

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

400N0354

SENATE COMMERCE COMMITTEE ENGROSSED NO.

SB 48 - 02/01/2007

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

Introduced by: The Committee on Commerce at the request of the Department of Revenue and Regulation

1 FOR AN ACT ENTITLED, An Act to adopt consumer protection standards for property
2 casualty insurance claims.

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

4 Section 1. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 Terms used in this Act mean:

- 7 (1) "Agent," any person, corporation, association, partnership, or other legal entity
8 authorized to represent an insurer with respect to a claim;
- 9 (2) "Claim file," any retrievable electronic file, paper file, or combination of both related
10 to a claim arising under an insurance policy or contract;
- 11 (3) "Claimant," an insured or legal representative of an insured, including a member of
12 the insured's immediate family designated by the insured, making a claim under a
13 policy. Unless otherwise specified, claimant does not include a third party claimant;
- 14 (4) "Comparable motor vehicle," when compared to the insured motor vehicle, a motor



- 1 vehicle that is of the same manufacturer, same or newer year, similar body style,
2 similar options and mileage, in as good or better overall condition, available for
3 inspection at a licensed dealer within a reasonable distance of the insured's residence;
- 4 (5) "Days," calendar days;
- 5 (6) "Documentation," includes all pertinent communications, transactions, notes, work
6 papers, claim forms, bills, and explanation of benefits forms relative to the claim;
- 7 (7) "First party claimant," any person, corporation, association, partnership, or other legal
8 entity asserting a right to payment under an insurance policy or insurance contract
9 arising out of the occurrence of the contingency or loss covered by the policy or
10 contract;
- 11 (8) "Investigation," any activity of an insurer directly or indirectly related to the
12 determination of liabilities under coverages afforded by an insurance policy or
13 insurance contract;
- 14 (9) "Notification of claim," any notification, whether in writing or other means
15 acceptable under the terms of an insurance policy, to an insurer or its agent by a
16 claimant, which reasonably apprises the insurer of the facts pertinent to a claim;
- 17 (10) "Proof of loss," written proofs, such as claim forms, medical bills, medical
18 authorizations, or other reasonable evidence of the claim that is customarily required
19 of all insureds or beneficiaries submitting the claims;
- 20 (11) "Reasonable explanation," information sufficient to enable the insured to compare
21 the allowable benefits with policy provisions and determine whether proper payment
22 has been made;
- 23 (12) "Replacement crash part," sheet metal or plastic parts which generally constitute the
24 exterior of a motor vehicle, including inner and outer panels;

1 (13) "Written communications," includes all correspondence, regardless of source or type
2 that is materially related to the handling of the claim.

3 Section 2. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
4 follows:

5 The provisions of this Act set forth minimum standards for the investigation and disposition
6 of first party property and casualty claims arising under contracts or certificates issued to
7 residents of this state and do not apply to claims involving workers' compensation, fidelity,
8 suretyship, or boiler and machinery insurance. Nothing in this Act may be construed to create
9 or imply a private cause of action for violation of this Act nor may be construed to create or
10 imply third party bad faith.

11 Section 3. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
12 follows:

13 No insurer may fail to fully disclose to claimants all pertinent benefits, coverages, or other
14 provisions of a policy or contract under which a claim is presented.

15 Section 4. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
16 follows:

17 No claim may be denied on the basis of failure to exhibit property unless there is
18 documentation of breach of the policy provisions in the claim file. No insurer may deny a claim
19 based upon the failure of a claimant to give written notice of loss within a specified time limit
20 unless the written notice is a written policy condition, or claimant's failure to give written notice
21 after being requested to do so is so unreasonable as to constitute a breach of the claimant's duty
22 to cooperate with the insurer.

23 Section 5. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
24 follows:

1 No insurer may indicate to a claimant on a payment draft, check, or in any accompanying
2 letter that the payment is final or a release of any claim unless the policy limit has been paid or
3 there has been a compromise settlement agreed to by the claimant and the insurer as to coverage
4 and amount payable under the contract.

5 No insurer may issue any check or draft in partial settlement of a loss or claim under a
6 specific coverage that contains language purporting to release the insurer or its insured from
7 total liability.

8 Any payment of a claim to a claimant shall be made payable to the claimant only and may
9 not include other persons unless either there is written permission given by the claimant or the
10 additional payee is listed as loss payee or mortgagee on the policy. If a claimant or third party
11 claimant requests in writing the inclusion of an additional payee, the insurer shall honor that
12 request.

13 Section 6. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
14 follows:

15 Every insurer, upon receiving notification of a claim, shall acknowledge the receipt of the
16 notice within a reasonable period of time. Payment of the claim may be made in lieu of an
17 acknowledgment. If an acknowledgment is made by means other than writing, an appropriate
18 notation of the acknowledgment shall be made in the claim file of the insurer and dated.
19 Notification of a claim given to an agent of an insurer is notification to the insurer.

