

# VIRGINIA ACTS OF ASSEMBLY -- 1998 SESSION

## CHAPTER 230

*An Act to amend and reenact §§ 38.2-1601, 38.2-1603, 38.2-1604, 38.2-1606, 38.2-1618, 38.2-1620, 38.2-1621, and 38.2-1622 of the Code of Virginia, relating to the Virginia Property and Casualty Insurance Guaranty Association.*

[S 64]

Approved April 2, 1998

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 38.2-1601, 38.2-1603, 38.2-1604, 38.2-1606, 38.2-1618, 38.2-1620, 38.2-1621, and 38.2-1622 of the Code of Virginia are amended and reenacted as follows:**

§ 38.2-1601. Application.

This chapter shall apply to all classes of direct insurance written by member insurers but shall not be applicable to the following:

1. Life, annuity, health or disability insurance;
2. Mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risks;
3. Fidelity or surety bonds, or any other bonding obligations;
4. Credit insurance and credit involuntary unemployment insurance;
5. Insurance of warranties or service contracts;
6. Title insurance;
7. Insurance of vessels or craft used primarily in a trade or business, their cargoes, and marine builders' risk and marine protection and indemnity;
8. Any transaction or combination of transactions between a person, including affiliates of such person, and an insurer, including affiliates of such insurer, which involves the transfer of investment or credit risk unaccompanied by transfer of insurance risk; or
9. Any class of insurance written by cooperative nonprofit life benefit companies, mutual assessment life, accident and sickness insurers, burial societies, fraternal benefit societies, captive insurers, *risk retention groups*, and home protection companies.

§ 38.2-1603. Definitions.

As used in this chapter:

"Account" means any one of the three accounts created by § 38.2-1604.

"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 next preceding the date the insurer becomes an insolvent insurer.

"Association" means the Virginia Property and Casualty Insurance Guaranty Association created under § 38.2-1604.

"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.

"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 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.

"Covered claim" means an unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of a policy covered by this chapter and issued by an insurer who has been declared to be an insolvent insurer. The claimant or insured shall be a resident of this Commonwealth at the time of the insured loss, provided that for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured loss or the property from which the claim arises shall be permanently located in this Commonwealth. "Covered claim" shall not include any amount awarded as punitive or exemplary damages or sought as a return of premium under any retrospective rating plan.

"Insolvent insurer" means an insurer that is (i) licensed to transact the business of insurance in this Commonwealth either at the time the policy was issued or when the insured loss occurred and (ii) against whom an order of liquidation with a finding of insolvency has been entered after July 1, 1987, by a court of competent jurisdiction in the insurer's state of domicile or of this Commonwealth under the provisions of Chapter 15 (§ 38.2-1500 et seq.) 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.

"Member insurer" means any person who (i) writes any class of insurance to which this chapter applies under § 38.2-1601, including reciprocal insurance contracts, and (ii) is licensed to transact the business of insurance in this Commonwealth *but shall not include persons listed in subdivision 9 of § 38.2-1601*.

"Net direct written premiums" means direct gross premiums written in this Commonwealth on insurance policies applicable to this chapter, less return premiums and dividends paid or credited to policyholders on direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

§ 38.2-1604. Association created; members; divided into three accounts.

The nonprofit unincorporated legal entity known as the Virginia Property and Casualty Insurance Guaranty Association, created by former § 38.1-761, shall continue in existence. All insurers defined as "member insurers" under § 38.2-1603 shall be and remain members of the Association as a condition of their license to transact the business of insurance in this Commonwealth. The Association shall perform its functions under a plan of operation established and approved under § 38.2-1607 and shall exercise its powers through a board of directors established under § 38.2-1605. For purposes of administration and assessment, the Association shall have three separate accounts: (i) the workers' compensation insurance account; (ii) the automobile insurance account; and (iii) the account for all other insurance to which this chapter applies. *These accounts shall be in addition to and separate from the safety fund authorized by § 38.2-1619.*

§ 38.2-1606. Duties and powers of Association.

