

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

SENATE BILL NO. 2111
(Industry, Business and Labor Committee)
(At the request of the Insurance Commissioner)

AN ACT to create and enact section 26.1-38.1-17 of the North Dakota Century Code, relating to the application of effective dates of amendments to member insurers of the North Dakota life and health insurance guaranty association; and to amend and reenact section 26.1-38.1-01, subsections 12, 20, and 23 of section 26.1-38.1-02, subdivision b of subsection 1 of section 26.1-38.1-05, paragraph 4 of subdivision b of subsection 2 of section 26.1-38.1-05, subsection 3 of section 26.1-38.1-06, subdivision e of subsection 14 of section 26.1-38.1-06, subsection 4 of section 26.1-38.1-07, subsection 4 of section 26.1-38.1-08, and sections 26.1-38.1-11 and 26.1-38.1-15 of the North Dakota Century Code, relating to coverage limits, powers and duties, and assessments of the North Dakota life and health insurance guaranty association.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 26.1-38.1-01 of the North Dakota Century Code is amended and reenacted as follows:

26.1-38.1-01. Scope.

1. This section provides coverage for the policies and contracts specified in subsection 2:
 - a. To persons, except for nonresident certificate holders under group policies or contracts, who, regardless of where they reside, are the beneficiaries, assignees, or payees of the persons covered under subdivision b.
 - b. To persons who are owners of or certificate holders under such policies or contracts other than unallocated annuity contracts and structured settlement annuities, and in each case who:
 - (1) Are residents; or
 - (2) Are not residents, but only under all of the following conditions:
 - (a) The insurer that issued such policies or contracts is domiciled in this state;
 - (b) The states in which the persons reside have associations similar to the association created under this chapter; and
 - (c) The persons are not eligible for coverage by an association in any other state due to the fact that the insurer was not licensed in the state at the time specified in the state's guaranty association law.
 - c. For any unallocated annuity contract specified in subsection 2, subdivisions a and b do not apply, and this chapter, except as provided in subdivisions e and f, provides coverage to:
 - (1) Persons who are the owners of the unallocated annuity contracts if the contracts are issued to or in connection with a specific benefit plan, the sponsor of which has its principal place of business in this state; and
 - (2) Persons who are owners of unallocated annuity contracts issued to or in connection with government lotteries if the owners are residents.

- d. For structured settlement annuities specified in subsection 2, subdivisions a and b do not apply, and this chapter, except as provided in subdivisions e and f, provides coverage to a person who is a payee under a structured settlement annuity or beneficiary of a payee if the payee is deceased, if the payee:
 - (1) Is a resident, regardless of where the contract owner resides; or
 - (2) Is not a resident, and:
 - (a) The contract owner of the structured settlement annuity is a resident, or the contract owner of the structured settlement annuity is not a resident but the insurer that issued the structured settlement annuity is domiciled in this state and the state in which the contract owner resides has an association similar to the association created under this chapter; and
 - (b) Neither the payee or beneficiary nor the contract owner is eligible for coverage by the association of the state in which the payee or contract owner resides.
 - e. This chapter does not provide coverage to:
 - (1) A person who is a payee or beneficiary of a contract owner resident of this state, if the payee or beneficiary is afforded any coverage by the association of another state; or
 - (2) A person covered under subdivision b, if any coverage is provided by the association of another state to the person.
 - f. This chapter provides coverage to a person who is a resident of this state and, in special circumstances, to a nonresident. In order to avoid duplicate coverage, if a person who would otherwise receive coverage under this chapter is provided coverage under the laws of any other state, the person may not be provided coverage under this chapter. In determining the application of the provisions of this subdivision in situations in which a person could be covered by the association of more than one state, whether as an owner, payee, beneficiary, or assignee, this chapter must be construed in conjunction with other state laws to result in coverage by only one association.
2. This chapter provides coverage to the persons specified in subsection 1 for direct, nongroup life, health, or annuity policies or contracts, and supplemental contracts to any of these, for certificates under direct group policies and contracts, and supplemental contracts to any of these and for unallocated annuity contracts issued by member insurers, except as limited by this chapter. Annuity contracts and certificates under group annuity contracts include guaranteed investment contracts, deposit administration contracts, unallocated funding agreements, allocated funding agreements, structured settlement annuities, annuities issued to or in connection with government lotteries, and any immediate or deferred annuity contracts.
 3. This chapter does not provide coverage for:
 - a. Any portion of a policy or contract not guaranteed by the insurer, or under which the risk is borne by the policy owner or contract owner;
 - b. Any policy or contract of reinsurance, unless assumption certificates have been issued pursuant to the reinsurance policy or contract;
 - c. Any portion of a policy or contract to the extent that the rate of interest on which the portion of the policy or contract is based or to the extent that the rate of interest, crediting of a rate of interest, or similar factor determined by using an index or other external

reference stated in the policy or contract which is employed in calculating returns or changes in value:

- (1) ~~Averaged over the period of four years prior to the date on which the associationmember insurer becomes obligated with respect to such policy or contract~~ an impaired or insolvent insurer under this chapter, exceeds a rate of interest determined by subtracting two percentage points from Moody's corporate bond yield average averaged for that same four-year period or for such lesser period if the policy or contract was issued less than four years ~~before the association became obligated~~ prior to the date on which the member insurer becomes an impaired or insolvent insurer under this chapter; and
 - (2) On and after the date on which the ~~associationmember insurer becomes obligated with respect to such policy or contract~~ an impaired or insolvent insurer under this chapter, exceeds the rate of interest determined by subtracting three percentage points from Moody's corporate bond yield average as most recently available;
- d. A portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or annuity benefits to its employees, members, or others, to the extent that such plan or program is self-funded or uninsured, including benefits payable by an employer, association, or other person under:
- (1) A multiple employer welfare arrangement as defined in 29 U.S.C. 1144;
 - (2) A minimum premium group insurance plan;
 - (3) A stop-loss group insurance plan; or
 - (4) An administrative services only contract;
- e. Any portion of a policy or contract to the extent that it provides for dividends or experience rating credits, voting rights, or payment of any fees or allowances to any person, including the policy owner or contract owner, in connection with the service to or administration of such policy or contract;
- f. Any policy or contract issued in this state by a member insurer at a time when it was not licensed or did not have a certificate of authority to issue such policy or contract in this state;
- g. Any unallocated annuity contract issued to or in connection with a benefit plan protected under the federal pension benefit guaranty corporation regardless of whether the federal pension benefit guaranty corporation has yet become liable to make any payments with respect to the benefit plan;
- h. Any portion of any unallocated annuity contract which is not issued to, or in connection with, a specific employee, union, or association of natural persons benefit plan or a government lottery;
- i. A portion of a policy or contract to the extent that the assessments required by section 26.1-38.1-06 with respect to the policy or contract are preempted or otherwise not permitted by federal or state law;
- j. An obligation that does not arise under the express written terms of the policy or contract issued by the insurer to the contract owner or policy owner, including:
- (1) Claims based on marketing materials;
 - (2) Claims based on side letters, riders, or other documents that were issued by the insurer without meeting applicable policy form filing or approval requirements;

- (3) Misrepresentations of or regarding policy benefits;
 - (4) Extracontractual claims; or
 - (5) A claim for penalties or consequential or incidental damages;
- k. A contractual agreement that establishes the member insurer's obligations to provide a book value accounting guaranty for defined contribution benefit plan participants by reference to a portfolio of assets that is owned by the benefit plan or its trustee, which in each case is not an affiliate of the member insurer; and
- l. A portion of a policy or contract to the extent it provides for interest or other changes in value to be determined by the use of an index or other external reference stated in the policy or contract, but which has not been credited to the policy or contract, or as to which the policy owner's or contract owner's rights are subject to forfeiture, as of the date the member insurer becomes an impaired or insolvent insurer under this chapter, whichever is earlier. If a policy's or contract's interest or changes in value are credited less frequently than annually, then for purposes of determining the values that have been credited and are not subject to forfeiture under this subdivision, the interest or changes in value determined by using the procedures defined in the policy or contract will be credited as if the contractual date of crediting interest or changing values was the date of impairment or insolvency, whichever is earlier, and is not subject to forfeiture; and
- m. A policy or contract providing any hospital, medical, prescription drug, or other health care benefits pursuant to part C or part D of subchapter XVIII, chapter 7 of title 42 of the United States Code (commonly known as medicare part C and part D) or any regulations issued pursuant thereto.
4. The benefits that the association may become obligated to cover may in no event exceed the lesser of:
- a. The contractual obligations for which the insurer is liable or would have been liable if it were not an impaired or insolvent insurer;
 - b. (1) With any respect to one life, regardless of the number of policies, or contracts:
 - (4) (a) Three hundred thousand dollars in life insurance death benefits, but not more than one hundred thousand dollars in net cash surrender and net cash withdrawal values for life insurance;
 - (2) (b) In health insurance benefits:
 - [1] One hundred thousand dollars in health insurance benefits for coverages not defined as disability insurance or basic hospital, medical, and surgical insurance or major medical insurance or long-term care insurance, including any net cash surrender and net cash withdrawal values; or,
 - (3)[2] Three hundred thousand dollars for disability insurance, and three hundred thousand dollars for long-term care insurance.
 - [3] Five hundred thousand dollars for basic hospital, medical, and surgical insurance or major medical insurance.
 - (c) OneTwo hundred fifty thousand dollars in the present value of annuity benefits, including net cash surrender and net cash withdrawal values;
 - e.(2) With respect to each individual participating in a government retirement benefit plan established under section 401(k), 403(b), or 457 of the United States Internal

