

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

400N0354

SENATE BILL NO. 48

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;
- 10 (3) "Claimant," an insured or legal representative of an insured, including a member of
11 the insured's immediate family designated by the insured, making a claim under a
12 policy and unless otherwise specified includes a third party claimant;
- 13 (4) "Days," calendar days;
- 14 (5) "Documentation," includes all pertinent communications, transactions, notes, work
15 papers, claim forms, bills, and explanation of benefits forms relative to the claim;



- 1 (6) "First party claimant," any person, corporation, association, partnership, or other legal
2 entity asserting a right to payment under an insurance policy or insurance contract
3 arising out of the occurrence of the contingency or loss covered by the policy or
4 contract;
- 5 (7) "Investigation," any activity of an insurer directly or indirectly related to the
6 determination of liabilities under coverages afforded by an insurance policy or
7 insurance contract;
- 8 (8) "Notification of claim," any notification, whether in writing or other means
9 acceptable under the terms of an insurance policy to an insurer or its agent, by a
10 claimant, which reasonably apprises the insurer of the facts pertinent to a claim;
- 11 (9) "Proof of loss," written proofs, such as claim forms, medical bills, medical
12 authorizations, or other reasonable evidence of the claim that is ordinarily required
13 of all insureds or beneficiaries submitting the claims;
- 14 (10) "Reasonable explanation," information sufficient to enable the insured to compare
15 the allowable benefits with policy provisions and determine whether proper payment
16 has been made;
- 17 (11) "Replacement crash part," sheet metal or plastic parts which generally constitute the
18 exterior of a motor vehicle, including inner and outer panels;
- 19 (12) "Written communications," includes all correspondence, regardless of source or type
20 that is materially related to the handling of the claim.

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

23 The provisions of this Act set forth minimum standards for the investigation and disposition
24 of first party property and casualty claims arising under contracts or certificates issued to

1 residents of this state and do not apply to claims involving workers' compensation, fidelity,
2 suretyship, or boiler and machinery insurance. Nothing in this Act may be construed to create
3 or imply a private cause of action for violation of this Act nor may be construed to create or
4 imply third party bad faith.

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

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

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

11 No claim may be denied on the basis of failure to exhibit property unless there is
12 documentation of breach of the policy provisions in the claim file. No insurer may deny a claim
13 based upon the failure of a first party claimant to give written notice of loss within a specified
14 time limit unless the written notice is a written policy condition, or claimant's failure to give
15 written notice after being requested to do so is so unreasonable as to constitute a breach of the
16 claimant's duty to cooperate with the insurer.

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

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

23 No insurer may issue any check or draft in partial settlement of a loss or claim under a
24 specific coverage that contains language purporting to release the insurer or its insured from

1 total liability.

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3 Any payment of a claim to a claimant shall be made payable to the claimant only and may
4 not include other persons unless either there is express permission given from the claimant or
5 the payee is listed as loss payee or mortgagee on the policy. If written permission is obtained
6 from the insured or from a claimant, the insurer shall honor that request by including the named
7 party on the claim check.

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

10 Every insurer, upon receiving notification of a claim, shall promptly acknowledge the receipt
11 of the notice unless payment is made within that period of time. If an acknowledgment is made
12 by means other than writing, an appropriate notation of the acknowledgment shall be made in
13 the claim file of the insurer and dated. Notification of a claim given to an agent of an insurer is
14 notification to the insurer.

15 An appropriate reply shall be made promptly on all other pertinent communications from
16 a claimant which reasonably suggest that a response is expected.

17 Every insurer, upon receiving notification of claim, shall promptly provide necessary claim
18 forms, instructions, and reasonable assistance so that a first party claimant can comply with the
19 policy conditions and the insurer's reasonable requirements.

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

22 Upon receipt by the insurer of properly executed proofs of loss, the first party claimant shall
23 be promptly advised of the acceptance or denial of the claim by the insurer. No insurer may deny
24 a claim on the grounds of a specific policy provision, condition, or exclusion unless reference

1 to such provision, condition, or exclusion is included in the denial. The denial shall be given to
2 the claimant in writing and the claim file of the insurer shall contain documentation of the denial
3 as required by § 58-3-7.4.

4 If there is a reasonable basis supported by specific information available for review by the
5 division that the first party claimant has fraudulently caused or contributed to the loss, the
6 insurer is relieved from the requirements of this section. However, the first party claimant shall
7 be advised of the acceptance or denial of the claim within a reasonable time for full
8 investigation after receipt by the insurer of a properly executed proof of loss.

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

11 If the insurer needs more time to determine whether a first party claim should be accepted
12 or denied, the insurer shall promptly notify the first party claimant after receipt of the proofs of
13 loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer
14 shall send to the first party claimant a letter setting forth the reasons additional time is needed
15 for investigation at reasonable intervals until such time as it is completed.