20 A reply shall be made within a reasonable period of time on all other pertinent
21 communications from a claimant which reasonably suggest that a response is expected. The
22 reply must acknowledge receipt of the claim communication and include what steps the insurer
23 intends to take in response to the communication and what steps the claimant needs to take.

24 Every insurer, upon receiving notification of claim, shall within a reasonable period of time

1 provide necessary claim forms, instructions, and reasonable assistance to allow the claimant to
2 comply with the policy conditions and the insurer's reasonable requirements.

3 Section 7. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
4 follows:

5 Upon receipt by the insurer of properly executed proofs of loss, the claimant shall, within
6 a reasonable period of time, be advised of the acceptance or denial of the claim by the insurer.
7 No insurer may deny a claim on the grounds of a specific policy provision, condition, or
8 exclusion unless reference to such provision, condition, or exclusion is included in the denial.
9 Any denial shall be given to the claimant in writing and the claim file of the insurer shall contain
10 documentation of the denial as required by § 58-3-7.4.

11 If there is a reasonable basis supported by specific information available for review by the
12 division that the claimant has fraudulently caused or contributed to the loss, the insurer is
13 relieved from the requirements of this section. After receipt by the insurer of a properly executed
14 proof of loss, the claimant shall be advised of the acceptance or denial of the claim within a
15 reasonable time for full investigation.

16 Section 8. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
17 follows:

18 If the insurer needs more time to determine whether a claim should be accepted or denied,
19 the insurer shall, within a reasonable period of time, notify the claimant after receipt of the
20 proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete,
21 the insurer shall correspond with the claimant at reasonable intervals and include in that
22 correspondence the reason for needing additional time.

23 If there is a reasonable basis supported by specific information available for review by the
24 division for suspecting that the claimant has fraudulently caused or contributed to the loss, the

1 insurer is relieved from the requirements of this section. After receipt by the insurer of a
2 properly executed proof of loss, the claimant shall be advised of the acceptance or denial of the
3 claim by the insurer within a reasonable time for full investigation.

4 No insurer may fail to settle claims on the basis that responsibility for payment should be
5 assumed by others except as may be provided by policy provisions.

6 Section 9. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
7 follows:

8 An insurer shall provide written notice to a claimant and a third party claimant of the statute
9 of limitations if the claimant or third party claimant is not represented by counsel and if the
10 claim remains open until sixty days prior to the expiration of the statute of limitations. The
11 notice must be provided no earlier than sixty days prior to and no later than thirty days prior to
12 the expiration of the statute of limitations. This section does not apply unless there are active
13 negotiations between the parties sixty days prior to the expiration of the statute of limitations.

14 Section 10. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 The insurer shall affirm or deny liability on claims within a reasonable time and shall, within
17 a reasonable period of time, tender payment after affirmation of liability, if the amount of the
18 claim is determined and not in dispute. In claims where multiple coverages are involved,
19 payments which are not in dispute and where the payee is known shall be made within a
20 reasonable period of time.

21 Section 11. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 No insurer may require any claimant to submit to a polygraph examination.

24 Section 12. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 No insurer may pay or offer to pay a claimant an amount less than what is required under
3 the terms of the policy or any applicable legal requirement. If, after an insurer denies a claim,
4 the claimant objects to the denial, the insurer shall notify the claimant in writing that the
5 claimant may have the matter reviewed by the division and provide the address and phone
6 number of the division.

7 Section 13. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
8 follows:

9 Any insurer covering motor vehicles shall provide for settlement of a claim, less any
10 applicable deductible, using one of the following methods:

- 11 (1) Cost of the repairs;
- 12 (2) Actual cash value; or
- 13 (3) Replacement cost.

14 If the settlement of a claimant's motor vehicle total loss is on the basis of actual cash value
15 or replacement with a comparable motor vehicle, one of the methods provided in sections 14
16 to 18, inclusive, of this Act shall apply.

17 Section 14. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 The insurer may elect to offer a replacement motor vehicle that is a comparable motor
20 vehicle. The insurer shall pay all applicable taxes, license fees, and other fees incident to
21 transfer of evidence of ownership of the motor vehicle paid, at no cost other than any deductible
22 provided in the policy. The offer and any rejection by the claimant shall be documented in the
23 claim file.

24 Section 15. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 The insurer may, as a means of determining the actual cash value of the motor vehicle, elect
3 a cash settlement based upon the actual cost, less any deductible provided in the policy, to
4 purchase a comparable motor vehicle including all applicable taxes, license fees, and other fees
5 incident to transfer of evidence of ownership of a comparable motor vehicle. Any differences
6 in the claimant's motor vehicle compared to a similar motor vehicle in the local market area that
7 are attributable to normal cleaning and similar minor appearance alterations by a dealer to make
8 the motor vehicle ready for sale may not be used to determine that the vehicle is not comparable.