Revenue Code covered by an unallocated annuity contract or the beneficiaries of each such individual if deceased, in the aggregate, ~~one~~two hundred ~~fifty~~ thousand dollars in present value annuity benefits, including net cash surrender and net cash withdrawal values;

~~d.~~(3) With respect to each payee of a structured settlement annuity or beneficiary, or beneficiaries of the payee if deceased, ~~one~~two hundred ~~fifty~~ thousand dollars in present value annuity benefits, in the aggregate, including net cash surrender and net cash withdrawal values, if any; ~~or~~

(4) However, in no event shall the association be obligated to cover more than:

(a) An aggregate of three hundred thousand dollars in benefits with respect to any one life under paragraphs 1, 2, and 3 of subdivision b except with respect to the benefits for basic hospital, medical, and surgical insurance and major medical insurance under subparagraph b of paragraph 1 of subdivision b, in which case the aggregate liability of the association shall not exceed five hundred thousand dollars with respect to any one individual; or

(b) With respect to one owner of multiple nongroup policies of life insurance, whether the persons insured are officers, managers, employees, or other persons, more than five million dollars in benefits, regardless of the number of policies and contracts held by the owner.

~~e.~~(5) With respect to either one contract owner provided coverage under subparagraph c of paragraph 2 of subdivision b of subsection 1; or one plan sponsor whose plans own directly or in trust one or more unallocated annuity contracts not included in paragraph 2 of subdivision eb, five million dollars in benefits, irrespective of the number of contracts with respect to the contract owner or plan sponsor. However, in the case in which one or more unallocated annuity contracts are covered contracts under this chapter and are owned by a trust or other entity for the benefit of two or more plan sponsors, coverage must be afforded by the association if the largest interest in the trust or entity owning the contract or contracts is held by a plan sponsor whose principal place of business is in this state and in no event is the association obligated to cover more than five million dollars in benefits with respect to all these unallocated contracts.

~~5.~~ ~~However, under subsection 4 in no event shall the association be obligated to cover more than an aggregate of three hundred thousand dollars in benefits with respect to any one life under subdivision b of subsection 4, or with respect to one owner of multiple nongroup policies of life insurance, whether the policy owner is an individual, firm, corporation, or other person, and whether the persons insured are officers, managers, employees, or other persons, more than five million dollars in benefits, regardless of the number of policies and contracts held by the owner.~~

~~6.~~ (6) The limitations set forth in this subsection 4 are limitations on the benefits for which the association is obligated before taking into account either its subrogation and assignment rights or the extent to which those benefits could be provided out of the assets of the impaired or insolvent insurer attributable to covered policies. The costs of the association's obligations under this chapter may be met by the use of assets attributable to covered policies or reimbursed to the association pursuant to its subrogation and assignment rights.

~~7.5.~~ In performing its obligations to provide coverage under this chapter, the association is not required to guarantee, assume, reinsure, or perform, or cause to be guaranteed, assumed, reinsured, or performed, the contractual obligations of the insolvent or impaired insurer under

a covered policy or contract that do not materially affect the economic values or economic benefits of the covered policy or contract.