A. The Association shall:

1. Be obligated to pay covered claims that existed prior to the determination of insolvency and which arose before the earliest of (i) ninety-one days after the determination of insolvency, (ii) the policy expiration date, or (iii) the date the insured replaces or cancels the policy.

a. 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 coverage; or

(ii) An amount not exceeding \$300,000 per claimant for all other covered claims.

b. In no event shall the Association be obligated to pay a claimant for an amount in excess of the insolvent insurer's obligation for a covered claim. Notwithstanding any other provision of this chapter, a covered claim shall not include any claim filed with the Guaranty Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. The Association shall pay only that amount of each unearned premium which is in excess of fifty dollars. A covered claim shall not include any claim filed with the Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

2. Be deemed the insurer to the extent of the insolvent insurer's obligation on the covered claims and to that extent shall have all the rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

3. Allocate claims paid and expenses incurred among the three accounts and assess member insurers separately for each account (i) the amounts necessary to pay the obligations of the Association under subdivision 1 of this subsection subsequent to an insolvency, (ii) the expenses of handling covered claims subsequent to an insolvency, and (iii) other expenses authorized by this chapter. The assessment of each member insurer shall be based on the ratio of the net direct written premiums of the member insurer to the net direct written premiums of all member insurers. This ratio shall be determined using the premiums for the calendar year preceding the assessment on the classes of insurance in the account. Each member insurer shall be notified of the assessment at least thirty days before it is due. No member insurer may be assessed in any year on any account an amount greater than two percent of that member insurer's net direct written premiums for the calendar year preceding the assessment on the classes of insurance in the account. If the sum of the maximum assessment and the assets of the account does not provide in any one year an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon as funds become available. The Association shall pay claims in any order which it may deem 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 payment of the assessment would cause the member insurer's financial statement to reflect an impairment of the insurer's minimum capital and surplus in any jurisdiction in which the member insurer is authorized to transact insurance; provided, that during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when the payments shall not cause an impairment of minimum capital and surplus. These payments shall be refunded to those members receiving larger assessments by virtue of the deferment, or at the election of any such company, credited against future assessments. Each member insurer may set off against any assessment, payments authorized by the Association and made on covered claims and expenses incurred in the payment of those claims. The offset shall be allowed only if the payments are chargeable to the account for which

the assessment is made.

3a. The Association shall issue to each insurer paying an assessment under this chapter, other than assessments paid pursuant to subdivision 3 (iii) of this subsection, a certificate of contribution in a form prescribed by the Commission, for the amount of the assessment paid, excluding interest penalties. All outstanding certificates shall be of equal priority without reference to amounts or dates of issue. A certificate of contribution may be shown by the insurer on its financial statement as an asset. This shall be shown in a form, in an amount, and for a period of time approved by the Commission.

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 may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which the settlements, releases and judgments may be properly contested.

5. Notify those persons as the Commission directs under subdivision 8 of this subsection.

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 (i) the approval of the Commission; and (ii) acceptance by the designated insurer.

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

8. Notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this chapter. Notification shall be sent by mail to the insureds' last known address. If the Association is unable to obtain the information required to mail the notice in a timely manner, the Association shall publish the notice in newspapers of general circulation likely to cover geographical areas occupied by the policyholders.

B. The Association may:

1. Employ or retain persons necessary to perform the 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.

4. Negotiate and become a party to those contracts necessary to carry out the purpose of this chapter.

5. Perform any other acts necessary or proper to achieve the purpose of this chapter.

6. Pay refunds to the member insurers in proportion to their contributions made to each account during the five years immediately preceding the date of the refund. The total refund shall be the amount by which the assets of the account are expected to exceed the liabilities for the coming year as determined by the board of directors.

