

## POST-ASSESSMENT PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION MODEL ACT

*Adopted by the Property-Casualty Insurance Committee on November 16, 2007, and Executive Committee on November 17, 2007. Amended by both Committees on March 1, 2015.*

### **Summary**

This model provides a comprehensive scheme for the protection of certain policy claimants when a property-casualty insurance company becomes insolvent and is ordered liquidated. The model calls for payment of covered policy claims that the now insolvent insurance company would not be able to pay on a timely basis and most likely would not be able to pay in full. While the model provides for claims payment, it is intended as a statutory remedy and not replacement insurance coverage. Hence, coverage will not always mirror that called for under the insurance policy. Reasonable limits are placed on coverage in order to strike a balance between the need to protect policy claimants when an insurance company becomes insolvent and the need to keep costs to the public, for providing this remedy, at a rational level.

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### **Section 1. Title**

This Act shall be known as the *[insert state name]* Insurance Guaranty Association Act.

### **Section 2. Scope**

This Act shall apply to all kinds of direct insurance, but shall not be applicable to the following:

- A. life, annuity, health, or disability insurance
- B. mortgage guaranty, financial guaranty, or other forms of insurance offering protection against investment risks

- C. fidelity or surety bonds, or any other bonding obligations
- D. 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
- E. 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
- F. title insurance
- G. ocean marine insurance
- H. any transaction or combination of transactions between a person (including affiliates of such person) and an insurer (including affiliates of such insurer) that involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk or
- I. any insurance provided by or guaranteed by government

*Drafting Note: In states where the insurance code does not adequately define "ocean marine insurance," the following may be added to Section 3. Definitions:*

*"Ocean marine insurance" includes any form of insurance, regardless of the name, label, or marketing designation of the insurance policy, that insures against maritime perils or risks and other related perils or risks that are usually insured against by traditional marine insurance, such as hull and machinery, marine builders risk, and marine protection and indemnity. Such perils and risks insured against include, without limitation, loss, damage, or 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, or death or for loss or damage to the property of the insured or another person.*

### **Section 3. Definitions**

As used in this Act:

- A. "Account" means any one of the three (3) accounts created by Section 6.
- B. "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.
- C. "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.
- D. "Association" means the *[insert name of state]* Insurance Guaranty Association created under Section 4.
- E. "Association similar to the Association" means any guaranty association, security fund, or other insolvency mechanism that affords protection similar to that provided by the Association. The term also shall include any property-casualty insolvency mechanism that obtains assessments

or other contributions from insurers on a pre-insolvency basis.

- F. "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.
- G. "Commissioner" means the Commissioner of Insurance of this State.

*Drafting Note: States that use the term "Director" or "Superintendent" rather than "Commissioner" should substitute that term in paragraph G and as used elsewhere in this Act.*

- H. "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 (10) 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.
- I.
  - 1. "Covered claim" means an unpaid claim, including one for unearned premiums, submitted by a claimant, that arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this Act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Act 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, 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 claim is a first-party claim for damage to property with a permanent location in this state.
  - 2. "Covered claim" 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, 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 6 of this Act.

*Drafting Note: Express exclusions set out in (c) above for health maintenance organizations, hospital plan corporations, professional health service corporations, and self-insurers may not be included in many current state laws. Fund counsel should review applicable case law in their states to determine if it is necessary or advisable to add them as part of an amendment package. Funds may want to consider characterizing such an amendment, if adopted, as "clarifying" or "technical."*

Option A approach for net worth limitations—Exclude only first-party claims (Note: Amounts paid to third parties may be recovered by Association pursuant to section 9.B of this Act.)

- d. any first-party claim by an insured whose net worth exceeds \$10 million on December 31 of the year prior to 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

Option B approach for net worth limitation—Exclude both first and third-party claims

- d. any first-party claim by an insured whose net worth exceeds \$10 million on December 31 of the year prior to 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;
- e. any third-party claim relating to a policy of an insured whose net worth exceeds \$25 million on December 31 of the year prior to 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. This exclusion shall not apply to 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.

