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CHAPTER 81

Legal Malpractice Insurance

ARTICLE 1

Reporting Requirements

**SECTION 38‑81‑20.** Exemption from liability for action taken in performance of powers and duties in reporting legal professional malpractice claims.

 There is no liability on the part of, and no cause of action of any nature may arise against, any insurer, its officers, its agents, or employees or the director, his designees, or his representatives for any action taken by them in performance of their powers and duties under this chapter.

HISTORY: Former 1976 Code Section 38‑61‑20 [1977 Act No. 120 Section 2] recodified as Section 38‑81‑20 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 832.

ARTICLE 3

Legal Professional Liability Insurance Joint Underwriting Association

**SECTION 38‑81‑210.** Findings.

 The General Assembly declares that there exists the potential for a legal professional liability insurance crisis for attorneys in this State because of the high cost of liability insurance and a want of competition. These conditions could result in a situation in which liability insurance would not be available to attorneys in the State.

 The public interest requires that a contingency program for providing legal professional liability insurance be enacted and that the Insurance Department of South Carolina (department) activate this program upon finding that an emergency exists because insurance is not available through normal channels or is not available on a reasonable basis because of lack of competition or otherwise.

HISTORY: 1988 Act No. 360, Section 1; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑220.** Definitions.

 As used in this article:

 (1) “Association” means any joint underwriting association established pursuant to this article.

 (2) “Legal professional liability insurance” means insurance protection against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of legal service to or representation of any person as the result of negligence or malpractice in rendering or failing to render professional service.

 (3) “Net direct premiums” means gross direct premiums written on bodily injury liability insurance, other than automobile liability insurance, homeowners liability insurance, and farmowners liability insurance, including the liability component of multiple peril package policies, as computed by the director or his designee less return premiums or the unused or unabsorbed portions of premium deposits.

HISTORY: 1988 Act No. 360, Section 2; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑230.** Joint underwriting association created.

 (A) A joint underwriting association is created, consisting of all insurers authorized to write within this State, on a direct basis, bodily injury liability insurance, other than automobile bodily injury liability insurance, homeowners liability insurance, and farmowners liability insurance, including insurers covering such peril in multiple peril package policies. Every such insurer is and must remain a member of the association as a condition of its authority to continue to transact this kind of insurance in this State.

 (B) The purpose of the association is to provide legal professional liability insurance on a self‑supporting basis to the fullest extent possible.

 (C) The association is activated when the department finds and declares the existence of an emergency because of the unavailability of legal professional liability insurance or the unavailability of such insurance on a reasonable basis through normal channels.

HISTORY: 1988 Act No. 360, Section 3; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑240.** Powers of association.

 The association has the power on behalf of its members to:

 (1) issue, or cause to be issued, policies of insurance to applicants including incidental coverages such as, but not limited to, premises or operations liability coverage on the premises where services are rendered, all subject to limits of liability as specified in the plan of operation but not to exceed five million dollars for all claimants under one policy in any one year;

 (2) underwrite legal professional liability insurance and to adjust and pay losses with respect thereto or to appoint service companies to perform those functions;

 (3) cede and assume reinsurance.

HISTORY: 1988 Act No. 360, Section 4; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑250.** Plan of operation.

 (A) Not less than thirty nor more than ninety days after the effective date of this article the director or his designee, after consultation with the members of the association, representatives of the public, the South Carolina Bar, and other affected individuals and organizations, shall promulgate a plan of operation consistent with this article. The plan of operation becomes effective and operative no later than thirty days after the declaration of an emergency by the department.

 (B) The plan of operation shall provide for economic, fair, and nondiscriminatory administration and for the prompt and efficient‑ provision of legal professional liability insurance and may contain other provisions including, but not limited to, preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the association, assessment of the members to defray losses and expenses, commission arrangements, reasonable and objective underwriting standards, acceptance and cession of reinsurance, appointment of servicing carriers, and procedures for determining amounts of insurance to be provided by the association.

 (C) The plan of operation shall provide that any profit achieved by the association must be added to the reserves of the association or returned to the policyholders as a dividend.

 (D) Amendments to the plan of operation may be made by the directors of the association with the approval of the director or his designee or must be made at the direction of the director or his designee after proper notice and public hearing.

HISTORY: 1988 Act No. 360, Section 5; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑260.** Legal professional liability insurance coverage by association.

 Upon the activation of the plan of operation, any attorney licensed in this State is entitled to apply to the association for coverage. The application may be made on behalf of the applicant by a licensed agent or broker authorized in writing by the applicant.

