

CHAPTER 165

AN ACT concerning the New Jersey Surplus Lines Insurance Guaranty Fund and amending and supplementing P.L.1984, c.101.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 2 of P.L.1984, c.101 (C.17:22-6.71) is amended to read as follows:

C.17:22-6.71 Purpose, application of act.

2. The purpose of this act is to provide a mechanism for the payment of covered claims under certain insurance policies issued by eligible surplus lines insurers; to minimize excessive delays in the payment of the covered claims against insolvent, eligible, nonadmitted insurers; and to avoid financial loss to claimants or policyholders because of the insolvency of an eligible, nonadmitted insurer.

On and after July 27, 1984 and before June 25, 2002, P.L.1984, c.101 (C.17:22-6.70 et seq.) shall apply to all property and casualty lines of direct insurance authorized under R.S.17:17-1, except workers' compensation insurance, title insurance, surety bonds, credit insurance, mortgage guaranty insurance, municipal bond coverage, fidelity insurance, investment return assurance, and ocean marine insurance. This act shall also not apply to reinsurance of any kind.

On or after June 25, 2002, P.L.1984, c.101 (C.17:22-6.70 et seq.) shall apply only to medical malpractice liability insurance as defined in subsection d. of section 3 of P.L.1975, c.301 (C.17:30D-3) and property insurance covering owner occupied dwellings of less than four dwelling units. On or after June 25, 2002, P.L.1984, c.101 (C.17:22-6.70 et seq.) shall not apply to reinsurance of any kind.

2. Section 3 of P.L.1984, c.101 (C.17:22-6.72) is amended to read as follows:

C.17:22-6.72 Definitions relative to the Surplus Lines Insurance Guaranty Fund.

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

"Association" means the New Jersey Property-Liability Insurance Guaranty Association created pursuant to P.L.1974, c.17 (C.17:30A-1 et seq.).

"Commissioner" means the Commissioner of Banking and Insurance.

"Covered claim" means an unpaid claim, including a claim for unearned premiums, which arises out of and is within the coverage, and not in excess of the applicable limits of an insurance policy to which this act applies, and which was issued by a surplus lines insurer which was eligible to transact insurance business in this State at the time the policy was issued and which has been determined to be an insolvent insurer on or after June 1, 1984, but prior to June 25, 2002, if (1) the claimant or policyholder is a resident of this State at the time of the occurrence of the insured event for which a claim has been made, provided that for an entity other than an individual, the residence of the claimant or insured is the state in which its principal place of business was located at the time of the insured event; or (2) the claim is a first party claim for damage to property with a permanent location in this State. A "covered claim" which arises because of an insolvency occurring on or after June 25, 2002 shall be limited to an unpaid claim, including a claim for unearned premiums, which arises out of either medical malpractice liability insurance coverage or property insurance covering owner occupied dwellings of less than four dwelling units within the coverage, and not in excess of the applicable limits, of an insurance policy to which P.L.1984, c.101 (C.17:22-6.70 et seq.) applies, and which was issued by a surplus lines insurer which was eligible to transact insurance business in this State at the time the policy was issued and which has been determined to be an insolvent insurer on or after June 25, 2002, if (1) the claimant or policyholder is a resident of this State at the time of the occurrence of the insured event for which a claim has been made, provided that for an entity other than an individual, the residence of the claimant or insured is the state in which its principal place of business was located at the time of the insured event; or (2) the claim is a first party claim for damage to property with a permanent location in this State.

"Covered claim" shall not include: (1) any amount due any reinsurer, insurance pool or underwriting association, as subrogation recoveries or otherwise, except that a claim for any

such amount, asserted against a person insured under a policy issued by a surplus lines insurer which has become an insolvent insurer, which, if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool, or underwriting association, would be a "covered claim," may be filed directly with the receiver of the insolvent insurer, but in no event may any such claim be asserted in any legal action against the insured of that insolvent insurer; (2) amounts for interest on unliquidated claims; (3) punitive damages unless covered by the policy; (4) counsel fees for prosecuting suits for claims against the fund; (5) assessments or charges for failure by an insolvent insurer to have expeditiously settled claims; (6) counsel fees and other claim expenses incurred prior to the date of insolvency; (7) a claim filed with the fund, liquidator or receiver of an insolvent insurer after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer or, if a final date is not set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer, two years from the date of the order of liquidation, unless the claimant demonstrates unusual hardship and the commissioner approves of treatment of the claim as a "covered claim." "Unusual hardship" shall be defined in regulations promulgated by the commissioner. With respect to insurer insolvencies pending as of the effective date of P.L.2004, c.165 (C.17:22-6.84 et al.), a "covered claim" shall not include a claim filed with the fund, liquidator or receiver of an insolvent insurer: (a) more than one year after the effective date of P.L.1996, c. 156 or (b) the date set by the court for the filing of claims against the liquidator or receiver of the insolvent insurer, whichever date occurs later; and (8) any first party claim by an insured whose net worth exceeds \$25 million on December 31 of the year prior to the year in which the insurer becomes an insolvent insurer provided that the insured's net worth on that date shall be deemed to include the aggregate net worth of the insured and all of its affiliates as calculated on a consolidated basis.

