SPONSOR: Rep. B. Short & Sen. Bushweller
Reps. Q. Johnson, Keeley; Sen. Cloutier

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

# HOUSE BILL NO. 318

AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE RELATING TO THE DELAWARE INSURANCE GUARANTY ASSOCIATION ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 4203, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4203 Scope.

This chapter shall apply to all kinds of direct insurance but ~~shall not be applicable to~~ does not apply to any of the following:

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

(2) Mortgage guaranty, financial guaranty and other forms of financial guarantees;

(3) Fidelity and surety bonds, or 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, or 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 combinations of transactions between a person (including affiliates of such person) and an insurer (including affiliates of such insurer) which involves the transfer of an investment or credit risk unaccompanied by the transfer of insurance risk;

(9) Any insurance provided by or guaranteed by government.

Section 2. Amend § 4205, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows and by redesignating accordingly:

§ 4205 Definitions.

As used in this chapter:

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

(2) "Association" means the Delaware Insurance Guaranty Association created under § 4206 of this title.

(3) "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 an insolvent insurer may be a claimant.

(4) "Commissioner" means the Commissioner of Insurance of this State.

(5) "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 the power to vote or holds proxies representing 10 percent or more of the voting securities of any other person. This presumption may be rebutted by showing the control does not in fact exist.

(6)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 subject to the applicable limits, of an insurance policy to which this chapter applies, issued by an insurer, if such insurer becomes an insolvent insurer after July 5, 1991, and:

1. The claim is a first-party claim for damage to property with a permanent location; or

2. The claimant or insured is a resident of this State at the time of the insured event. For entities other than individuals, for purposes of this chapter, the state of residence of a claimant or insured shall be the state in which that entity has a principal place of business most closely related to the claim.

b. "Covered claim" shall in no event include:

1. Any amount awarded as punitive, bad faith or exemplary damages regardless of the language of the insurance policy invoked;

2. Any amount sought as a return of premium under any retrospective rating plan;

3. Any amount due any re-insurer, insurer, ~~insurance pool or~~ insurance pool, underwriting ~~association~~ association, health maintenance organization, hospital plan corporation, professional health service corporation, or self-insurer as reinsurance recoveries, contribution, indemnification, subrogation ~~moneys~~ moneys, or otherwise. No such claim for any amount due any reinsurer, insurer, ~~insurance pool or~~

insurance pool, underwriting ~~association~~ association, health maintenance organization, hospital plan corporation, professional health service 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 limits set forth in § 4208 of this title;

4. Any first-party claim by an insured whose net worth exceeds $10,000,000 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~~ affiliates as calculated on a consolidated basis; or

5. Any first-party claim by an insured which is an affiliate of the insolvent insurer.

(7) "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 an order of liquidation with a finding of insolvency has been entered after July 5, 1991, by a court of competent jurisdiction in the state of domicile or in this State under Chapter 59 of this title and which order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

(8) "Member insurer" means any person who:

a. Writes any kind of insurance to which this chapter applies under § 4203 of this title, including the exchange of reciprocal or inter-insurance contracts; and

b. Is licensed to transact insurance in this State.

(9) "Net direct written premiums" means direct gross premiums written in this State on insurance policies to which this chapter applies, less return premiums thereon 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.

(10) "Ocean marine insurance" includes any form of insurance, regardless of the name, label, or marketing designation of the insurance policy, which insures against maritime perils or risks and other related perils or risks, which are usually insured against by traditional marine insurance, such as hull and machinery, marine builders risk, and marine protection and indemnity. Such perils and risk insured against include without limitation loss, damage, expense, or legal liability of the insured for loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft, or instrumentality in use in ocean or inland waterways for commercial purposes, including liability of the insured for personal injury, illness, death, or for loss or damage to the property of the insured or another person.

~~(10)~~(11) "Person" means any individual, corporation, partnership, association, governmental entity or voluntary organization.

Section 3. Amend § 4208, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4208 Powers and duties of the Association.