16 If there is a reasonable basis supported by specific information available for review by the
17 division for suspecting that the first party claimant has fraudulently caused or contributed to the
18 loss, the insurer is relieved from the requirements of this section. However, the first party
19 claimant shall be advised of the acceptance or denial of the claim by the insurer within a
20 reasonable time for full investigation after receipt by the insurer of a properly executed proof
21 of loss.

22 No insurer may fail to settle first party claims on the basis that responsibility for payment
23 should be assumed by others except as may otherwise be provided by policy provisions.

24 Section 9. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 No insurer may continue negotiations for settlement of a claim directly with a claimant who
3 is not legally represented, if the claimant's rights may be affected by a statute of limitations,
4 unless the insurer has given the claimant written notice of the limitation. Notice shall be given
5 to claimants at least thirty days before the date on which the time limit may expire.

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

8 The insurer shall affirm or deny liability on claims within a reasonable time and shall
9 promptly tender payment after affirmation of liability, if the amount of the claim is determined
10 and not in dispute. In claims where multiple coverages are involved, payments which are not
11 in dispute and where the payee is known shall be made promptly.

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

14 No insurer may request or require any insured to submit to a polygraph examination.

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

17 No insurer may pay or offer to pay an insured an amount less than what is required under
18 the terms of the policy and any applicable legal requirement. If, after an insurer denies a claim,
19 the claimant objects to the rejection, the insurer shall notify the claimant in writing that the
20 claimant may have the matter reviewed by the division and provide the address and phone
21 number of the division.

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

24 Any insurer covering motor vehicles shall provide for settlement of a claim, less any

1 applicable deductible, using one of the following methods:

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

5 If the settlement of a first party claimant's total loss motor vehicle is on the basis of actual
6 cash value or replacement with another of like kind and quality, one of the methods provided
7 in sections 14 to 18, inclusive, of this Act shall apply.

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

10 The insurer may elect to offer a replacement motor vehicle that is at least comparable in that
11 it shall be by the same manufacturer, same or newer year, similar body style, similar options,
12 and mileage as the insured motor vehicle and in as good or better overall condition and available
13 for inspection at a licensed dealer within a reasonable distance of the insured's residence. The
14 insurer shall pay all applicable taxes, license fees, and other fees incident to transfer of evidence
15 of ownership of the motor vehicle paid, at no cost other than any deductible provided in the
16 policy. The offer and any rejection thereof shall be documented in the claim file.

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

19 The insurer may, as a means of determining the actual cash value of the motor vehicle, elect
20 a cash settlement based upon the actual cost, less any deductible provided in the policy, to
21 purchase a comparable motor vehicle including all applicable taxes, license fees, and other fees
22 incident to transfer of evidence of ownership of a comparable motor vehicle. Any differences
23 in the first party claimant's motor vehicle relative to a similar motor vehicle in the local market
24 area that are attributable to normal cleaning and similar minor appearance alterations by a dealer

1 to make the motor vehicle ready for sale are not sufficient for the motor vehicle not to be
2 comparable. Such actual cost may be derived from:

3 (1) The cost of two or more comparable motor vehicles in the local market area if
4 comparable motor vehicles are available or were available within the last ninety days
5 to consumers in the local market area;

6 (2) One of two or more quotations obtained by the insurer from two or more licensed
7 dealers located within the local market area if the cost of comparable motor vehicles
8 are not available pursuant to subdivisions (1); or

9 (3) Any source for determining statistically valid fair market values that meet all of the
10 following criteria:

11 (a) The source shall give primary consideration to the values of motor vehicles in
12 the local market area and may consider data on motor vehicles outside the
13 area;

14 (b) The source's database shall produce values for at least eighty-five percent of
15 all makes and models for the last fifteen model years taking into account the
16 values of all major options for such motor vehicles; and

17 (c) The source shall produce fair market values based on current data available
18 from the area surrounding the location where the insured motor vehicle was
19 principally garaged or a necessary expansion of parameters, such as time and
20 area, to assure statistical validity.

21 If the cost of repair of the motor vehicle is less than the actual cash value of the motor
22 vehicle, without any salvage deduction, then the insurer must pay at least the cost of repair. If
23 the claim is paid based upon the cost of repair, the cost of the repair including labor shall be paid
24 to the insured regardless of whether the motor vehicle is repaired.

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

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

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

10 (2) The insurer shall either pay the insured the difference between the market value
11 before applicable deductions and the cost of the comparable motor vehicle of like
12 kind and quality which the insured has located, or negotiate and effect the purchase
13 of this motor vehicle for the insured;

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

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

18 The insurer is not required to take action under sections 15 and 16 of this Act if its
19 documentation to the insured at the time of settlement included written notification of the
20 availability and location of a specified and comparable motor vehicle of the same manufacturer,
21 same year, similar body style, and similar options in as good or better condition as the total loss
22 motor vehicle which could have been purchased locally for the market value determined by the
23 insurer before applicable deductions. The documentation shall include the motor vehicle
24 identification number.

