WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008

ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4381

(By Delegates Kominar, Moore, Barker, Perry, Schoen, Ashley and Walters)

Passed March 7, 2008
In Effect from Passage
AN ACT to repeal §23-2C-9 of the Code of West Virginia, 1931, as amended; to amend and reenact §23-2C-2 and §23-2C-10 of said code; and to amend and reenact §33-26-3, §33-26-5, §33-26-6, §33-26-8 and §33-26-12 of said code, all relating to an assigned risk plan and guaranty association account for workers’ compensation insurance; defining terms; eliminating certain funds in the treasurer’s office and transferring moneys in such funds to the Old Fund; eliminating the requirement that private carriers maintain an office in this state; providing for the establishment and operation of an assigned risk plan; making workers’ compensation insurance applicable to the Insurance Guaranty Association Act; establishing a new account to be administered by the West Virginia Insurance Guaranty Association; modifying standards for paying duplicate claims; and providing that limits on benefits payable by the guaranty association are not applicable to obligations arising out of workers’ compensation insurance.
Be it enacted by the Legislature of West Virginia:

That §23-2C-9 of the Code of West Virginia, 1931, as amended, be repealed; that §23-2C-2 and §23-2C-10 of said code be amended and reenacted; and that §33-26-3, §33-26-5, §33-26-6, §33-26-8 and §33-26-12 of said code be amended and reenacted, all to read as follows:

CHAPTER 23. WORKERS’ COMPENSATION.

ARTICLE 2C. EMPLOYERS’ MUTUAL INSURANCE COMPANY.


(a) "Executive director" means the Executive Director of the West Virginia Workers' Compensation Commission as provided in section one-b, article one of this chapter.

(b) "Commission" means the West Virginia Workers' Compensation Commission as provided by section one, article one of this chapter.

(c) "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in section one, article two, chapter thirty-three of this code.

(d) "Company" or "successor to the commission" means the employers' mutual insurance company created pursuant to the terms of this article.

(e) "Policy default" means a policyholder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation insurance coverage.
(f) “Workers’ compensation insurance” means insurance which provides all compensation and benefits required by this chapter.

(g) “Insurer” includes:

1. A self-insured employer; and
2. A private carrier.

(h) “Industrial Council” means the advisory group established in section five of this article.

(i) “Mutualization Transition Fund” is a fund over which the State Treasurer is custodian. Moneys transferred or otherwise payable to the Mutualization Transition Fund shall be deposited in the State Treasury to the credit of the Mutualization Transition Fund. Disbursements shall be made from the Mutualization Transition Fund upon requisitions signed by the executive director, and, upon termination of the commission, the Insurance Commissioner, and shall be reasonably related to the legal, operational, consultative and human resource-related expenses associated with the establishment of the company and the transferring of personnel from the commission to the company.

(j) “New Fund” means a fund owned and operated by the commission and, upon termination of the commission, the successor organization of the West Virginia Workers' Compensation Commission and consists of those funds transferred to it from the Workers' Compensation Fund and any other applicable funds. New Fund includes all moneys due and payable to the Workers' Compensation Fund for the quarters ending the thirtieth day of September, two thousand five, and the thirty-first day of December, two thousand five, which have not been collected by the Workers' Compensation
Fund as of the thirty-first day of December, two thousand five.

(k) "New Fund liabilities" means all claims payment obligations (indemnity and medical expenses) for all claims, actual and incurred but not reported, for any claim with a date of injury or last exposure on or after the first day of July, two thousand five: Provided, That New Fund liabilities begin with claims payments becoming due and owing on said claims on or after the first day of January, two thousand six.

(l) "Old Fund" means a fund held by the State Treasurer's office consisting of those funds transferred to it from the Workers' Compensation Fund or other sources and those funds due and owing the Workers' Compensation Fund as of the thirtieth day of June, two thousand five, that are thereafter collected. The Old Fund and assets in the fund remain property of the state and do not novate or otherwise transfer to the company.