(a) The Association shall:

(1) Be obligated to pay valid covered claims existing prior to the order of liquidation of the insolvency and arising within 30 days after the order of liquidation or before the policy expiration date if less than 30 days after the order of liquidation, or before the insured replaces the policy or causes its cancellation, if it is done within 30 days of that order of liquidation. Such obligation shall be satisfied by paying to the claimant an amount as follows: (i) the full amount of a covered claim for benefits under a workers' compensation insurance policy; (ii) an amount not exceeding $10,000 per policy for a covered claim for the return of an unearned premium; (iii) an amount not exceeding ~~$300,000~~ 500,000 per claimant for all other covered claims provided that, for the purposes of this limitation, all claims of any kind arising from or relating to bodily injury or death to any person will constitute a single claim, regardless of the number of claims made, or the number of claimants. ~~In no event shall the~~ The Association ~~be~~ is not 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 chapter, a covered claim ~~shall not~~ does not include any claim filed with the Association after the ~~later~~ earlier of: (i) 24 months after the date of the order of liquidation or (ii) final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer; provided, however, that a "covered claim" shall include any covered claim of which notice was given to the Association on or prior to June 30, 1991. Notwithstanding any other provisions of this chapter, except in the case of a claim for benefits under workers' compensation coverage, any obligation of the association to any and all persons shall cease when $10,000,000 shall have been paid in the aggregate by the association and any 1 or more associations similar to the Association of any other state or states or any property/casualty security fund which obtains contributions from insurers on a pre-insolvency basis, to or on behalf of any insured and its affiliates on covered claims or allowed claims arising under the policy or policies of any one insolvent insurer. For purposes of this section, the term "affiliate" shall mean a person who directly, or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with another person. If the association determines that there may be more than one claimant having a covered claim or allowed claim against the Association or any association similar to the Association or any property/casualty insurance security fund in other states, under the policy or policies of any one insolvent insurer, the Association may

establish a plan to allocate amounts payable by the Association in such manner as the Association in its discretion deems equitable.

(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 chapter, shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

(3) Be relieved of any obligation to defend an insured on a covered claim upon any of the following:

a. The Association's payment, 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.

b. The Association’s tender of an amount equal to the lesser of the Association's covered claim obligation limit or the applicable policy limit.

~~(3)~~(4) For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the Board of Directors shall assess the member insurers, separately for each class, at such times and in such amounts as the Board finds necessary. Assessments shall be due not less than 30 days after written notice to the member insurers.

a. There shall be 3 classes of assessments as follows:

1. Class A assessments shall be made for the purpose of meeting administrative costs and other expenses and examinations conducted under the authority of § 4213 of this title.

2. Class B assessments shall be made annually to partially subsidize the oversight activities of the Commissioner, thereby minimizing the need for class C assessments.

3. Class C assessments shall be made to the extent necessary to carry out the powers and duties of the Association under this chapter with regard to an insolvent member insurer.

b. The assessments shall be determined as follows:

1. The class A assessments will be equal in amount as to each member and may be assessed not more often than once each year. Such assessment shall not exceed $150 annually.

2. The class B assessments shall be made annually. The Commissioner shall determine the amount and shall so notify the Association on or before July 31 of each calendar year in which the assessment is to be made. Class B assessments will also be equal in amount as to each member. The said assessments shall be paid to the Insurance Commissioner's regulatory revolving fund. Not later than October 31 of each said calendar year, the Commissioner shall issue a report to the Association detailing the expenditure of those funds. Amounts not expended will remain in the revolving fund to be used in the succeeding year.

3. Class C 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. If the maximum assessment, together with the other assets of the Association, does not provide in any 1 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 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 a member insurer is authorized to transact insurance.

c. The amounts assessed for class B assessments shall in no event exceed 1/10 of 1 percent of the members' premiums for the year on which the assessment is based. The amounts assessed for class B and class C assessments combined shall not result in members being assessed a total B and C assessment amount which exceeds 2 percent of the members' premiums written in the applicable year.

(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 settlements, releases and judgments may be properly contested.

(5) Notify such persons as the Commissioner directs under § 4210(b)(1) of this title.

(6) Handle claims through its employees or through 1 or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.