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

3 Any deductions from the cost, including deduction for salvage, shall be measurable,
4 discernible, itemized, and specified as to dollar amount and shall be appropriate in amount. The
5 basis for the settlement shall be fully explained to the first party claimant.

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

8 No insurer may require a first party claimant to travel an unreasonable distance either to
9 inspect a replacement motor vehicle, to obtain a repair estimate, or to have the motor vehicle
10 repaired at a specific repair shop.

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

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

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

21 If partial losses are settled on the basis of a written estimate prepared by or for the insurer,
22 the insurer shall supply the insured with a copy of the estimate upon which the settlement is
23 based. The estimate prepared by or for the insurer shall be reasonable, in accordance with
24 applicable policy provisions, and of an amount which will allow for repairs to be made in a

1 workmanlike manner. If the insured subsequently claims, based upon a written estimate which
2 the insured obtains, that necessary repairs will exceed the written estimate prepared by or for
3 the insurer, the insurer shall pay the difference between the written estimate and a higher
4 estimate obtained by the insured, or promptly provide the insured with the name of at least one
5 repair shop that will make the repairs for the amount of the written estimate. If the insurer
6 designates only one or two such repairers, the insurer shall assure that the repairs are performed
7 in a workmanlike manner. The insurer shall maintain documentation of all such
8 communications.

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

11 If the amount claimed is reduced because of betterment or depreciation all information for
12 the reduction shall be contained in the claim file. The deductions shall be itemized and specified
13 as to dollar amount and shall be appropriate for the amount of deductions.

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

16 If the insurer recommends or offers the repair be done at a specific repair shop for motor
17 vehicle repairs, the insurer shall cause the damaged motor vehicle to be restored to its condition
18 prior to the loss at no additional cost to the first party claimant other than as stated in the policy
19 and within a reasonable period of time.

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

22 The insurer shall provide reasonable notice to an insured prior to termination of payment for
23 motor vehicle storage charges and documentation of the denial as required by § 58-3-7.4. The
24 insurer shall provide reasonable time for the insured to remove the motor vehicle from storage

1 prior to the termination of payment. Unless the insurer has provided an insured with the name
2 of a specific towing company prior to the insured's use of another towing company, the insurer
3 shall pay all reasonable towing charges irrespective of the towing company used by the insured.

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

6 Betterment deductions are allowable only if the deductions:

7 (1) Reflect the general overall condition of the motor vehicle, considering its age, for
8 either or both of the following:

9 (a) The wear and tear or rust, limited to no more than a deduction of one thousand
10 dollars;

11 (b) Missing parts, limited to no more of a deduction than the replacement costs of
12 the part or parts.

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

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

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

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

21 No insurer may require the insured or claimant to supply parts for replacement.

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

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

1 All replacement crash parts, which are subject to this Act and manufactured after the effective
2 date of this Act, shall carry sufficient permanent nonremovable identification so as to identify
3 its manufacturer. The identification shall be accessible to the extent possible after installation.

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

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

10 For any motor vehicle that is purchased as new that is less than two years old prior to the
11 date of the accident and has less than thirty thousand miles on the odometer, the insurer shall
12 offer to use new original equipment manufacturer parts. For any motor vehicle for which either
13 two years has elapsed from the purchase of the motor vehicle as new or thirty thousand or more
14 miles have been driven according to the odometer, the insurer may, at its option, adjust the loss
15 based upon original equipment manufacturer parts, nonoriginal equipment manufacturer parts,
16 or used parts of like kind and quality.

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

19 In any property coverage for the roof of a structure, the insurer, in reimbursing the insured
20 for the repairs, shall cover the full cost of the repairs less any applicable deductible. The full cost
21 of repairs includes any removal of old shingles regardless of the number of layers, provided that
22 those shingles must be removed in order to complete repair or replacement of damaged shingles
23 or other roof parts. If the roof is covered on a replacement basis or actual cash value basis, the
24 post claim existence of prior damage, except damage paid for under a policy or previously

1 known by the insured to have been damaged but not reported as a claim, may not be used to
2 reduce the claim payment. Nothing in this Act requires a loss to a roof to be paid on a
3 replacement cost basis if the policy provides for the losses to a roof be reimbursed on an actual
4 cash value basis.

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

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

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

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

19 The director may promulgate rules pursuant to chapter 1-26 to carry out the purposes of this
20 Act. In promulgating any rules, the director shall consider the impact of the rule on the cost and
21 availability of property casualty insurance in this state and the degree of protection that the rule
22 will have for the insurance buying public in this state. The rules shall be limited to the following
23 areas of property casualty claims:

24 (1) Definition of terms;

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