9 Actual cost may be derived from:

- 10 (1) The cost of two or more comparable motor vehicles in the local market area if the
11 motor vehicles are available or were available within the last ninety days to
12 consumers in the claimant's local market area;
- 13 (2) One of two or more quotations obtained by the insurer from two or more licensed
14 dealers located within the local market area if the cost of comparable motor vehicles
15 are not available pursuant to subdivision (1); or
- 16 (3) Any source for determining statistically valid fair market values that meet all of the
17 following criteria:
 - 18 (a) The source shall give primary consideration to the values of motor vehicles in
19 the local market area and may consider data on motor vehicles outside the
20 area;
 - 21 (b) The source's database shall produce values for at least eighty-five percent of
22 all makes and models for the last fifteen model years taking into account the
23 values of all major options for such motor vehicles; and
 - 24 (c) The source shall produce fair market values based on current data available

1 from the area surrounding the location where the insured motor vehicle was
2 principally garaged, or add data as is necessary, to assure statistical validity.

3 If the cost of repair of the motor vehicle is less than the actual cash value of the motor
4 vehicle then the insurer must pay at least the cost of repair. For the purposes of this section,
5 actual cash value may not include an adjustment for salvage. If the claim is paid based upon the
6 cost of repair, the cost of the repair including labor shall be paid to the claimant regardless of
7 whether the motor vehicle is repaired.

8 Section 16. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
9 follows:

10 If the insurer is notified within thirty-five days of the receipt of the claim draft that the
11 claimant cannot purchase a comparable motor vehicle for the market value, the insurer shall
12 reopen its claim file and the following procedures shall apply:

13 (1) The insurer may locate a comparable motor vehicle by the same manufacturer, same
14 year, similar body style, and similar options and price range for the claimant for the
15 market value determined by the insurer at the time of settlement. Any such motor
16 vehicle must be available through licensed dealers;

17 (2) The insurer shall either pay the claimant the difference between the market value
18 before applicable deductions and the cost of the comparable motor vehicle of like
19 kind and quality which the claimant has located, or negotiate and effect the purchase
20 of this motor vehicle for the claimant; or

21 (3) The insurer may elect to offer a replacement in accordance with the provisions set
22 forth in section 14 of this Act.

23 Section 17. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
24 follows:

1 The insurer is not required to take action under section 16 of this Act if its documentation
2 to the claimant at the time of settlement included written notification of the availability and
3 location of a specific and comparable motor vehicle. The documentation shall include the motor
4 vehicle identification number.

5 Section 18. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 Any deductions from actual cash value, including a deduction for salvage if the claimant
8 retains the vehicle, shall be reasonable, measurable, discernible, itemized, and specified as to
9 dollar amount. The basis for the settlement shall be fully explained to the claimant.

10 Section 19. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
11 follows:

12 No insurer may require a claimant to travel an unreasonable distance either to inspect a
13 replacement motor vehicle, to obtain a repair estimate, or to have the motor vehicle repaired at
14 a specific repair shop.

15 Section 20. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
16 follows:

17 Each insurer shall include the claimant's deductible, if any, in subrogation demands.
18 Subrogation recoveries shall be shared on a proportionate basis with the claimant, unless the
19 deductible amount has been otherwise recovered. No deduction for expenses may be made from
20 the deductible recovery unless an outside attorney is retained to collect the recovery. The
21 deduction may then be for only a pro rata share of the allocated loss adjustment expense.

22 Section 21. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 If partial losses are settled on the basis of a written estimate prepared by or for the insurer,

1 the insurer shall supply the claimant with a copy of the estimate upon which the settlement is
2 based. The estimate prepared by or for the insurer shall be reasonable, in accordance with
3 applicable policy provisions, and in an amount which will allow for repairs to be made in a
4 workmanlike manner. If the claimant subsequently claims, based upon a written estimate which
5 the claimant obtains, that necessary repairs will exceed the written estimate prepared by or for
6 the insurer, the insurer shall pay the difference between the estimates, or, within a reasonable
7 period of time, provide the claimant with the name of at least one repair shop that will make the
8 repairs for the amount of the written estimate. If the insurer designates two or fewer such
9 repairers, the insurer shall assure that the repairs are performed in a workmanlike manner. The
10 insurer shall maintain documentation of all such communications. This section only applies to
11 personal lines property casualty claims.

12 Section 22. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 If the insurer reduces a claim offer or settlement because of betterment or depreciation all
15 information for the reduction shall be documented in the claim file. Each deduction shall be
16 itemized, specified as to dollar amount, and shall be reasonable.

17 Section 23. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 If the insurer recommends or offers the repair be done at a specific motor vehicle repair
20 shop, the insurer shall, within a reasonable period of time, cause the damaged motor vehicle to
21 be restored to its condition prior to the loss at no additional cost to the claimant other than as
22 stated in the policy.

