

State of South Dakota

SEVENTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2000

517D0439

SENATE BILL NO. 75

Introduced by: Senators Halverson, Dunn (Jim), Hutmacher, Olson, and Rounds and
Representatives Brown (Richard), Apa, Cutler, Fischer-Clemens, and Haley

1 FOR AN ACT ENTITLED, An Act to revise certain provisions relating to the South Dakota
2 Insurance Guaranty Association.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. This Act applies to any kind of direct insurance, but does not apply to:

5 (1) Life, annuity, health, or disability insurance;

6 (2) Mortgage guaranty, financial guaranty, or other forms of insurance offering protection
7 against investment risks;

8 (3) Fidelity or surety bonds, or any other bonding obligations;

9 (4) Credit insurance, vendors' single-interest insurance, or collateral protection insurance,
10 or any similar insurance protecting the interests of a creditor arising out of a creditor-
11 debtor transaction;

12 (5) Insurance of warranties or service contracts including insurance that provides for the
13 repair, replacement, or service of goods or property or indemnification for repair,
14 replacement, or service for the operational or structural failure of the goods or
15 property due to a defect in materials or workmanship or to normal wear and tear, or
16 provides reimbursement for the liability incurred by the issuer of agreements or

1 service contracts that provide such benefits;

2 (6) Title insurance;

3 (7) Ocean marine insurance;

4 (8) Any transaction or combination of transactions between a person, including affiliates
5 of the person, and an insurer, including affiliates of the insurer, that involves the
6 transfer of investment or credit risk unaccompanied by a transfer of insurance risk; or

7 (9) Any insurance provided by or guaranteed by government.

8 Section 2. Terms used in this Act mean:

9 (1) "Affiliate," any person who, directly or indirectly, through one or more intermediaries,
10 controls, is controlled by, or is under common control with an insolvent insurer on
11 December thirty-first of the year immediately preceding the date the insurer becomes
12 an insolvent insurer;

13 (2) "Association," the South Dakota Insurance Guaranty Association created under this
14 Act;

15 (3) "Claimant," any insured making a first party claim or any person instituting a liability
16 claim. No person who is an affiliate of the insolvent insurer may be a claimant;

17 (4) "Director," the director of the Division of Insurance of the Department of Commerce
18 and Regulation;

19 (5) "Control," the possession, direct or indirect, of the power to direct or cause the
20 direction of the management and policies of a person, whether through the ownership
21 of voting securities, by contract other than a commercial contract for goods or
22 nonmanagement services, or otherwise, unless the power is the result of an official
23 position with or corporate office held by the person. Control is presumed to exist if
24 a person, directly or indirectly, owns, controls, holds with the power to vote, or holds
25 proxies representing ten percent or more of the voting securities of any other person.

1 This presumption may be rebutted by a showing that control does not exist in fact;

2 (6) "Covered claim," an unpaid claim, including one for unearned premiums, submitted
3 by a claimant, which arises out of and is within the coverage and is subject to the
4 applicable limits of an insurance policy to which this Act applies issued by an insurer,
5 if the insurer becomes an insolvent insurer after the effective date of this Act, and:

6 (a) The claimant or insured is a resident of this state at the time of the insured
7 event. However, for entities other than an individual, the residence of a
8 claimant, insured, or policyholder is the state in which its principal place of
9 business is located at the time of the insured event; or

10 (b) The claim is a first party claim for damage to property with a permanent
11 location in this state.

12 The term, covered claim, does not include:

13 (a) Any amount awarded as punitive or exemplary damages;

14 (b) Any amount sought as a return of premium under any retrospective rating plan;

15 (c) Any amount due any reinsurer, insurer, insurance pool, or underwriting
16 association as subrogation recoveries, reinsurance recoveries, contribution,
17 indemnification, or otherwise. No claim for any amount due any reinsurer,
18 insurer, insurance pool, or underwriting association may be asserted against a
19 person insured under a policy issued by an insolvent insurer other than to the
20 extent the claim exceeds the association obligation limitations set forth in this
21 Act;

22 (d) Any first party claims by an insured whose net worth exceeds twenty-five
23 million dollars on December thirty-first of the year prior to the year in which
24 the insurer becomes an insolvent insurer. However, an insured's net worth on
25 that date shall be deemed to include the aggregate net worth of the insured and