(m) "Old Fund liabilities" mean all claims payment obligations (indemnity and medical expenses), related liabilities and appropriate administrative expenses necessary for the administration of all claims, actual and incurred but not reported, for any claim with a date of injury or last exposure on or before the thirtieth day of June, two thousand five: Provided, That Old Fund liabilities include all claims payments for any claim, regardless of date of injury or last exposure, through the thirty-first day of December, two thousand five: Provided, however, That Old Fund liabilities include all claims with dates of injuries or last exposure prior to the first day of July, two thousand four, for bankrupt self-insured employers that had defaulted on their claims obligations which have been recognized by the commission in its actuarially determined liability number as of the thirtieth day of June, two thousand five.
(n) "Private carrier" means any insurer or the legal representative of an insurer authorized by the Insurance Commissioner to provide workers' compensation insurance pursuant to this chapter. The term does not include a self-insured employer or private employers but does include any successor to the commission.

(o) "Uninsured Employer Fund" means a fund held by the State Treasurer's office consisting of those funds transferred to it from the Workers' Compensation Fund and any other source. Disbursements from the Uninsured Employer Fund shall be upon requisitions signed by the Insurance Commissioner, and as otherwise set forth in an exempt legislative rule promulgated by the Workers' Compensation Board of Managers.

(p) "Self-Insured Employer Guaranty Risk Pool" is a fund held by the State Treasurer's office consisting of those funds transferred to it from the guaranty pool created pursuant to 85 CSR 19 (2007) and any future funds collected through continued administration of that exempt legislative rule as administered by the Insurance Commissioner. Disbursements shall be made from the Self-Insured Employer Guaranty Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19 (2007).

(q) "Self-Insured Employer Security Risk Pool" is a fund held by the State Treasurer consisting of those funds paid into it through the Insurance Commissioner's administration of 85 CSR 19 (2007). Disbursement from the fund shall be made from the Self-Insured Employer Security Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19: Provided, That the liabilities are limited to those self-insured employers who default on their claims obligations after the termination of the commission.
(r) "Private Carrier Guaranty Fund" is a fund held by the State Treasurer's office consisting of funds deposited pursuant to this article. Disbursements shall be made from the Private Carrier Guaranty Fund upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in this article. The Private Carrier Guaranty Fund terminates on the thirtieth day of June, two thousand eight, and any moneys remaining in the fund on the date of its termination shall be transferred to the Old Fund.

(s) "Assigned Risk Fund" is a fund held by the State Treasurer's office consisting of funds deposited pursuant to this article. Disbursements shall be made from the Assigned Risk Fund upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in this article. The Assigned Risk Fund terminates on the thirtieth day of June, two thousand eight, and any moneys remaining in the fund on the date of its termination shall be transferred to the Old Fund.

(t) "Comprehensive financial plan" means the plan compiled by the director for acceptance by the Insurance Commissioner identifying and forecasting cash flows, funding sources, debt terms and structures and scheduled amortization and permanent resolution of all Old Fund liabilities. The comprehensive financial plan shall provide for the retirement of the revenue bonds authorized by article two-d of this chapter and all realized and potential claims against the Old Fund shall be fully reserved. The comprehensive financial plan may include any other information the Insurance Commissioner may require as a basis for managing the post-transition fiscal soundness of the Old Fund.

(u) "Voluntary market" means the workers' compensation insurance market in which insurers voluntarily
§23-2C-10. West Virginia adverse risk assignment.

(a) The Insurance Commissioner shall provide for the development and administration of an assigned risk plan to provide workers' compensation insurance coverage to employers who are unable to procure coverage in the voluntary market.

(b) To qualify for coverage under the plan, an employer must have been categorically declined coverage by at least two insurers that are not affiliated with each other. The employer has the burden of establishing that at least two unaffiliated insurers are unwilling to provide coverage at any premium level that is reasonably related to the risk presented by the employer. The assigned risk plan may also provide for other reasonable qualifications and for the termination of coverage under the plan for specified reasons.