SECTION 2. AMENDMENT. Subsections 12, 20, and 23 of section 26.1-38.1-02 of the North Dakota Century Code are amended and reenacted as follows:

12. "Member insurer" means any insurer, including a nonprofit health service corporation, licensed or which holds a certificate of authority to transact in this state any kind of insurance for which coverage is provided under section 26.1-38.1-01, and includes any insurer whose license or certificate of authority in this state may have been suspended, revoked, not renewed or voluntarily withdrawn, but does not include:
 - a. A health maintenance organization;
 - b. A fraternal benefit society;
 - c. A mandatory state pooling plan;
 - d. A mutual assessment company or other person that operates on an assessment basis;
 - e. A nonprofit health service corporation that is participating in a reinsurance plan that has been approved by the commissioner as an alternative to participation in the state guaranty association;
 - f. An insurance exchange; ~~or~~
 - g. An organization that has a certificate or license limited to the issuance of charitable gift annuities under sections 26.1-34.1-01 through 26.1-34.1-07; or
 - h. Any entity similar to any of the above.
20. "Resident" means any person to whom a contractual obligation is owed and who resides in this state on the date of entry of a court order that determines a member insurer to be an impaired insurer or a court order that determines a member insurer to be an insolvent insurer; ~~whichever occurs first~~. A person may be a resident of only one state, which in the case of a person other than a natural person must be its principal place of business. Citizens of the United States who are residents of foreign countries, or residents of United States possessions, territories, or protectorates that do not have an association similar to the association created under this chapter, are deemed residents of the state of domicile of the insurer that issued the policies or contracts.
23. "Supplemental contract" means any written agreement entered into for the distribution of proceeds under a life, health, or annuity policy or a life, health, or annuity contract.

SECTION 3. AMENDMENT. Subdivision b of subsection 1 of section 26.1-38.1-05 of the North Dakota Century Code is amended and reenacted as follows:

- b. Provide such moneys, pledges, loans, notes, guarantees, or other means as are proper to effectuate subdivision a and ~~assume~~assure payment of the contractual obligations of the impaired insurer pending action under subdivision a.

SECTION 4. AMENDMENT. Paragraph 4 of subdivision b of subsection 2 of section 26.1-38.1-05 of the North Dakota Century Code is amended and reenacted as follows:

- (4) Alternative policies adopted by the association shall be subject to the approval of the domiciliary insurance commissioner and the receivership court. The association may adopt alternative policies of various types ~~effor~~ future issuance without regard to any particular impairment or insolvency.

SECTION 5. AMENDMENT. Subsection 3 of section 26.1-38.1-06 of the North Dakota Century Code is amended and reenacted as follows:

3. The amount of any class A assessment must be determined ~~by~~ at the discretion of the board of directors and ~~may~~ must be authorized and called on a ~~pro-rata or non-pro rata~~ basis. ~~If pro-rata, the board may provide that it be credited against future class B assessments. The total of all non-pro rata assessments may not exceed one hundred fifty dollars per member insurer in any one calendar year.~~

SECTION 6. AMENDMENT. Subdivision e of subsection 14 of section 26.1-38.1-06 of the North Dakota Century Code is amended and reenacted as follows:

- e. If the protest or appeal on the assessment is upheld, the amount paid in error or excess must be returned to the member insurer. Interest on a refund due a protesting member shall be paid at the rate actually earned by the association.

SECTION 7. AMENDMENT. Subsection 4 of section 26.1-38.1-07 of the North Dakota Century Code is amended and reenacted as follows:

4. The plan of operation must, in addition to requirements enumerated elsewhere in this chapter:
 - a. Establish procedures for handling the assets of the association;
 - b. Establish the amount and method of reimbursing members of the board of directors under section 26.1-38.1-04;
 - c. Establish regular places and times for meetings, including telephone conference calls of the board of directors;
 - d. Establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors;
 - e. Establish the procedures whereby ~~elections~~ selections for the board of directors will be made and submitted to the commissioner;
 - f. Establish any additional procedures for assessments under section 26.1-38.1-06; and
 - g. Contain additional provisions necessary or proper for the execution of the powers and duties of the association;
 - h. Establish procedures whereby a director may be removed for cause, including if a member insurer director becomes an impaired or insolvent insurer; and
 - i. Require the board of directors to establish a policy and procedures for addressing conflicts of interest.

SECTION 8. AMENDMENT. Subsection 4 of section 26.1-38.1-08 of the North Dakota Century Code is amended and reenacted as follows:

4. The liquidator, rehabilitator, or conservator of any impaired or insolvent insurer may notify any interested persons of the effect of this chapter.

SECTION 9. AMENDMENT. Section 26.1-38.1-11 of the North Dakota Century Code is amended and reenacted as follows:

26.1-38.1-11. Miscellaneous provisions.

1. This chapter does not reduce the liability for unpaid assessments of the insured of an impaired or insolvent insurer operating under a plan with assessment liability.