1 any of its subsidiaries as calculated on a consolidated basis; or

2 (e) Any first party claims by an insured which is an affiliate of the insolvent insurer;

3 (7) "Insolvent insurer," an insurer licensed to transact insurance in this state, either at the
4 time the policy was issued or when the insured event occurred, and against whom a
5 final order of liquidation has been entered after the effective date of this Act with a
6 finding of insolvency by a court of competent jurisdiction in the insurer's state of
7 domicile;

8 (8) "Member insurer," any person who:

9 (a) Writes any kind of insurance to which this Act applies, including the exchange
10 of reciprocal or inter-insurance contracts; and

11 (b) Is licensed to transact insurance in this state.

12 An insurer shall cease to be a member insurer effective on the day following the
13 termination or expiration of its license to transact the kinds of insurance to which this
14 Act applies, however, the insurer shall remain liable as a member insurer for any
15 obligations, including obligations for assessments levied prior to the termination or
16 expiration of the insurer's license and assessments levied after the termination or
17 expiration, with respect to any insurer that became an insolvent insurer prior to the
18 termination or expiration of the insurer's license;

19 (9) "Net direct written premiums," direct gross premiums' less return premiums written
20 in this state on insurance policies to which this Act applies, and dividends paid or
21 credit to policyholders on that direct business. The term, net direct written premiums,
22 does not include premiums on contracts between insurers or reinsurers;

23 (10) "Person," any individual, corporation, partnership, association, or voluntary
24 organization.

25 Section 3. There is created a nonprofit unincorporated legal entity to be known as the South

1 Dakota Insurance Guaranty Association. Any insurer defined as a member insurer in this Act is
2 a member of the association as a condition of its authority to transact insurance in this state. The
3 association shall perform its functions under a plan of operation established and approved
4 pursuant to this Act and shall exercise its powers through a board of directors established under
5 this Act.

6 Section 4. The board of directors of the association shall consist of not less than five nor
7 more than nine persons serving terms as established in the plan of operation. The member
8 insurers shall select the insurer members of the board, subject to the approval of the director. If
9 no members are selected within sixty days after the effective date of this Act, the director may
10 appoint the initial members of the board of directors. Vacancies on the board shall be filled for
11 the remainder of the term by a majority vote of the remaining insurer members, subject to the
12 approval of the director. The director shall appoint two persons, who must be representatives
13 of the public, to the board of directors. Vacancies of positions held by public representatives shall
14 be filled by the director. A public representative may not be an officer, director, or employee of
15 an insurance company or any person engaged in the business of insurance.

16 In approving selections to the board, the director shall consider among other things whether
17 all member insurers are fairly represented.

18 Section 5. Members of the board of directors may be reimbursed from the assets of the
19 association for expenses incurred by them as members of the board of directors.

20 Section 6. The association shall:

- 21 (1) Be obligated to pay covered claims existing prior to the order of liquidation, arising
22 within thirty days after the order of liquidation, or before the policy expiration date
23 if less than thirty days after the order of liquidation, or before the insured replaces the
24 policy or causes its cancellation, if the insured does so within thirty days of the order
25 of liquidation. The obligation shall be satisfied by paying to the claimant an amount

1 as follows:

- 2 (a) The full amount of a covered claim for benefits under a workers' compensation
3 insurance coverage;
- 4 (b) An amount not exceeding ten thousand dollars for each policy for a covered
5 claim for the return of unearned premium;
- 6 (c) An amount not exceeding three hundred thousand dollars for each claimant for
7 all other covered claims.

8 In no event is the association obligated to pay a claimant an amount in excess
9 of the obligation of the insolvent insurer under the policy or coverage from which the
10 claim arises. Notwithstanding any other provisions of this Act, a covered claim does
11 not include a claim filed with the guaranty fund after the final date set by the court for
12 the filing of claims against the liquidator or receiver of an insolvent insurer.