*Drafting Note: If Option B for net worth is chosen, drafters may want to consider whether jurisdictional circumstances warrant a carve out from subparagraph e. for workers' compensation claims, personal injury protection (PIP) claims, no-fault claims, and any other claims for ongoing medical payments to third parties. If administrative considerations suggest that an unacceptable interruption in claims payments would occur, such a carve out may be warranted.*

- f. 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.
  - g. any first-party claims by an insured that is an affiliate of the insolvent insurer
  - h. 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
  - i. 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
  - j. any claims for interest
  - k. any claim filed with the Association or a liquidator for protection afforded under the insured's policy for incurred-but-not-reported losses
- J. "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 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.

*Drafting Note: "Final order" as used in this section means an order that has not been stayed. States in which the "final order" language does not accurately reflect whether or not the order is subject to a stay should substitute appropriate language consistent with the statutes or rules of the state to convey the intended meaning.*

- K. "Insured" means any name insured, any additional insured, any vendor, lessor, or any other party identified as an insured under the policy.
  
- L. 1. "Member insurer" means any person who:
  - a. writes any kind of insurance to which this Act applies under Section 2, including the exchange of reciprocal or inter-insurance contracts; and
  - b. is licensed to transact insurance in this state (except at option of state).
  
- 2. 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 Act 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 that became an insolvent insurer prior to the termination or expiration of such insurer's license.
  
- M. "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this Act applies, less return premiums thereon and dividends paid or credit to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.
  
- N. "Person" means any individual or legal entity, including governmental entities.

*Drafting Note: In determining whether this definition of person is appropriate in a particular jurisdiction, fund managers and counsel should consider other applicable definitions of "person" embodied in state codes and case history interpreting existing definitions as applied to the guaranty association.*

- O. "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.

#### **Section 4. Creation of the Association**

There is created a nonprofit unincorporated legal entity to be known as the *[insert state name]* Insurance Guaranty Association. All insurers defined as member insurers in Section 3 shall be and remain members of the Association as a condition of their authority to transact insurance in this state. The Association shall perform its functions under a plan of operation established and approved under Section 7 and shall exercise its powers through a board of directors established under Section 5. For purposes of administration and assessment, the Association shall be divided into three (3) separate accounts: the account for workers' compensation, the account for auto, and the account for all other claims covered by the Association.

*Drafting Note: While the three accounts set out above are typical, states may divide guaranty fund liabilities into other account structures as they deem appropriate.*

## Section 5. Board of Directors

- A. The Board of Directors of the Association shall consist of not less than \_\_\_\_\_ (\_\_) nor more than \_\_\_\_\_ (\_\_) 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 (60) days after the effective date of this Act, the Commissioner may appoint the initial members of the Board of Directors.
- B. In approving selections to the Board, the Commissioner shall consider, among other things, whether all member insurers are fairly represented.
- C. Members of the Board of Directors may be reimbursed from the assets of the Association for expenses incurred by them as members of the Board.

## Section 6. Powers and Duties of the Association

- A. The Association shall:
  - 1. be obligated to pay covered claims existing prior to the order of liquidation, that arise within thirty (30) days after the order of liquidation or before the policy expiration date if such expiration date is less than thirty (30) days after the order of liquidation, or that arise before the insured replaces the policy or causes its cancellation, if he does so within thirty (30) days of the order of liquidation. Such 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
    - 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

*Drafting Note: A state may wish to enact a higher claim limit depending on cost-of-living issues in the state.*

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 Act, a covered claim shall not include a claim filed with the Association after the earlier of: (a) twenty-five (25) months after the date of the order of liquidation, or (b) the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

*Drafting Note: Optional language concerning workers' compensation benefits is included below for consideration in jurisdictions where the use of a 25-month bar date may be inappropriate in view of the latent nature of some occupational diseases that do not manifest themselves within this shortened period. This language is as follows:*

*The requirement of filing within twenty-five (25) months after the date of the order of liquidation shall not apply to claims by injured employees for workers compensation benefits where the basis for the claim is an occupational illness that does not manifest itself within the 25-month period.*

*Drafting Note: We recommend that the bar date provision set out above be applied only to claims related to liquidations occurring after the effective date of the amendment.*

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.