(c) Any employer that satisfies the requirements of subsection (b) of this section and other qualifications established in the plan shall be provided coverage at a premium level to be determined or approved by the Insurance Commissioner, which premiums shall be actuarially sound, consistent with classification and rate-making methodologies found in the insurance industry, and calculated to enable the plan to be self-sustaining and, to the greatest extent possible, able to operate without subsidies from employers and insurers in the voluntary market. Rates may not be excessive, inadequate or unfairly discriminatory.

(d) The Insurance Commissioner may designate any third party, including any private carrier or rating organization with substantial experience in developing and
administering similar programs in other states, to develop and administer the assigned risk plan for a period of three years, and thereafter, shall contract with any qualified party, including the then current administrator, to continue the administration of the assigned risk plan: Provided, That the Insurance Commissioner must approve the plan prior to the plan becoming operative. The plan established pursuant to this section shall require that all private carriers participate as a condition of their authority to transact business in this state.

(e) In the event the plan incurs a deficit in one or more policy years, the Insurance Commissioner may assess all private carriers providing Workers' Compensation insurance in voluntary market funds as are necessary to cover the deficits. The assessments shall result in an equitable distribution of costs among private carriers based upon premiums received by the private carriers in the private market. Assessments made upon the policies of each private carrier pursuant to this section may be collected by each carrier in the form of a surcharge.

CHAPTER 33. INSURANCE.

ARTICLE 26. WEST VIRGINIA GUARANTY ASSOCIATION ACT.


This article applies to all kinds of direct insurance, except life, title, surety, disability, credit, mortgage guaranty and ocean marine insurance.

§33-26-5. Definitions.

As used in this article:
(1) "Account" means any one of the three accounts created by section six of this article.

(2) "Association" means the West Virginia Insurance Guaranty Association created under section six of this article.

(3) "Commissioner" means the Insurance Commissioner of West Virginia.

(4) "Covered claim" means an unpaid claim, including one for unearned premiums other than retrospective premiums or other premiums subject to adjustment after the date of liquidation, which arises out of and is within the coverage of an insurance policy to which this article applies and which policy is in force at the time of the occurrence giving rise to the unpaid claims if the insurer issuing the policy becomes an insolvent insurer after the effective date of this article and the claimant or insured is a resident of this state at the time of the insured occurrence, or the property from which the claim arises is permanently located in this state. "Covered claim" does not include (i) any amount in excess of the applicable limits of coverage provided by an insurance policy to which this article applies; nor (ii) any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise from an insolvent insurer or the insured of an insolvent insurer to the extent of coverage under the insured's policy.

(5) "Insolvent insurer" means an insurer:

(A) Licensed to transact insurance in this state either at the time the policy was issued or when the insured event occurred; and
31 (B) Against whom an order of liquidation with a finding
32 of insolvency has been entered by a court of competent
33 jurisdiction in the insurer's state of domicile or of this state.
34
35 (6) "Member insurer" means any person who:
36
37 (A) Writes any kind of insurance to which this article
38 applies under section three of this article, including farmers'
39 mutual fire insurance companies and the exchange of
40 reciprocal or interinsurance contracts; and
41
42 (B) Is licensed to transact insurance in this state.
43
44 (7) "Net direct written premiums" means direct gross
45 premiums written in this state on insurance policies to which
46 this article applies, less return premiums on the policies and
47 dividends paid or credited to policyholders on such direct
48 business. "Net direct written premiums" does not include
49 premiums on contracts between insurers or reinsurers.
50
51 (8) "Person" includes an individual, company, insurer,
52 association, organization, society, reciprocal, partnership,
53 syndicate, business trust, corporation or any other legal
54 entity.
55
56 (9) "Receiver" means receiver, liquidator, rehabilitator or
57 conservator as the context may require.

§33-26-6. Creation of the association.