23 Section 24. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
24 follows:

1 The insurer shall provide reasonable notice to a claimant prior to termination of payment for
2 motor vehicle storage charges. The insurer shall allow reasonable time for the claimant to
3 remove the motor vehicle from storage prior to the termination of payment.

4 Section 25. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 Unless the insurer has provided a claimant with the name of a specific towing company prior
7 to the claimant's use of another towing company, the insurer shall pay all reasonable towing
8 charges irrespective of the towing company used by the claimant.

9 Section 26. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
10 follows:

11 Betterment deductions are allowed only if the betterment deductions reflect the general
12 overall condition of the motor vehicle, considering its age, for either or both of the following:

- 13 (1) The wear and tear or rust, limited to no more than a deduction of one thousand
14 dollars;
- 15 (2) Missing parts, limited to no more of a deduction than the replacement costs of the
16 part or parts.

17 Betterment is not allowed unless the repairs or replaced parts increase the market value of
18 the motor vehicle as a whole.

19 Section 27. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
20 follows:

21 Any deductions set forth in section 25 of this Act shall be measurable, itemized, specified
22 as to dollar amount, and documented in the claim file.

23 Section 28. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
24 follows:

1 No insurer may require the claimant to supply parts for replacement.

2 Section 29. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
3 follows:

4 All replacement crash parts shall be identified and be of the same quality as the original part.

5 No insurer may require the use of replacement crash parts in the repair of a motor vehicle
6 unless the replacement crash part is at least equal in kind and quality to the original part in terms
7 of fit, quality, and performance. Any insurer specifying the use of replacement crash parts shall
8 consider the cost of any modifications which may become necessary when making the repair.

9 Section 30. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
10 follows:

11 For any motor vehicle that was purchased as new that is less than two years old on the date
12 of the loss and has less than thirty thousand miles on the odometer on the date of loss, the
13 insurer shall offer to use new original equipment manufacturer parts. For any other motor
14 vehicle, the insurer may, at its option, adjust the loss based upon original equipment
15 manufacturer parts, nonoriginal equipment manufacturer parts, or used parts. Any nonoriginal
16 equipment manufacturer parts or used parts specified by the insurer shall be of like kind and
17 quality to the original parts in terms of fit, quality, and performance. Nothing in this section may
18 be construed as limiting the right of a third party claimant to have the vehicle repaired with new,
19 original equipment manufacturer parts.

20 Section 31. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
21 follows:

22 In any property coverage for the roof of a structure, the insurer, in reimbursing the insured
23 for the repairs, shall cover the full cost of the repairs less any applicable deductible. The full cost
24 of repairs includes any removal of all old shingles, provided that those shingles must be

1 removed to complete repair or replacement of damaged shingles or other roof parts. If the roof
2 is covered on a replacement basis or actual cash value basis, the post claim existence of prior
3 damage, except damage paid for under a policy or previously known by the claimant to have
4 been damaged but not reported as a claim, may not be used to reduce the claim payment.
5 Nothing in this Act requires a loss to a roof to be paid on a replacement cost basis if the policy
6 provides for the losses to be reimbursed on an actual cash value basis. The insurer may deduct
7 from the amount owed to repair any damage that occurred prior to the inception of the policy
8 unless the covered loss could not be repaired without also repairing the prior damage.

9 For any property coverage for fire and extended coverage policies, when a loss requires
10 repair or replacement of an item or part, any consequential physical damage incurred in making
11 such repair or replacement not otherwise excluded by the policy, shall be included in the loss.
12 The claimant may not be required to pay for betterment nor any other cost except for the
13 applicable deductible.

14 Section 32. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 Depreciation reductions, where not otherwise prohibited and where provided for in the
17 policy, may be used but shall be based on the life expectancy of the insured property and
18 reduced by the percentage of age of the property to the life expectancy. Generally accepted
19 industry guides may be used for the calculation of life expectancy, but the actual condition of
20 the insured property shall be taken into account.

21 Section 33. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 The director may promulgate rules pursuant to chapter 1-26 to carry out the purposes of this
24 Act. In promulgating any rules, the director shall consider the impact of the rule on the cost and

1 availability of property casualty insurance in this state and the degree of protection that the rule
2 will have for the insurance buying public in this state. The rules shall be limited to the following
3 areas of property casualty claims:

- 4 (1) Definition of terms;
- 5 (2) Claim handling procedures;
- 6 (3) Timeliness;
- 7 (4) Appropriateness of repairs;
- 8 (5) Determining actual cash value;
- 9 (6) Notices and communications to claimants; and
- 10 (7) Valuation.

11 Section 34. Sections 22 to 30, inclusive, of this Act only apply to automobile insurance
12 claims.