"Exhaust" means with respect to other insurance, the application of a credit for the maximum limit under the policy provided, however, in any case where continuous indivisible injury or property damage occurs over a period of years as a result of exposure to injurious conditions, exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other coverages, primary or excess, if applicable, issued in all other years has been applied. With respect to health insurance and workers' compensation insurance, "exhaust" means the application of a credit for the amount of recovery under the insurance policy. With respect to another insurance guaranty association or its equivalent, "exhaust" means the application of a credit for the maximum statutory limit of recovery from that other guaranty association or its equivalent. The amount of a covered claim payable by the fund shall be reduced by the amount of any applicable credits.

"Fund" means the New Jersey Surplus Lines Insurance Guaranty Fund created pursuant to section 4 of this act.

"Insolvent insurer" means an insurer which was an eligible surplus lines insurer at the time the insurance policy was issued or when the insured event occurred, and against whom an order of liquidation has been entered with a finding of insolvency by a court of competent jurisdiction in this State or the state or place in which the surplus lines insurer is domiciled. "Insolvent insurer" does not include an admitted insurer or any insurance exchange issuing insurance pursuant to section 10 of P.L.1960, c.32 (C.17:22-6.44).

"Member insurer" means an eligible, nonadmitted or surplus lines insurer required to be a member of, and that is subject to, assessments by the fund.

"Net direct written premiums" means direct gross premiums on insurance policies written by a surplus lines insurer to which this act applies, less return premiums thereon and dividends paid or credited to policyholders on that direct business. If a policy issued by a surplus lines insurer covers risks or exposures only partially in this State, the "net direct written premiums" shall be computed, for assessment purposes, on that portion of the premium subject to the premium receipts tax levied in accordance with section 25 of P.L.1960, c.32 (C.17:22-6.59). "Net direct written premiums" do not include premiums on contracts between insurers or reinsurers.

"Person" means any individual, corporation, partnership, association or voluntary organization.

"Surplus lines insurer" means a nonadmitted insurer approved as an eligible, nonadmitted or unauthorized insurer pursuant to section 11 of P.L.1960, c.32 (C.17:22-6.45) at the time the

policies were issued against which a covered claim may be filed in accordance with this act.

3. Section 5 of P.L.1984, c.101 (C.17:22-6.74) is amended to read as follows:

C.17:22-6.74 Powers, duties and obligations of the Surplus Lines Insurance Guaranty Fund.

5. a. The fund shall:

(1) Be obligated to the extent of the covered claims against an insolvent insurer incurred prior to or 30 days after the determination of insolvency, or before the policy expiration date, if less than 30 days after that determination, or before the policyholder replaces the policy or causes its cancellation, if he does so within 30 days of the determination. The fund's obligation for covered claims shall not be greater than \$300,000.00 per occurrence, subject to any applicable deductible and self-insured retention contained in the policy. The commissioner may pay a portion of or defer the fund's obligations for covered claims based on the moneys available in the fund. In no event shall the fund be obligated to a policyholder or claimant in excess of the limits of liability of the insolvent insurer stated in the policy from which the claim arises. Any obligation of the fund to defend an insured shall cease upon the fund's payment or tender of an amount equal to the lesser of the fund's covered claim statutory limit or the applicable policy limit;

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent;

(3) Assess member insurers in accordance with section 6 of this act in amounts necessary to pay:

(a) Obligations of the fund under paragraph (1) of this subsection,

(b) Expenses of handling covered claims,

(c) Any other expenses incurred in the implementation of the provisions of this act;

(4) Investigate claims brought against the fund; and adjust, compromise, settle, and pay covered claims to the extent of the fund's obligation; and deny all other claims; and may review settlements, releases and judgments to which the insolvent insurer or its policyholders were parties to determine the extent to which the settlements, releases and judgments may be properly contested;

(5) Notify those persons as the commissioner directs under section 8 of this act;

(6) Handle claims through the association's employees or representatives, or through one or more insurers or other persons designated as servicing facilities;

(7) Pay the other expenses of the association in administering the provisions of this act; and

(8) (Deleted by amendment, P.L.2004, c.165.)

b. The fund may:

(1) Sue or be sued;

(2) Negotiate and become a party to those contracts which are necessary to carry out the purpose of this act;

(3) Perform those other acts which are necessary or appropriate to effectuate the purpose of this act;

(4) (Deleted by amendment, P.L.2002, c.30.)

(5) With the approval of the commissioner, borrow and separately account for moneys from any source, including but not limited to the New Jersey Property-Liability Insurance Guaranty Association and the Unsatisfied Claim and Judgment Fund, in such amounts and on such terms as the New Jersey Property-Liability Insurance Guaranty Association may determine are necessary or appropriate to effectuate the purposes of P.L.2003, c.89 (C.17:30A-2.1 et al.) in accordance with the association's plan of operation; and

(6) Make loans, in such amounts and on such terms as the association may determine are necessary or appropriate, to the New Jersey Property-Liability Insurance Guaranty Association in accordance with the provisions of the "New Jersey Property-Liability Insurance Guaranty Association Act," P.L.1974, c.17 (C.17:30A-1 et seq.) and the "Unsatisfied Claim and Judgment Fund Law," P.L.1952, c.174 (C.39:6-61 et seq.).