7. *Obtain commitments or lines of credit, and in the event a natural disaster such as an earthquake, windstorm or fire results in covered claims, with the approval of its board of directors and the Commission, secure indebtedness for borrowed money to be used for the purpose set forth in subsection A of § 38.2-1622 in an amount not to exceed the amount reasonably estimated by its board of directors and the Commission as the aggregate amount of assessments which the Association will be authorized to make during the succeeding calendar year, by pledge, assignment, transfer in trust or hypothecation of any or all of the assessments to be made against its member insurers.*

§ 38.2-1618. Purpose and applicability of article.

The purpose of this article is to provide directions and guidelines for the control and use of funds provided pursuant to § 38.2-225, *obtained through secured borrowings made pursuant to subdivision B 7 of § 38.2-1606, or any other obtained from* sources of funds not specified in Article 1 (§ 38.2-1600 et seq.) of this chapter.

§ 38.2-1620. Financing the safety fund, maximum amount, distribution of excess.

A. The safety fund, at the discretion of the Commission, shall receive penalty payments levied against member insurers made pursuant to subsection B of § 38.2-225 or any other payments approved by the Commission. *Such payments shall include funds borrowed under the provisions of subdivision B 7 of § 38.2-1606 in the event of a natural disaster in order to provide for the prompt payment of covered claims and expenses related thereto.*

B. The Commission may approve the payment of funds to the Association provided the balance in the safety fund account does not exceed two percent of the total of all member ~~insurer's~~ insurers' net direct written premiums for classes of insurance covered by the accounts specified in § 38.2-1604.

C. Except as provided in subsection D of this section, investment income earned on assets held in the safety fund shall be credited to the safety fund.

D. In the event the safety fund balance exceeds three percent of the net written premium for all classes of insurance covered by the accounts specified in § 38.2-1604, at the discretion of the Commission the difference shall be paid to the state treasury to the credit of the Literary Fund or shall be subject to subsection F of § 38.2-1622.

E. In the event the fund is dissolved, remaining assets in the safety fund will be distributed to the state treasury to the credit of the Literary Fund.

§ 38.2-1621. Investment of safety fund.

The assets ~~of~~ held in the safety fund may be invested in securities set forth in § 38.2-1415.

§ 38.2-1622. Use of safety fund, repayment, etc.

A. The purpose of the safety fund is to provide for the payment of covered claims in the event the assessment limit specified in subdivision A 3 of § 38.2-1606 is reached.

B. In the event the assets ~~of~~ *in* the safety fund are needed to pay covered claims, these assets shall be loaned to the respective account specified in § 38.2-1604. This loan shall be the general obligation of the Association ~~members and shall be evidenced by an agreement approved by the Commission.~~

C. *Assets in the safety fund derived from borrowed moneys obtained under the provisions of subdivision B 7 of § 38.2-1606 shall be lent to an account at the rate of interest the Association is paying the lender providing such moneys.* Interest on ~~this~~ *any other* loan shall be compounded quarterly and be based upon the average ninety-day treasury bill rate for the most recently completed calendar quarter as published in the Federal Reserve Bulletin. This rate will be updated quarterly in order to conform with the market rates of interest.

D. ~~This loan~~ *Loans* shall be repaid by levying assessments pursuant to subdivision A 3 of § 38.2-1606 against the members for the account on whose behalf the loan was negotiated. Unless otherwise approved by the Commission, the loan shall be repaid within six months of its issuance. This assessment in conjunction with any other assessments levied, shall not exceed the limit specified in subdivision A 3 of § 38.2-1606.

E. Subject to the approval of the Commission, assets ~~of~~ *in* the safety fund may be loaned to any account specified in § 38.2-1604 even though the maximum assessment in subdivision A 3 of § 38.2-1606 has not been levied if the directors of the Association determine that this action will minimize the cost to the Association in paying covered claims.

F. ~~Excess safety fund~~ *assets in the safety fund* set forth in subsection D of § 38.2-1620 may be used to pay the Association's covered claims without the members incurring a liability to repay the safety fund.