 If the association determines that the applicant meets the underwriting standards of the association as set forth in the approved plan of operation and there is no unpaid, uncontested premium due from the applicant for any prior insurance of the same kind, the association, upon receipt of the premium, or a portion thereof as prescribed by the plan of operation, shall cause to be issued a policy of legal professional liability insurance for a term of one year.

 The rates, rating plans, rating rules, rating classifications, territories, and policy forms applicable to insurance written by the association and the statistical and experience data relating thereto are subject to this act and to those provisions of Chapter 73, Title 38, Code of Laws of South Carolina, 1976, which are not inconsistent with this article.

HISTORY: 1988 Act No. 360, Section 6; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑270.** Gathering of data.

 The director or his designee shall obtain complete statistical data in respect to legal professional liability losses and reparation costs as well as all other costs or expenses which underlie or are related to legal professional liability insurance. The department shall promulgate any statistical plan he considers necessary for the purpose of gathering data referable to loss and loss adjustment expense experience and other expense experience. When the statistical plan is promulgated all members of the association shall adopt and use it. The director or his designee also shall obtain statistical data in respect to the costs of compensating victims of legal professional liability. The director or his designee may require from any person obtaining insurance through the association loss, claim, or expense data. This information or data is confidential and the attorney‑client privilege must be preserved.

HISTORY: 1988 Act No. 360, Section 7; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑280.** Structuring rates.

 In structuring rates for legal professional liability insurance and determining the profit or loss of the association in respect to such insurance, consideration must be given by the director or his designee to all investment income.

HISTORY: 1988 Act No. 360, Section 8; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑290.** Filing of forms.

 Within a time that the director or his designee directs, the association shall submit, for the approval of the director or his designee, an initial filing, in proper form, of policy forms, classifications, rates, rating plans, and rating rules applicable to legal professional liability insurance to be written by the association. If the director or his designee disapproves the initial filing, in whole or in part, the association shall amend the filing, in whole or in part, in accordance with the direction of the director or his designee. If the director or his designee is unable to approve the filing or amended filing, within the time specified, he shall promulgate the policy forms, classifications, rates, rating plans, and rules to be used by the association in making rates for and writing the insurance.

HISTORY: 1988 Act No. 360, Section 9; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑300.** Specification of coverage basis.

 (A) The director or his designee shall specify whether policy forms and the rate structure must be on a “claims‑made” or “occurrence” basis and coverage may be provided by the association only on the basis specified by the director or his designee. The director or his designee shall specify the claims‑made basis only if the contract makes provision for residual occurrence coverage upon the retirement, death, disability, or removal from the State of the insured. Provision may be made for a premium charge allocable to any residual occurrence coverage and the premium charges for the residual coverage must be segregated and separately maintained for such purpose which may include the reinsurance of all or part of that portion of the risk.

 (B) The policy may not contain any limitation in relation to the existing law in tort as provided by the statute of limitations of this State.

 (C) The policy form whether on a claims‑made or occurrence basis may not require as a condition precedent to settlement or compromise of any claim the consent or acquiescence of the insured. However, such settlement or compromise is not considered an admission of fault or wrongdoing by the insured.

 (D) The premium rate charged for either or both claims‑made or occurrence coverage must be at rates established on an actuarially sound basis, including consideration of trends in the frequency and severity of losses and must be calculated to be self‑supporting.

HISTORY: 1988 Act No. 360, Section 10; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑310.** Rate increases or assessments.

 The association may provide a rate increase or assessment subject to the approval of the director or his designee.

HISTORY: 1988 Act No. 360, Section 11; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑320.** Recoupment of deficits.

 Any deficit sustained by the association in any year must be recouped, pursuant to the plan of operation and the rating plan then in effect, by one or both of the following procedures:

 (1) an assessment upon the policyholders, which may not exceed one additional annual premium at the then current rate;

 (2) a rate increase applicable prospectively.

HISTORY: 1988 Act No. 360, Section 12; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑330.** Change in premium rates after initial year of operation.

 After the initial year of operation, rates, rating plans, and rating rules, and any provision for recoupment through policyholder assessment or premium rate increase must be based upon the association’s loss and expense experience and investment income, together with any other information based upon this experience and income as the director or his designee considers appropriate. The resultant premium rates must be on an actuarially sound basis and must be calculated to be self‑supporting.

 If sufficient funds are not available for the sound financial operation of the association, pending recoupment as provided in Section 38‑81‑320, all members, on a temporary basis, shall contribute to the financial requirements of the association in the manner provided for in Section 38‑81‑340. Any such contribution must be reimbursed to the members following recoupment as provided in Section 38‑81‑320.

HISTORY: 1988 Act No. 360, Section 13; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑340.** Participation of insurers.