*Drafting Note: The provision set out in this subsection 6. A. 2. is intended to be a clarification of the existing law in this state of the extent to which an association shall be deemed the insurer and concerning the nature of the contacts of the association outside of [designate state].*

3. allocate claims paid and expenses incurred among the three (3) accounts separately, and assess member insurers separately for each account, amounts necessary to pay the obligations of the Association under this Act subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency and other expenses authorized by this Act. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the 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 calendar year prior to the assessment on the kinds of insurance in the account. Each member insurer shall be notified of the assessment not later than thirty (30) days before it is due. No member insurer may be assessed in any one year on any account an amount greater than two (2) percent of that member insurer's net direct written premiums for the 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 pro-rated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association shall pay claims in any order that it deems reasonable, including the payment of claims as such 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; provided, however, that during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when such payment will not reduce capital or surplus below required minimums. Such 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.

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. The Association shall have the right to appoint and to direct legal counsel retained under liability insurance policies for the defense of covered claims.
5. not be bound by any settlement, release, compromise, waiver, or judgment executed or entered within twelve (12) months prior to an order of liquidation and shall have the right to assert all defenses available to the Association including, but not limited to, defenses applicable to determining and enforcing its statutory rights and obligations to any such claim. The Association shall be bound by any settlement, release, compromise, waiver, or judgment executed or entered into more than one year prior to an order of liquidation; provided, however, such claim is a covered claim and such settlement or judgment was not a result of fraud, collusion, default, or failure to defend. Further, 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 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 such claim on the merits.
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 such 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 Act.
8. establish procedures for requesting financial information from insureds and claimants on a confidential basis for purposes of applying sections of this Act 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 *[insert proper amount]* at the relevant time.

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 Act 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 as a matter of right before any court in this state that has jurisdiction over an insolvent insurer as defined by this Act.
4. negotiate and become a party to such contracts as are necessary to carry out the purpose of this Act
5. perform such other acts as are necessary or proper to effectuate the purpose of this Act
6. refund to the member insurers in proportion to the contribution of each member insurer



to that 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

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 ("claims 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 claims information in the custody or control of such third-party administrator, agent, attorney, or other representative of the insolvent insurer, regardless of where such claims information may be physically located. In bringing such an action, the Association shall not be subject to any defense, lien (possessory or otherwise) or other legal or equitable ground whatsoever for refusal to surrender such claims information that might be asserted against the Liquidator of the insolvent insurers. To the extent that litigation is required for the Association to obtain custody of the claims information requested and it results in the relinquishment of claims 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 attorneys' fees incurred in bringing the action. The provisions of this section shall have no effect on the rights and remedies that the custodian of such claims 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 claims information under this Act.

#### C. Suits Involving the Association

1. Except for actions by member insurers aggrieved by final actions or decisions of the Association pursuant to Section 6.A.3., all actions relating to or arising out of this Act against the Association must be brought in the courts in this state. Such courts shall have exclusive jurisdiction over all actions relating to or arising out of this Act against the Association.
2. Exclusive venue in any action by or against the Association is in *[designate appropriate court]*. The Association may, at the option of the Association, waive such venue as to specific actions.
3. In any lawsuit contesting the applicability of Sections 3.I.2.d. and e. or 9.B.1. where the insured or claimant has declined to provide financial information under the procedure provided pursuant to Section 6 of this Act, the insured or claimant shall bear the burden of proof concerning its net worth at the relevant time. If the insured or claimant fails to prove that its net worth at the relevant time was less than the applicable amount, the court shall award the Association its full costs, expenses, and reasonable attorneys' fees in contesting its claim.

*Drafting Note: Because of the potential impact on guaranty association coverage, it is recommended that the legislation include an appropriate provision clearly stating that the any newly enacted net worth provision applies only to legislation estates commencing after its effective date. If only the new administrative provisions are being added to a pre-existing net worth exemption, it would be possible to apply them to all outstanding claims.*

## Section 7. Plan of Operation

- A. 1. The Association shall 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.