1 There is created a nonprofit unincorporated legal entity
to be known as the West Virginia Insurance Guaranty
Association. All insurers defined as member insurers in
section five of this article 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 nine of this article and shall exercise its powers through a board of directors established under section seven of this article. For purposes of administration and assessment, the association shall establish and maintain three separate accounts:

(1) The automobile insurance account;
(2) The workers’ compensation insurance account; and
(3) The account for all other insurance to which this article applies.


(1) The association:

(a) Is obligated to the extent of the covered claims existing prior to the determination of insolvency, and for those claims arising within thirty days after the determination of insolvency, but the obligation only includes that amount of each covered claim which is in excess of one hundred dollars and is less than three hundred thousand dollars: Provided, That neither of these monetary limits applies to obligations arising out of covered workers’ compensation claims. In no event is the association obligated to a policyholder or claimant in an amount in excess of the obligations of the insolvent insurer under the policy from which the claim arises. Notwithstanding any other provision of this article, a covered claim does not include any claim filed with the guaranty fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. A default judgment or stipulated judgment
against the insolvent insurer, or against the insured of an
insolvent insurer, is not binding against the association.

(b) Is the insurer to the extent of its obligation on the
covered claims and to such extent has all rights, duties,
defenses and obligations of the insolvent insurer as if the
insurer had not become insolvent.

c) Shall allocate claims paid and expenses incurred
among the three accounts separately, and assess member
insurers separately for each account amounts necessary to
pay the obligations of the association under subdivision (a)
of this subsection subsequent to an insolvency, the expenses
of handling covered claims subsequent to an insolvency, the
cost of examinations under section thirteen of this article and
other expenses authorized by this article. The assessments of
each member insurer shall be in the proportion that the net
direct written premiums of the member insurer for the
preceding calendar year on the kinds of insurance in the
account bears to the net direct written premiums of all
member insurers for the preceding calendar year on the kinds
of insurance in the account. Provided, That farmers mutual
insurance companies that do not issue worker's compensation
insurance policies may not be assessed to pay for the
obligations of the association payable from the workers'
compensation insurance account. Each member insurer shall
be notified of the assessment not later than thirty days before
it is due. No member insurer may be assessed in any one
year on any account an amount greater than two percent of
that member insurer's net direct written premiums for the
preceding calendar year 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 prorated and the unpaid portion shall be paid as soon
after that as funds become available. The association may
exempt or defer, in whole or in part, the assessment of any
member insurer, if the assessment would cause the member
insurer's financial statement to reflect the 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. 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.

(d) Shall investigate claims brought against the
association and adjust, compromise, settle, and pay covered
claims to the extent of the association's obligation and deny
all other claims and may review settlements, releases and
judgments to which the insolvent insurer or its insureds were
parties to determine the extent to which the settlements,
releases and judgments may be properly contested.

(e) Shall notify persons as the commissioner directs under
subsection (2), section ten of this article.

(f) Shall 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 the designation may be
declined by a member insurer.

(g) Shall 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 article.
(2) The association may:

(a) Employ or retain persons that are necessary to handle claims and perform other duties of the association.

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

(c) Sue or be sued.

(d) Negotiate and become a party to contracts that are necessary to carry out the purpose of this article.

(e) Perform other acts that are necessary or proper to effectuate the purpose of this article.

(f) Refund to the member insurers in proportion to the contribution of each member insurer to an 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.

§33-26-12. Nonduplication of recovery.

(1) Any person having a claim against a solvent insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, is required to exhaust first his or her right under the solvent insurer's policy. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery under the solvent insurer's policy.

(2) Any person having a claim which may be recovered under more than one Insurance Guaranty Association or its
equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he or she shall seek recovery first from the association of the location of the property, and if it is a workers' compensation claim, the person shall seek recovery first from the association of the residence of the claimant. Any recovery under this article shall be reduced by the amount of the recovery from any other insurance guaranty association or its equivalent.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 21st day of March, 2008.

Governor
PRESENTED TO THE
GOVERNOR
MAR 18 2008
Time 9:30am