by the association and estimates of anticipated claims against the association which shall preserve the rights of the association against the assets of the insolvent insurer.

§33-26-12. ~~Nonduplication of recovery~~ Exhaustion of other coverage; deductible reimbursement.

~~(1) Any person having a claim against a solvent insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, is required to exhaust first his or her right under the solvent insurer's policy. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery under the solvent insurer's policy~~

(a) Any person having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, shall be required first to exhaust all coverage provided by any such policy. Any amount payable on a covered claim under this article shall be reduced by the full applicable limits stated in such other insurance policy and the association shall receive a full credit for such stated limits or, where there are no applicable

stated limits, the claim shall be reduced by the total recovery. Notwithstanding the foregoing, no person shall be required to exhaust any right under the policy of an insolvent insurer.

(1) A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim shall be considered to be a claim arising from the same facts, injury or loss that gave rise to the covered claim against the association.

(2) A claim under an insurance policy shall also include, for purposes of this section:

(A) A claim against a health maintenance organization, a hospital plan corporation or a professional health service corporation; and

(B) Any amount payable by or on behalf of a self-insurer.

(3) To the extent that the association's obligation is reduced by the application of this section, the liability of the person insured by the insolvent insurer's policy for the claim shall be reduced in the same amount.

~~(2)~~ (b) Any person having a claim which 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 it is a first party claim for damage to property with a permanent location, he or she shall seek recovery first from the association of the location of the property, and if it is a workers' compensation claim, the person shall seek recovery first from the association of the residence of the claimant. Any recovery under this article shall be reduced by the amount of the recovery from any other insurance guaranty association or its equivalent.

(c) To the extent the association pays any deductible claim for which the insurer would have been entitled to reimbursement from the insured, the association shall be entitled to the full amount of the reimbursement and available collateral as provided under this subsection to the extent necessary to reimburse the association. Reimbursements paid to the association pursuant to this subsection shall not be treated as distributions or as early access payments. To the extent that the association pays a deductible claim that is not reimbursed either from collateral or by

insured payments, or incurred expenses in connection with large deductible policies that are not reimbursed under this subsection, the association shall have an exclusive cause of action against the insured, including the right to enforce against the insured the rights of the insurer with respect to any obligation of the insured to reimburse the insurer for deductibles or pay claims within a deductible. Further, the fund is vested with a first lien in any collateral provided by the insured to the insolvent insurer to secure the insured's performance, to the extent of claims paid by the association, which lien can be perfected by notice to the liquidator. Nothing in this subsection limits any rights of the association that may otherwise exist under applicable law to obtain reimbursement from insureds for claims payments made by the association under policies of the insurer or for the association's related expenses.

§33-26-13. Prevention of insolvencies.

To aid in the detection and prevention of insurer insolvencies:

~~(1) It shall be the duty of the board of directors, upon majority vote, to notify the commissioner of any information indicating that any member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public~~

~~(2) 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 such 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 complying with subdivision (3) of this section. 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~~

~~(3) It shall be the duty of the commissioner to report to the board of directors when he 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~~

~~(4) The board of directors may, upon majority vote, make reports and recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents~~

~~(5) The board of directors may, upon majority vote, make recommendations to the commissioner for the detection and prevention of insurer insolvencies~~

~~(6) The board of directors shall, at the conclusion of any 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 may, upon majority vote, make recommendations to the commissioner on matters generally related to improving or enhancing regulation for solvency.

(2) At the conclusion of any domestic insurer insolvency in which the association was obligated to pay covered claims, the board of directors may, upon majority vote, 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.

(3) Reports and recommendations provided under this section shall not be considered public documents subject to disclosure under chapter twenty-nine-b of this code.

§33-26-14. Examination of association; financial report.

The association shall be subject to examination and regulation by the commissioner. The board of directors shall submit, not later than ~~March thirtieth~~ April 30 of each year, a financial report for the preceding calendar year, in a form approved by the commissioner.

§33-26-18. Stay of proceedings; reopening of default judgments.

(a) All proceedings in which the insolvent insurer is a party or obligated to defend a party in any court in this state shall, subject to waiver by the association in specific cases involving covered claims, be stayed for six months and such additional time as may be determined by the court from the date ~~the proof of claim provided for in section eighteen, article ten of this chapter is filed with the receiver~~ the insolvency is determined to permit proper defense by the association of all pending causes of action.

(b) The liquidator, receiver or statutory successor of an insolvent insurer covered by this article shall permit access by the association, or its authorized representative to such of the insolvent insurer's records that are necessary for the association in carrying out its functions under this article with regard to covered claims. In addition, the liquidator, receiver or statutory successor shall provide the association or its representative with copies of such records upon the request by the association and at the expense of the association.

(c) As to any covered claims arising from a judgment under any order, decision, verdict or finding based on the default of the insolvent insurer or its wrongful failure to defend an insured, the association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits.

NOTE: The purpose of this bill is to update the West Virginia Guaranty Association Act.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.