2. If the Association fails to submit a suitable plan of operation within ninety (90) days following the effective date of this Act, 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 Act. 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.
- B. All member insurers shall comply with the plan of operation.
- C. The plan of operation shall:
1. establish the procedures whereby all the powers and duties of the Association under Section 6 will be performed
  2. establish procedures for handling assets of the Association
  3. mandate that procedures be established for the disposition of liquidating dividends or other monies received from the estate of the insolvent insurer
  4. mandate that procedures be established to designate the amount and method of reimbursing members of the board of directors under Section 5.C
  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 claims shall be periodically submitted to the Association or Association similar to the Association in another state by the receiver or liquidator
  6. establish regular places and times for meetings of the board of directors
  7. mandate that procedures be established for records to be kept of all financial transactions of the Association, its agents, and the board of directors
  8. provide that any member insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within thirty (30) days after the action or decision
  9. establish the procedures whereby selections for the board of directors will be submitted to the Commissioner
  10. contain additional provisions necessary or proper for the execution of the powers and duties of the Association
- D. The plan of operation may provide that any or all powers and duties of the Association, except those under Section 6.A.3. and 6.B.2., are delegated to a corporation, Association similar to the Association, or other organization that 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 that extends protection not substantially less favorable and effective than that provided by this Act.

## **Section 8. Duties and Powers of the Commissioner**

- A. The Commissioner shall:
  - 1. notify the Association of the existence of an insolvent insurer not later than three (3) days after he receives notice of the determination of the insolvency. The Association shall be entitled to a copy of any complaint seeking an order of liquidation with a finding of insolvency against a member company at the same time that such 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
- B. The Commissioner may:
  - 1. suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer that 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 that fails to pay an assessment when due. Such fine shall not exceed five (5) percent of the unpaid assessment per month, except that no fine shall be less than \$100 per month.
  - 2. revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily
- C. Any final action or order of the Commissioner under this Act shall be subject to judicial review in a court of competent jurisdiction.

## **Section 9. Effect of Paid Claims**

- A. Any person recovering under this Act shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Act 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. below. In the case of an insolvent insurer operating 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 assessments.
- 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; 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 Act or similar laws in other states and shall receive dividends and any other distributions at the priority set forth in *[Liquidation Act reference]*. The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by determinations of covered claim eligibility under this Act and by settlements of claims made by the Association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that which the claimant would have been entitled in the absence of this Act 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 liquidator's expenses.
- D. The Association shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Association and estimates of anticipated claims on the Association. Such filing shall preserve the rights of the Association against the assets of the insolvent insurer.

#### **Section 10. Exhaustion of Other Coverage**

- 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 Act 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
    - c. 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 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 it is a first-party claim for damage to property with a permanent location, he shall seek recovery first from the Association of the location of the property, and if it is a workers' compensation claim, he shall seek recovery first from the Association of the residence of the claimant. Any recovery under this Act shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

## **Section 11. Prevention of Insolvencies**

To aid in the detection and prevention of insurer insolvencies:

- A. The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.
- B. The board of directors may, upon majority vote, make recommendations to the Commissioner on matters generally related to improving or enhancing regulation for solvency.
- C. 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.

## **Section 12. Examination of the Association**

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

## **Section 13. Tax Exemption**

The Association shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions except taxes levied on real or personal property.

## **Section 14. Recognition of Assessments in Rates**

*Drafting Note: Insurance companies that are "members" of the guaranty associations provide funds through assessments, as needed, for the guaranty associations' claim payment obligations. A method to recoup such assessments needs to be established in each state. Mechanisms currently employed include 1) permitting member insurers to surcharge policyholders, 2) permitting a premium tax offset for assessments paid by insurers, and 3) permitting premium increases to recoup assessment costs. This Section is left blank so that local authorities may determine the most appropriate mechanism for their states.*

## **Section 15. 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, or any person serving as a representative of any director, or the Commissioner or his representatives for any action taken or any failure to act by them in the performance of their powers and duties under this Act.

## **Section 16. Stay of Proceedings**

All proceedings in which the insolvent insurer is a party or is 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 until the last day fixed by the court for the filing of claims and such 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.

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