13 Any obligation of the association to defend an insured ceases upon the
14 association's payment or tender of an amount equal to the lesser of the association's
15 covered claim obligation limit or the applicable policy limit;

16 (2) Be deemed the insurer to the extent of its obligation on the covered claims and to that
17 extent has all rights, duties, and obligations of the insolvent insurer as if the insurer
18 had not become insolvent, including the right to pursue and retain salvage and
19 subrogation recoverable on covered claim obligations to the extent paid by the
20 association;

21 (3) Assess insurers amounts necessary to pay the obligations of the association under this
22 Act subsequent to an insolvency, the expenses of handling covered claims subsequent
23 to an insolvency, and other expenses authorized by this Act. The assessments of each
24 member insurer shall be in the proportion that the net direct written premiums of the
25 member insurer for the calendar year preceding the assessment bears to the net direct

1 written premiums of all member insurers for the calendar year preceding the
2 assessment. Each member insurer shall be notified of the assessment not later than
3 thirty days before it is due. No member insurer may be assessed in any year an amount
4 greater than two percent of that member insurer's net direct written premiums for the
5 calendar year preceding the assessment. If the maximum assessment, together with the
6 other assets of the association, does not provide in any one year an amount sufficient
7 to make all necessary payments, the funds available shall be prorated and the unpaid
8 portion shall be paid as soon as funds become available. The association shall pay
9 claims in any order that it may deem reasonable, including the payment of claims as
10 they are received from the claimants or in groups or categories of claims. The
11 association may exempt or defer, in whole or in part, the assessment of a member
12 insurer, if the assessment would cause the member insurer's financial statement to
13 reflect amounts of capital or surplus less than the minimum amounts required for a
14 certificate of authority by a jurisdiction in which the member insurer is authorized to
15 transact insurance. However, during the period of deferment no dividends may be paid
16 to shareholders or policyholders. Deferred assessments shall be paid if the payment
17 does not reduce capital or surplus below required minimums. Payments shall be
18 refunded to those companies receiving larger assessments by virtue of the deferment,
19 or at the election of the company, credited against future assessments;

20 (4) Investigate claims brought against the association and adjust, compromise, settle, and
21 pay covered claims to the extent of the association's obligation and deny any other
22 claims. The association may review settlements, releases, and judgments to which the
23 insolvent insurer or its insurers were parties to determine the extent to which the
24 settlements, releases, and judgments may be properly contested. The association may
25 appoint or substitute and direct legal counsel retained under liability insurance policies

1 for the defense of covered claims;

2 (5) Notify claimants in this state as deemed necessary by the director, to the extent
3 records are available to the association;

4 (6) Handle claims through its employees or through one or more insurers or other persons
5 designated as servicing facilities. Designation of a servicing facility is subject to the
6 approval of the director, but the designation may be declined by a member insurer;

7 (7) Reimburse each servicing facility for obligations of the association paid by the facility
8 and for expenses incurred by the facility while handling claims on behalf of the
9 association and shall pay the other expenses of the association authorized by this Act.

10 Section 7. The association may:

11 (1) Employ or retain persons necessary to handle claims and perform other duties of the
12 association;

13 (2) Borrow funds necessary to effect the purposes of this Act in accordance with the plan
14 of operation;

15 (3) Sue or be sued;

16 (4) Negotiate and become a party to contracts necessary to carry out the purpose of this
17 Act;

18 (5) Perform other acts necessary or proper to effectuate the purpose of this Act;

19 (6) Refund to member insurers in proportion to the contribution of each member insurer
20 to the association that amount by which the assets of the association exceed the
21 liabilities, if at the end of any calendar year, the board of directors finds that the assets
22 of the association exceed the liabilities of the association as estimated by the board of
23 directors for the coming year.

24 Section 8. The association shall submit to the director a plan of operation and any
25 amendments to the plan of operation necessary or suitable to assure the fair, reasonable, and

1 equitable administration of the association. The plan of operation and amendments shall become
2 effective upon approval in writing by the director.

3 If the association fails to submit a suitable plan of operation within ninety days following the
4 effective date of this Act, or if at any time thereafter the association fails to submit suitable
5 amendments to the plan, the director shall, after notice and hearing, adopt reasonable rules
6 necessary or advisable to effectuate section 10 of this Act. The rules shall continue in force until
7 modified by the director or superseded by a plan submitted by the association and approved by
8 the director.