4. Section 8 of P.L.1984, c.101 (C.17:22-6.77) is amended to read as follows:

C.17:22-6.77 Declaration of insolvency, actions of commissioner.

8. a. An insolvent insurer shall forward to the commissioner and to the association a copy of the declaration of insolvency within three business days of the date of the determination of the insolvency. A surplus lines insurer shall forward to the fund and commissioner a copy of any complaint seeking an order of liquidation with a finding of insolvency against the insurer at the same time that such complaint is filed with a court of competent jurisdiction.

b. The commissioner shall:

(1) Order the termination of all in-force policies of an insolvent insurer within 30 days of the date of determination of the insolvency;

(2) Upon request, provide the fund with a statement of the net direct written premiums of each member insurer; and

(3) Require surplus lines agents or the fund to notify the policyholders of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this act. Notification shall be by publication in newspapers of general circulation as the commissioner shall direct.

5. Section 9 of P.L.1984, c.101 (C.17:22-6.78) is amended to read as follows:

C.17:22-6.78 Assignment of rights by person recovering.

9. a. Any person recovering under this act shall be deemed to have assigned his rights under the policy from which the claim arose to the fund to the extent of his recovery from the fund. Every policyholder or claimant seeking the protection of this act shall cooperate with the fund to the same extent as that person would have been required to cooperate with the insolvent insurer. The fund shall have no cause of action against the policyholder of the insolvent insurer for any sums it has paid out, except for those causes of action as the insolvent insurer would have had if the sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with an assessment liability, payments of claims by the fund shall not operate to reduce the liability of policyholders to the receiver, liquidator, or statutory successor for unpaid assessments.

b. The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the fund or its representatives. The court having jurisdiction shall grant the covered claims paid by the fund priority, against the assets of the insolvent insurer, over any claims against the assets of the insolvent insurer by claimants having received any payment from the fund for the covered claims, to the extent of the amount of the payments made by the fund. The expenses of the fund in handling claims shall be accorded the same priority as the liquidator's expenses.

c. The fund shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the fund and estimates of anticipated claims on the fund, which shall preserve the rights of the fund against the assets of the insolvent insurer.

d. The liquidator, receiver, or statutory successor of an insolvent insurer covered by this act shall permit access by the fund or its representative to all of the insolvent insurer's records which would assist the fund in carrying out its functions under this act with regard to covered claims. In addition, the liquidator, receiver or statutory successor shall provide the fund or its representative with copies, or permit copies to be made of the insolvent insurer's records upon request, and at the expense of the fund.

e. The fund shall have the right to recover from the following persons the amount of any covered claim paid to or on behalf of such person pursuant to this act:

(1) An insured whose net worth on December 31 of the year immediately preceding the date the insurer becomes an insolvent insurer exceeds \$25 million and whose liability obligations to other persons are satisfied in whole or in part by payments made under P.L.1984, c.101 (C.17:22-6.71 et seq.); and

(2) Any person who is an affiliate of the insolvent insurer and whose liability obligations to other persons are satisfied in whole or in part by payments made under P.L.1984, c.101

(C.17:22-6.71 et seq.).

6. Section 10 of P.L.1984, c.101 (C.17:22-6.79) is amended to read as follows:

C.17:22-6.79 Recovery of covered claims, exhaustion of other sources.

10. a. Any person having a covered claim that may be recovered from more than one insurance guaranty association, or its equivalent, shall be required to exhaust first his rights under the statute governing the association of the place of residence of the policyholder at the time of the insured event, 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 jurisdiction in which the property is located. If recovery is denied or deferred by that association, a person may proceed to seek recovery from any other insurance guaranty association from which recovery may be legally sought.

b. Any person having a claim under an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under that other policy. For purposes of this subsection b., a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include without limitation, general liability, accident and health insurance, workers' compensation, health benefits plan coverage, primary and excess coverage, if applicable, and all other private, group or governmental coverages.

C.17:22-6.84 Proceedings involving insolvent insurer stayed; conditions.

7. 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 full or partial waiver by the fund in specific cases involving covered claims, be stayed for 120 days, and any additional time thereafter as may be determined by the court, from the date of the order of liquidation or any ancillary proceeding initiated in the State, whichever is later, to permit proper defense by the fund of all pending causes of action. Public notice of the stay shall be by publication in three newspapers of general circulation in this State within 10 days of the order of liquidation. With respect 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 fund either on its own behalf or on behalf of that insured may apply to have such judgment, order, decision, verdict or finding set aside by the court in which such judgment, order, decision, verdict or finding is entered and shall be permitted to defend against such claim on the merits.

8. This act shall take effect immediately and shall apply to covered claims resulting from insolvencies occurring on or after that date.

Approved December 7, 2004.