 All insurers which are members of the association shall participate in its writings, expenses, profits, and losses in the proportion that the net direct premiums of each member, excluding that portion of premiums attributable to the operation of the association, written during the preceding calendar year bear to the aggregate net direct premiums written in this State by all members of the association. Each insurer’s participation in the association must be determined annually on the basis of the net direct premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the insurer with the department. The assessment of a member insurer, after hearing, may be ordered deferred in whole or in part upon application by the insurer if, in the opinion of the director or his designee, payment of the assessment may render the insurer insolvent or in danger of insolvency or otherwise may leave the insurer in a condition that further transaction of the insurer’s business may be hazardous to its policyholders, creditors, members, subscribers, stockholders, or the public. If payment of an assessment against a member insurer is deferred by order of the director or his designee in whole or in part, the amount by which the assessment is deferred must be assessed against other member insurers in the same manner as provided in this section. In the order of deferral or in subsequent orders as may be necessary, the director or his designee shall prescribe a plan by which the assessment deferred must be repaid to the association by the impaired insurer with interest at the six‑month treasury bill rate adjusted semiannually. Profits, dividends, or other funds of the association to which the insurer is otherwise entitled may not be distributed to the impaired insurer but must be applied toward repayment of any assessment until the obligation has been satisfied. The association shall distribute the repayments, including interest on them, to the other member insurers on the basis on which assessments were made.

HISTORY: 1988 Act No. 360, Section 14; 1989 Act No. 129, Section 2; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑350.** Members bound by approved plan.

 Every member of the association is bound by the approved plan of operation of the association and the rules of the board of directors of the association.

HISTORY: 1988 Act No. 360, Section 15; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑360.** Continuation of obligations.

 (A) If the authority of an insurer to transact bodily injury liability insurance, other than automobile, homeowners, or farmowners, in this State terminates for any reason, its obligations as a member of the association continue until all its obligations are fulfilled and the director or his designee has so found and certified to the board of directors.

 (B) If a member insurer merges into or consolidates with another insurer authorized to transact insurance in this State or another insurer authorized to transact insurance in this State has reinsured the insurer’s entire general liability business in this State, both the insurer and its successor or assuming reinsurer, as the case may be, are liable for the insurer’s obligations to the association.

 (C) Any unsatisfied net liability of any insolvent member of the association must be assumed by and apportioned among the remaining members in the same manner in which assessments or gain and loss are apportioned and the association shall acquire and have all rights and remedies allowed by law in behalf of the remaining members against the estate or funds of the insolvent insurer for funds due the association.

HISTORY: 1988 Act No. 360, Section 16; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑370.** Board of directors.

 The association is governed by a board of seven directors, one of whom is appointed by the Governor to represent the general public and three of whom are members of the South Carolina Bar appointed by the Governor. Three directors are elected by cumulative voting by members of the association, whose votes in the election must be weighed in accordance with each member’s net direct premiums written during the preceding calendar year. The approved plan of operation of the association may make provision for combining insurers under common ownership or management into groups or voting, assessment, and all other purposes and may provide that not more than one of the officers or employees of such a group may serve as a director at any one time. The insurer representatives of the board of directors must be elected at a meeting of the members or their authorized representatives, which must be held at a time and place designated by the board of directors. The board shall elect a chairman and other necessary officers.

HISTORY: 1988 Act No. 360, Section 17; 1993 Act No. 181, Section 832; 1998 Act No. 411, Section 8.

**SECTION 38‑81‑380.** Appeals.

 Any applicant for insurance through the association, any person insured pursuant to this article, or his representative, or any insurer adversely affected, or claiming to be adversely affected, by any ruling, action, or decision by or on behalf of the association, may appeal to the director or his designee within thirty days after the ruling, action, or decision.

HISTORY: 1988 Act No. 360, Section 18; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑390.** Annual statement.

 The association shall file in the office of the department annually by March first a statement containing information with respect to its transactions, condition, operations, and affairs during the preceding year. The statement shall contain information prescribed by the director or his designee and must be in the form he directs.

 The director or his designee, at any reasonable time, may require the association to furnish additional information concerning its transactions, condition, or any matter connected therewith considered to be material and of assistance in evaluating the scope, operations, and experience of the association.

HISTORY: 1988 Act No. 360, Section 19; 1993 Act No. 181, Section 832.

**SECTION 38‑81‑400.** Examinations.

 The director or his designee shall make an examination into the financial condition and affairs of the association at least annually and shall file a report thereon with the department, the Governor, and the General Assembly. The expenses of the examination must be paid by the association.

HISTORY: 1988 Act No. 360, Section 20; 1993 Act No. 181, Section 832.