9 Section 9. All member insurers shall comply with the plan of operation.

10 Section 10. The plan of operation shall:

- 11 (1) Establish procedures under which the powers and duties of the association under this
12 Act will be performed;
- 13 (2) Establish procedures for handling assets of the association;
- 14 (3) Establish procedures for the disposition of liquidating dividends or other moneys
15 received from the estate of the insolvent insurer;
- 16 (4) Establish the amount and method of reimbursing members of the board of directors;
- 17 (5) Establish procedures by which claims may be filed with the association and establish
18 acceptable forms of proof of covered claims. Notice of claims to the receiver or
19 liquidator of the insolvent insurer shall be deemed notice to the association or its
20 agent and a list of claims shall be periodically submitted to the association or similar
21 organization in another state by the receiver or liquidator;
- 22 (6) Establish regular places and times for meetings of the board of directors;
- 23 (7) Establish procedures for records to be kept of all financial transactions of the
24 association, its agents, and the board of directors;
- 25 (8) Provide that any member insurer aggrieved by any final action or decision of the

1 association may appeal to the director within thirty days after the action or decision;

2 (9) Establish procedures under which selections for the board of directors will be
3 submitted to the director;

4 (10) Contain additional provisions necessary or proper for the execution of the powers and
5 duties of the association.

6 Section 11. The plan of operation may provide that any powers and duties of the association
7 are delegated to a corporation, association, or other organization that performs functions similar
8 to those of this association or its equivalent in two or more states. The corporation, association,
9 or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid
10 for its performance of any other functions of the association. A delegation under this section shall
11 take effect only with the approval of both the board of directors and the director, and may be
12 made only to a corporation, association, or organization which extends protection not
13 substantially less favorable and effective than that provided by this Act.

14 Section 12. The director shall notify the association of the existence of an insolvent insurer
15 not later than three days after the director receives notice of the determination of the insolvency.
16 The association is entitled to a copy of a complaint seeking an order of liquidation with a finding
17 of insolvency against a member company at the same time that the complaint is filed with a court
18 of competent jurisdiction. The director shall provide the association with a statement of the net
19 direct written premiums of each member insurer upon request of the board of directors.

20 Section 13. The director may suspend or revoke, after notice and hearing, the certificate of
21 authority to transact insurance in this state of a member insurer that fails to pay an assessment
22 when due or fails to comply with the plan of operation. As an alternative, the director may levy
23 a fine on a member insurer that fails to pay an assessment when due. The fine may not exceed
24 five percent of the unpaid assessment for each month. However, a fine may not be less than one
25 hundred dollars for each per month.

1 Section 14. The director may revoke the designation of a servicing facility if the director finds
2 that claims are being handled unsatisfactorily. A final action or order of the director under this
3 Act is subject to judicial review in a court of competent jurisdiction.

4 Section 15. Any person recovering under this Act shall be deemed to have assigned any
5 rights under the policy to the association to the extent of that person's recovery from the
6 association. Any insured or claimant seeking the protection of this Act shall cooperate with the
7 association to the same extent as the person would have been required to cooperate with the
8 insolvent insurer. The association has no cause of action against the insured of the insolvent
9 insurer for sums it has paid out except causes of action the insolvent insurer would have had if
10 the sums had been paid by the insolvent insurer and except as provided in subdivision (2) of
11 section 16 of this Act. In the case of an insolvent insurer operating on a plan with assessment
12 liability, payments of claims of the association do not reduce the liability of the insureds to the
13 receiver, liquidator, or statutory successor for unpaid assessments.

14 Section 16. The association may recover from the following persons the amount of any
15 covered claim paid on behalf of the person pursuant to this Act:

16 (1) An insured whose net worth on December thirty-first of the year immediately
17 preceding the date the insurer becomes an insolvent insurer exceeds fifty million
18 dollars and whose liability obligations to other persons are satisfied in whole or in part
19 by payments made under this Act; and

20 (2) Any person who is an affiliate of the insolvent insurer and whose liability obligations
21 to other persons are satisfied in whole or in part by payments made under this Act.

22 Section 17. The association and any similar organization in another state shall be recognized
23 as claimants in the liquidation of an insolvent insurer for amounts paid by them on covered claims
24 as determined under this Act or similar laws in other states and shall receive dividends and other
25 distributions at the priority set forth in statute. The receiver, liquidator, or statutory successor

1 of an insolvent insurer is bound by determinations of covered claim eligibility under this Act and
2 by settlements of claims made by the association or a similar organization in another state to the
3 extent such determinations or settlements satisfy obligations of the association. The receiver is
4 not bound in any way by such determinations or settlements to the extent there remains a claim
5 against the insolvent insurer. The court having jurisdiction shall grant the claims priority equal
6 to that which the claimant would have been entitled against the assets of the insolvent insurer in
7 the absence of this Act.