2. Records must be kept of all meetings of the board of directors to discuss the activities of the association in carrying out its powers and duties under section 26.1-38.1-05. The records of the association with respect to an impaired or insolvent insurer may not be disclosed before the termination of a liquidation, rehabilitation, or conservation proceeding involving the impaired or insolvent insurer, ~~upon the termination of the impairment or insolvency of the insurer, or~~ except upon the order of a court of competent jurisdiction. Nothing in this subsection limits the duty of the association to render a report of its activities under section 26.1-38.1-12.
3. For the purpose of carrying out its obligations under this chapter, the association must be deemed to be a creditor of the impaired or insolvent insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to subsections 12, 13, and 14 of section 26.1-38.1-05. Assets of the impaired or insolvent insurer attributable to covered policies must be used to continue as covered policies and pay all contractual obligations of the impaired or insolvent insurer as required by this chapter. Assets attributable to covered policies, as used in this subsection, are that proportion of the assets which the reserves that should have been established for such policies bear to the reserves that should have been established for all policies of insurance written by the impaired or insolvent insurer.
4. As a creditor of the impaired or insolvent insurer as established in subsection 3 and consistent with chapter 26.1-06, the association and other similar associations are entitled to receive a disbursement of assets out of the marshaled assets, from time to time as the assets become available to reimburse it, as a credit against contractual obligations under this chapter. If the liquidator, within one hundred twenty days of a final determination of insolvency of an insurer by the receivership court, does not apply to the court for the approval of a proposal to disburse assets out of marshaled assets to guaranty associations having obligations because of the insolvency, the association is entitled to apply to the receivership court for approval of its own proposal to disburse these assets.
5. Prior to the termination of any liquidation, rehabilitation, or conservation proceeding, the court may take into consideration the contributions of the respective parties, including the association, the shareholders, any policy owners of the insolvent insurer, and any other party with a bona fide interest, in making an equitable distribution of the ownership rights of such insolvent insurer. In making such a determination, consideration must be given to the welfare of the policy owners of the continuing or successor insurer.
6. No distribution to stockholders, if any, of an impaired or insolvent insurer may be made until and unless the total amount of valid claims of the association with interest thereon for funds expended in carrying out its powers and duties under section 26.1-38.1-05 with respect to such insurer have been fully recovered by the association.
7. a. If an order for liquidation or rehabilitation of an insurer domiciled in this state has been entered, the receiver appointed under the order has the right to recover on behalf of the insurer, from any affiliate that controlled its capital stock, the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation or rehabilitation subject to the limitations of ~~this subsection and subsections 8 and 9~~ subdivisions b, c, and d.
- ~~8-b.~~ No such distribution is recoverable if the insurer shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.
- ~~9-c.~~ Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions the person received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions the person would have received if payment had

been made immediately. If two or more persons are liable with respect to the same distributions, they are jointly and severally liable.

40.d. The maximum amount recoverable under this subsection is the amount needed in excess of all other available assets of the insolvent insurer to pay the contractual obligations of the insolvent insurer.

44.e. If any person liable under ~~subsection 8~~subdivision c is insolvent, all its affiliates that controlled it at the time the distribution was paid, are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

SECTION 10. AMENDMENT. Section 26.1-38.1-15 of the North Dakota Century Code is amended and reenacted as follows:

26.1-38.1-15. Stay of proceedings - Reopening default judgments.

All proceedings in which the insolvent insurer is a party in any court in this state must be stayed ~~sixtyone hundred eighty~~ days from the date an order of liquidation, rehabilitation, or conservation is final to permit proper legal action by the association on any matters germane to its powers or duties. As to judgment under any decision, order, verdict, or finding based on default, the association may apply to have such judgment set aside by the same court that made such judgment and must be permitted to defend against such suit on the merits.

SECTION 11. Section 26.1-38.1-17 of the North Dakota Century Code is created and enacted as follows:

26.1-38.1-17. Prospective application.

This Act applies to cases involving an insolvent insurer which is placed under an order of liquidation with a finding of insolvency on or after the effective date of this Act. For cases involving an insolvent insurer which was placed under an order of liquidation with a finding of insolvency prior to the effective date of this Act, the provisions of this chapter in effect at the time of the order of liquidation shall apply.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-second Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2111.

Senate Vote: Yeas 45 Nays 0 Absent 2

House Vote: Yeas 93 Nays 0 Absent 1

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2011.

Approved at _____ M. on _____, 2011.

Governor

Filed in this office this _____ day of _____, 2011,

at _____ o'clock _____ M.

Secretary of State