

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 815 Session of
2003

INTRODUCED BY D. WHITE, KUKOVICH, STACK, STOUT, MOWERY, MADIGAN,
WENGER, ROBBINS, ORIE, ERICKSON, CORMAN, RAFFERTY,
C. WILLIAMS AND THOMPSON, JUNE 18, 2003

AS AMENDED ON SECOND CONSIDERATION, FEBRUARY 9, 2004

AN ACT

1 Amending the act of May 17, 1921 (P.L.789, No.285), entitled, as
2 amended, "An act relating to insurance; establishing an
3 insurance department; and amending, revising, and
4 consolidating the law relating to the licensing,
5 qualification, regulation, examination, suspension, and
6 dissolution of insurance companies, Lloyds associations,
7 reciprocal and inter-insurance exchanges, and certain
8 societies and orders, the examination and regulation of fire
9 insurance rating bureaus, and the licensing and regulation of
10 insurance agents and brokers; the service of legal process
11 upon foreign insurance companies, associations or exchanges;
12 providing penalties, and repealing existing laws," providing
13 for policyholder collateral, for deductible reimbursements
14 and for other policyholder obligations.

15 The General Assembly of the Commonwealth of Pennsylvania
16 hereby enacts as follows:

17 Section 1. The act of May 17, 1921 (P.L.789, No.285), known
18 as The Insurance Department Act of 1921, is amended by adding a
19 section to read:

20 Section 523.1. Policyholder Collateral, Deductible
21 Reimbursements and Other Policyholder Obligations.--(a) Any
22 collateral held by, for the benefit of or assigned to the
23 insurer or subsequently to the receiver in order to secure the

obligations of a policyholder under a deductible agreement shall not be considered an asset of the estate and shall be maintained and administered by the receiver as provided in this section, notwithstanding any other provision of law or contract to the contrary.

(b) If the collateral is being held by, for the benefit of or assigned to the insurer or subsequently to the receiver to secure obligations under a deductible agreement with a policyholder, subject to the provisions of this section, the collateral shall be used to secure the policyholder's obligation to fund or reimburse claims payment within the agreed deductible amount.

(c) If a claim that is subject to a deductible agreement and secured by collateral is not covered by any guaranty association and the policyholder is unwilling or unable to take over the handling and payment of the non-covered claims, the receiver shall adjust and pay the non-covered claims utilizing the collateral but only to the extent the available collateral, after allocation under subsection (d), is sufficient to pay all outstanding and anticipated claims. A claim against the collateral by a third-party claimant is not a claim against the insolvent insurer's estate for the purposes of releasing the policyholder to the extent of applicable policy coverage. If the collateral is exhausted and the insured is not able to provide funds to pay the remaining claims within the deductible after all collection means against the insured have been exhausted, the receiver's obligation to pay such claims from the collateral terminates and the remaining claims shall be claims against the insurer's estate subject to complying with other provisions of this article for the filing and allowance of claims. When the

1 liquidator determines the collateral provided by the insured is
2 insufficient to pay all additional and anticipated claims
3 against the insured, the liquidator may file a plan for
4 equitably allocating the collateral among claimants of the
5 insured which provided the collateral, subject to court
6 approval.

7 (d) To the extent that the receiver is holding collateral
8 provided by a policyholder that was obtained to secure a
9 deductible agreement and to secure other obligations of the
10 policyholder to pay the insurer directly or indirectly amounts
11 that will become assets of the estate, such as reinsurance
12 obligations under a captive reinsurance program or premium
13 obligations under a retrospectively rated insurance policy where
14 the premium due is subject to adjustment based upon actual loss
15 experience, the receiver shall equitably allocate the collateral
16 among such obligations and administer the collateral allocated
17 to the deductible agreement pursuant to this section. With
18 respect to the collateral allocated to obligations under the
19 deductible agreement, if the collateral secured reimbursement
20 obligations are under more than one line of insurance, then the
21 collateral shall be equitably allocated among the various lines
22 based upon the estimated ultimate exposure within the deductible
23 amount for each line. The receiver shall inform the guaranty
24 associations of the method and details of all the foregoing
25 allocations.