8 Section 18. The association shall periodically file with the receiver or liquidator of the
9 insolvent insurer statements of the covered claims paid by the association and estimates of
10 anticipated claims on the association, which shall preserve the rights of the association against
11 the assets of the insolvent insurer.

12 Section 19. Any person having a claim against an insurer, whether or not the insurer is a
13 member insurer under any provision in an insurance policy other than a policy of an insolvent
14 insurer which is also a covered claim, shall be required to first exhaust any right under the policy.
15 An amount payable on a covered claim under this Act shall be reduced by the amount of
16 recovery under the insurance policy.

17 Section 20. A person having a claim which may be recovered under more than one insurance
18 guaranty association or its equivalent shall seek recovery first from the association of the place
19 of residence of the insured, except that if it is a first party claim for damage to property with a
20 permanent location, the person shall seek recovery first from the association of the location of
21 the property. If it is a workers' compensation claim, the person shall seek recovery first from the
22 association of the residence of the claimant. A recovery under this Act shall be reduced by the
23 amount of recovery from another insurance guaranty association or its equivalent.

24 Section 21. To aid in the detection and prevention of insurer insolvencies, the board of
25 directors may, upon majority vote, make recommendations to the director on matters generally

1 related to improving or enhancing regulation for solvency.

2 Section 22. To aid in the detection and prevention of insurer insolvencies, at the conclusion
3 of any domestic insurer insolvency in which the association was obligated to pay covered claims,
4 the board of directors may prepare a report on the history and causes of the insolvency, based
5 on the information available to the association and submit the report to the director.

6 Section 23. The association is subject to examination and regulation by the director. The
7 board of directors shall submit, not later than March thirtieth of each year, a financial report for
8 the preceding calendar year in a form approved by the director.

9 Section 24. The association is exempt from payment of any fees and taxes levied by this state
10 or any of its subdivisions except taxes levied on real or personal property.

11 Section 25. The rates and premiums charged for insurance policies to which this Act applies
12 shall be sufficient to recoup a sum equal to the amounts paid to the association by the member
13 insurer less any amounts returned to the member insurer by the association. No rate is excessive
14 merely because it contains an amount reasonably calculated to recoup assessments paid by the
15 member insurer.

16 Section 26. There is no liability on the part of, and no cause of action of any nature arises
17 against a member insurer, the association or its agents or employees, the board of directors, any
18 person serving as an alternate or substitute representative of any director, or the director or the
19 director's representatives for any action taken or any failure to act by them in the performance
20 of their powers and duties under this Act.

21 Section 27. Any proceedings in which the insolvent insurer is a party or is obligated to defend
22 a party in any court in this state shall, subject to waiver by the association in specific cases
23 involving covered claims, be stayed for six months and additional time that may be determined
24 by the court from the date the insolvency is determined or an ancillary proceeding is instituted
25 in the state, whichever is later, to permit proper defense by the association of any pending causes

1 of action. As to covered claims arising from a judgment, order, decision, verdict, or finding based
2 on the default of the insolvent insurer or its failure to defend an insured, the association, either
3 on its own behalf or on behalf of an insured, may apply to have the judgment, order, decision,
4 verdict, or finding set aside by the same court or administrator that made the judgment, order,
5 decision, verdict, or finding and may defend the claim on the merits.

6 The liquidator, receiver, or statutory successor of an insolvent insurer covered by this Act
7 shall permit access by the board or its authorized representative to the insolvent insurer's records
8 which are necessary for the board in carrying out its functions under this Act with regard to
9 covered claims. In addition, the liquidator, receiver, or statutory successor shall provide the
10 board or its representative with copies of those records upon the request by the board and at the
11 expense of the board.

12 Section 28. This Act shall be known as the South Dakota Insurance Guaranty Association
13 Act.

14 Section 29. That §§ 58-29A-1 to 58-29A-53, inclusive, be repealed.