(7) Reimburse each servicing facility for obligations of the Association paid by the facility and expenses incurred by the facility while handling claims on behalf of the Association and pay the other expenses of the Association authorized by this chapter.

(8) Issue to each insurer paying an assessment under this chapter a certificate of contribution, in a form prescribed by the Commissioner, for the amount so paid. All outstanding certificates shall be of equal dignity and priority without reference to amounts or dates of issue. A certificate of contribution may be shown by the insurer in its financial statement as an asset in such form and for such amount, if any, and period of time as the Commissioner may approve.

(9) [Repealed.]

(10) Exercise all powers and do all things authorized by this chapter with respect to a division of a bank or trust company established pursuant to § 767(a) of Title 5 and determined to be insolvent pursuant to § 4205(7) of this title with the same effect as if such department or division was a stock insurer.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association.

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

(3) Sue or be sued and such power to sue includes the power and right to intervene as a party before any court in this State that has jurisdiction over an insolvent insurer as defined by this chapter. All actions against the Association must be brought in this State. This State shall have exclusive jurisdiction over all actions against the Association.

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this chapter.

~~(5) Perform such other acts as are necessary or proper to effectuate the purpose of this chapter.~~

~~(6)~~(5) Refund to the member insurers in proportion to the contribution of each member insurer to the Association that amount by which the assets of the Association exceed the liabilities if at the end of any calendar year the Board of Directors finds that the assets of the Association exceed the liabilities for the coming year of the Association as estimated by the Board of Directors.

(6) Establish procedures for requesting financial information from insureds on a confidential basis for the purpose of determining net worth, subject to such information being shared with any other association similar to the Association and the liquidator or receiver of an insolvent insurer on the same confidential basis. If the insured 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 to be in excess of the amounts specified in paragraph (6)(b)(4) of § 4205 of this title or paragraph (a)(2)a. of § 4211 of this title at the relevant time under the respective section under this title.

(7) Bring an action against any third-party administrator, agent, attorney, or other representative of the insolvent insurer to obtain custody and control of all files, records, and electronic data information related to an insolvent company that are appropriate or necessary for the Association, or a similar association in other states, to carry out its duties under this Act. In such a suit, the Association shall have the absolute right through emergency equitable relief to obtain custody and control of all such information in the custody or control of such third-party administrator, agent, attorney, or other representative of the insolvent insurer, regardless of where such information may be physically located. In bringing such an action, the Association is not subject to any defense, lien (possessory or otherwise), or

other legal or equitable ground whatsoever for refusal to surrender such information that might be asserted against the liquidator or receiver of the insolvent insurer. To the extent that litigation is required for the Association to obtain custody of the information requested and it results in the relinquishment of information to the Association after refusal to provide the same in response to a written demand, the court shall award the Association its costs, expenses, and reasonable attorney fees incurred in bringing the action. This section does not affect the rights and remedies that the custodian of such information may have against the insolvent insurers, so long as such rights and remedies do not conflict with the rights of the Association to custody and control of the files, records, and electronic data information under this title.

(8) Subject to approval by the Commissioner, provide claims-handling services to any "run-off insurer" only if the Association's expenses related to the provision of the claims-handling services are fully reimbursed. 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, or any person serving as a representative of any director for any action taken or any failure to act by them in the performance of the services under this paragraph. For purposes of this paragraph, "run off insurer" means a property and casualty insurer that has any of the following:

a. Total Adjusted Capital under Risk Based Capital requirements in an amount less than the Authorized Control Level RBC as defined in § 5801 of this title as of the date specified in § 5802 of this title for filing of the annual RBC report and has indicated that it will cease writing new insurance policies, either as part of its corrective action plan or pursuant to being placed under regulatory control.

b. Total Adjusted Capital under Risk Based Capital requirements in an amount less than the Mandatory Control Level RBC as defined in § 5801 of this title as of the date specified in § 5802 of this title for the filing of the annual RBC report and that has not been placed into liquidation under § 5906 of this title.

(9) Perform such other acts as are necessary or proper to effectuate the purpose of this chapter.