26 (e) Regardless of whether there is collateral, if the
27 insurer has contractually agreed to allow the policyholder to
28 fund its own claims within the deductible amount pursuant to a
29 deductible agreement, either through the policyholder's own
30 administration of its claims or through the policyholder

1 providing funds directly to a third party administrator who
2 administers the claims, the receiver shall allow such funding
3 arrangement to continue and, where applicable, will enforce such
4 arrangements to the fullest extent possible. The funding of such
5 claims by the policyholder within the deductible amount will act
6 as a bar to a claim for such amount in the liquidation
7 proceeding including, but not limited to, a claim by the
8 policyholder or the third party claimant. The funding will
9 extinguish both the obligation, if any, of any guaranty
10 association to pay such claims within the deductible amount, as
11 well as the obligation, if any, of the policyholder or the
12 third-party administrator to reimburse the guaranty association.
13 No charge of any kind shall be made against a guaranty
14 association on the basis of the policyholder funding of claims
15 payment made pursuant to the mechanism set forth in this
16 subsection.

17 (f) (1) If the insurer has not contractually agreed to allow
18 the policyholder to fund its own claims within the deductible
19 amount, to the extent a guaranty association is required by
20 applicable State law to pay any claims for which the insurer
21 would have been entitled to reimbursement from the policyholder
22 under the terms of the deductible agreement and to the extent
23 the claims have not been paid by the policyholder or by a third
24 party, the receiver shall promptly bill the policyholder for
25 such reimbursement and the policyholder will be obligated to pay
26 such amount to the receiver for the benefit of the guaranty
27 associations who paid such claims. Neither the insolvency of the
28 insurer, nor its inability to perform any of its obligations
29 under the deductible agreement, shall be a defense to the
30 policyholder's reimbursements obligation under the deductible

1 agreement. When the policyholder reimbursements are collected,
2 the receiver shall promptly reimburse such guaranty association
3 for claims paid that were subject to the deductible. If the
4 policyholder fails to pay the amounts due within sixty days
5 after such bill for such reimbursements is due, the receiver
6 shall use the collateral to the extent necessary to reimburse
7 the guaranty association, and, at the same time, may pursue
8 other collections efforts against the policyholder. If the
9 policyholder reimbursements are not collected due to the
10 reduction in such reimbursements as provided in paragraph (2),
11 the receiver shall nonetheless reimburse such guaranty
12 association as if such reimbursements had been collected. The
13 receiver will obtain funds to reimburse a guaranty association
14 claim affected by paragraph (2) by subtracting from funds
15 collected by the receiver for other policyholder claim
16 reimbursements under this paragraph amounts sufficient to
17 reimburse the guaranty association affected by the application
18 of paragraph (2). Subtraction of funds shall be made against all
19 guaranty associations, including the guaranty association
20 affected by paragraph (2) on the basis of the ratio stated in
21 paragraph (3). If more than one guaranty association has a claim
22 against the same collateral and the available collateral, after
23 allocation under subsection (d), along with billing and
24 collection efforts, are together insufficient to pay each
25 guaranty association in full, then the receiver will prorate
26 payments to each guaranty association based upon the proportion
27 of the amount of claims each guaranty association has paid bears
28 to the total of all claims paid by such guaranty associations.

29 (2) The obligation of a policyholder arising solely from a
30 deductible agreement to reimburse the receiver for the benefit

1 of one or more guaranty associations under paragraph (1) for
2 losses paid by one or more guaranty associations shall be
3 reduced by the amount of premium paid by or on behalf of the
4 policyholder for one or more policies issued by a wholly owned
5 affiliate or subsidiary of the insurer, which affiliate or
6 subsidiary was either licensed to do business in this
7 Commonwealth or was an eligible surplus lines insurer under
8 Article XVI of the act of May 17, 1921 (P.L.682, No.284), known
9 as "The Insurance Company Law of 1921," at the time of the
10 issuance of such policies, where such policies were purchased to
11 fund the policyholder's obligation to reimburse the insurer for
12 deductibles under the deductible agreement, but in no event
13 shall the reduction in liability be less than ninety per centum
14 of the total premiums paid to the insurer and such affiliate or
15 subsidiary for such policies and coverage provided under the
16 related deductible agreement, provided that the policyholder's
17 reimbursement obligation shall be reduced only if: (i) the
18 wholly owned affiliate or subsidiary was merged into the insurer
19 that was a party to the deductible agreement before the entry of
20 a liquidation order against the insurer; (ii) the merger was
21 approved by the commissioner; and (iii) the merger took place
22 before the enactment of this section.