Section 4. Amend § 4212, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows and by redesignating accordingly:

~~§ 4212 Nonduplication of recovery.~~

~~(a) Any person having a claim covered 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 first exhaust the rights under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy.~~

~~(b) Any person having a claim which may be recovered under more than 1 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, such person shall seek recovery first from the association of the location of the property, and, if it is a workers' compensation claim, such person shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.~~

~~(c) 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 the rights under such program prior to recovery under this chapter. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such program.~~

§ 4212 Exhaustion of Other Coverage.

(a) Any person having a claim under an insurance policy shall first exhaust all coverage provided by any such policy, whether or not it is a policy issued by a member insurer, if the claim under such policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Association. Any amount payable on a covered claim under this title shall be reduced by the full applicable limits stated in such 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 an insurance policy providing liability coverage to a person who may be jointly and severally liable 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) For the purposes of this section, a claim against a health maintenance organization, a hospital plan corporation, or a professional health service corporation and any amount payable by or on behalf of a self-insurer will be considered under this section as a claim requiring exhaustion of other coverage if the claim arises from the same facts, injury, or loss that gave rise to the covered claim against the Association.

(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.

(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, recovery must be sought first from the association of the location of the property; and if it is a workers' compensation claim, recovery must be sought first from the association of the

residence of the claimant. Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

Section 5. Amend § 4213, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4213 Prevention of insolvencies.

To aid in the detection and prevention of insurer insolvencies:

(1) The Board of Directors may, upon majority ~~vote:~~ vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.

~~a. Make recommendations to the Commissioner for the detection and prevention of insurer insolvencies; and~~

~~b. Respond to requests by the Commissioner to discuss and make recommendations regarding the status of any member insurer whose financial condition may be hazardous to policyholders or the public. Such recommendations shall not be considered public documents.~~

(2) 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 upon the information available to the Association and submit such report to the Commissioner.

(3) It shall be the duty of the Commissioner to report 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.

(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.

Section 6. Amend § 4218, Title 18 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4218 Stay of proceedings; reopening of default judgments.

(a) All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this State shall be stayed for 120 days from the date the insolvency is determined, and for such time thereafter as may be determined by the court, to permit a proper defense by the Association of all pending causes of actions. 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 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.

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

SYNOPSIS

This Act updates the Delaware Insurance Guaranty Association (DIGA) Act to more closely align it with the National Association of Insurance Commissioners (NAIC) and National Conference of Insurance Guaranty Funds (NCIGF) Model Acts.

DIGA in a non-profit association, established under Chapter 42, Title 18 of the Delaware Code as a safety net to protect residents of this state when a covered property and casualty claim arises from an insolvency of a member insurance company. DIGA is fully funded by assessments levied on member insurance companies and remaining assets from insolvent insurance companies.

Section 1 clarifies the types of insurance that do not fall under this chapter.

Section 2 clarifies the definition of what is excluded from the definition of a “covered claim” and adds “ocean maritime insurance” to this chapter.

Section 3 provides for an increase in the maximum amount of covered claims from $300,000 to $500,000 (workers compensation coverage remains unlimited) and specifies when the Association would be relieved of any obligation to defend an insured on a covered claim. Section 3 permits procedures to be established for DIGA to retrieve net worth information from an insured, with consequences if the information is not provided in a timely basis. Section 3 also provides DIGA with the ability to bring an action against any third-party administrator or other party who refuses to release information related to an insolvent company interfering with DIGA’s ability to carry out its duties. Section 3 also provides DIGA with the authority, subject to approval by the Commissioner, to provide claims-handling services to any “run-off insurer” provided the Association expenses related thereto are fully reimbursed.

Section 4 renames § 4212 (formerly non-duplication of recovery) and clarifies that all other insurance coverage (excluding Medicare) is primary to DIGA coverage.

Section 5 removes unecessary language regarding the Board of Director’s functions in relation to making recommendations on the status of member insurers.

Section 6 provides the Board of Directors the right to request financial and other information from the liquidator, receiver, or statutory successor of an insolvent insurer covered by this chapter.