23 (3) The reduction as a result of paragraph (2) in the amount
24 of deductible reimbursements that one or more guaranty
25 associations would have been entitled to claim from a
26 policyholder of the insurer under paragraph (1) shall be
27 allocated by the receiver pursuant to this paragraph prorata
28 among all guaranty associations receiving deductible
29 reimbursements under paragraph (1). The pro rata allocation
30 among guaranty associations shall be based upon the ratio of:

(i) claims paid and to be paid as estimated by each guaranty association that are referred to in paragraph (1) to (ii) the total amount of claims paid and to be paid estimated by all the guaranty associations that are referred to in paragraph (1). Amounts used for the pro rata allocation shall be determined after giving effect to the provisions referred to in subsection (i) relating to insured net worth.

(4) Any claim of the policyholder under one or more policies issued by the affiliate or subsidiary as described in paragraph (2) is hereby waived except for those claims under policies that are not paid by a guaranty association as a covered claim or amounts the policyholder has reimbursed a guaranty association under Article XVIII of "The Insurance Company Law of 1921" or similar laws in other states.

(g) Receiver's duties and powers:

(1) The receiver is entitled to deduct from reimbursements owed to guaranty associations or collateral to be returned to a policyholder reasonable actual expenses incurred in fulfilling the responsibilities under this provision, not to exceed three per centum of the collateral or the total deductible reimbursements actually collected by the receiver.

(2) With respect to claim payments made by any guaranty associations, the receiver shall promptly provide the guaranty associations with a complete accounting of the receiver's deductible billing and collection activities, including, but not limited to, copies of the policyholder billings when rendered, the reimbursements collected, the available amounts and use of collateral for each account, and any proration of payments when it occurs. The receiver's costs of accounting shall be included with expenses referred to under this subsection and, together

1 with other reasonable actual expenses, be subject to the overall
2 limit called for by this subsection. If the receiver fails to
3 make a good faith effort within one hundred twenty days of
4 receipt of claims payment reports to collect reimbursements due
5 from a policyholder under a deductible agreement based on claim
6 payments made by one or more guaranty associations, then after
7 such one hundred twenty day period such guaranty associations
8 may pursue collection from the policyholders directly on the
9 same basis as the receiver, and with the same rights and
10 remedies, and will report any amounts so collected from each
11 policyholder to the receiver. To the extent that guaranty
12 associations pay claims within the deductible amount, but are
13 not reimbursed by either the receiver under this section or by
14 policyholder payments from the guaranty association's own
15 collection efforts, the guaranty association shall have a claim
16 in the insolvent insurer's estate for such unreimbursed claims
17 payments.

18 (3) The receiver shall periodically adjust the collateral
19 being held while the claims subject to the deductible agreement
20 are run off, provided that adequate collateral is maintained to
21 secure the entire estimated ultimate obligation of the
22 policyholder plus a reasonable safety factor, and the receiver
23 shall not be required to adjust the collateral more than once a
24 year. The guaranty associations and the policyholder shall be
25 informed of all such collateral reviews, including, but not
26 limited to, the basis for the adjustment. Once all claims
27 covered by the collateral have been paid and the receiver is
28 satisfied that no new claims can be presented, the receiver will
29 release any remaining collateral to the policyholder.

30 (h) The Commonwealth Court shall have jurisdiction to

1 resolve disputes arising under this section.

2 (i) Nothing in this section is intended to limit or
3 adversely affect any right the guaranty associations may have
4 under applicable State law to obtain reimbursement from certain
5 classes of policyholders for claims payments made by such
6 guaranty associations under policies of the insolvent insurer,
7 or for related expenses the guaranty associations incur.

8 (j) This provision will apply to all delinquency proceedings
9 which are open and pending as of the effective date of this
10 provision.

11 (k) For purposes of this section, the term "deductible
12 agreement" shall include any combination of one or more
13 policies, endorsements, contracts or security agreements which
14 provide for the policyholder to bear the risk of loss within a
15 specified amount per each claim or occurrence covered under a
16 policy of insurance and may be subject to aggregate limit of
17 policyholder reimbursement obligations AS SET FORTH IN AN <—
18 ENDORSEMENT TO A POLICY OR IN A PROGRAM AGREEMENT. This section
19 shall not apply to first party claims, or to claims funded by a
20 guaranty association net of the deductible unless subsection (e)
21 applies. The term "non-covered claims" shall mean a claim that
22 is subject to a deductible agreement, may be secured by
23 collateral and is not covered by a guaranty association.

24 Section 2. This act shall take effect immediately.