CHAPTER 29

South Carolina Life and Accident and Health Insurance Guaranty Association

CROSS REFERENCES

Exclusion of this chapter to Special Purpose Reinsurance Vehicles, see Section 38‑14‑160.

**SECTION 38‑29‑10.** Short title.

 This chapter is known and may be cited as the “South Carolina Life and Accident and Health Insurance Guaranty Association Act”.

HISTORY: Former 1976 Code Section 38‑29‑10 [1962 Code Section 37‑1400; 1971 (57) 351; 1986 Act No. 426, Section 1] recodified as Section 38‑21‑10 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑10 [1962 Code Section 37‑561; 1972 (57) 2776] recodified as Section 38‑29‑10 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

NOTES OF DECISIONS

In general 1

1. In general

Court rehabilitation order which created a lien on policies as an asset of insolvent insurer did not extend solvency of corporation past effective date of former Code 1962 Sections 37‑561 et seq. [former Code 1976 Sections 38‑17‑10 et seq.]; thus provisions of guaranty statutes were unavailable to policyholders of insurance company which became insolvent prior to effective date of such statutes. South Carolina Ins. Commission v. South Carolina Life and Health Ins. Guaranty Ass’n. (S.C. 1976) 267 S.C. 378, 228 S.E.2d 273.

Where insurance company was insolvent and under a final order of rehabilitation prior to July 14, 1972, the effective date of the act creating the Life and Health Insurance Guaranty Association (former Code 1962 Sections 37‑561 et seq. [former Code 1976 Sections 38‑17‑10 et seq.]), it was accordingly an impaired insurer prior to said date, thus rendering the guaranty provisions of former Code 1962 Section 37‑565(6)(b) [former Code 1976 Section 38‑17‑20(6)(b)] inapplicable to insurer’s policyholders. South Carolina Ins. Commission v. South Carolina Life and Health Ins. Guaranty Ass’n. (S.C. 1976) 267 S.C. 378, 228 S.E.2d 273.

**SECTION 38‑29‑20.** Definitions.

 As used in this chapter:

 (1) “Account” means any of the three accounts created under Section 38‑29‑50.

 (2) “Association” means the South Carolina Life and Accident and Health Insurance Guaranty Association created under Section 38‑29‑50.

 (3) “Contractual obligation” means any obligation under covered policies.

 (4) “Covered policy” means any policy or contract within the scope of Section 38‑29‑40.

 (5) “Impaired insurer” means:

 (a) an insurer which becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction, or

 (b) an insurer considered by the director or his designee to be unable or potentially unable to fulfill its contractual obligations.

 (6) “Member insurer” means any person authorized to transact in this State any kind of insurance to which this chapter applies under Section 38‑29‑40.

 (7) “Premiums” means direct gross insurance premiums and annuity considerations collected or written on covered policies, less return premiums and considerations thereon and dividends paid or credited to policyholders on the direct business. “Premiums” does not include premiums and considerations on contracts between insurers and reinsurers. As used in Section 38‑29‑80, “premiums” means those for the calendar year preceding the determination of impairment.

 (8) “Resident” means any person who resides in this State at the time the impairment is determined and to whom contractual obligations are owed.

HISTORY: Former 1976 Code Section 38‑29‑20 [1962 Code Section 37‑1401; 1971 (57) 351] recodified as Section 38‑21‑20 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑20 [1962 Code Section 37‑565; 1972 (57) 2776; 1977 Act No. 69 Section 1] recodified as Section 38‑29‑20 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1470, 1482, 1490.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 213 to 215, 219.

NOTES OF DECISIONS

In general 1

1. In general

Reserve deposit fund agreements (RDFA) that retirement plan trustees purchased from life insurer were not “annuities” or “contracts supplemental to annuity contracts” and, therefore, were not covered by Life and Accident and Health Insurance Guaranty Association Act, even though trustees had option to purchase annuity; funds were distributed only upon termination of agreement, as funds for pension benefits, or as return of terminated employee’s nonvested interest, and RDFAs did not add to or complete annuity settlement options of annual renewable term (ART) life insurance policies. South Carolina Life and Acc. and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C.App. 1998) 331 S.C. 268, 500 S.E.2d 193, rehearing denied, certiorari granted, affirmed 344 S.C. 436, 545 S.E.2d 270. Annuities 17; Annuities 30; Insurance 1487

Even if Insurance Department approved, as annuities, reserve deposit fund agreements (RDFA) that retirement plan trustees purchased from life insurer, that interpretation was not controlling on courts. South Carolina Life and Acc. and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C.App. 1998) 331 S.C. 268, 500 S.E.2d 193, rehearing denied, certiorari granted, affirmed 344 S.C. 436, 545 S.E.2d 270. Annuities 17; Annuities 30

**SECTION 38‑29‑30.** Declaration of purpose.

 The purpose of this chapter is to maintain public confidence in the promises of insurers by providing a mechanism for protecting policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, accident and health insurance policies, annuity contracts, and supplemental contracts against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts. To provide this protection:

 (1) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages;

 (2) members of the association are subject to assessment to provide funds to carry out the purpose of this chapter; and

 (3) the association is authorized to assist the director, his designee, and the department, in the prescribed manner, in the detection and prevention of insurer impairments.

HISTORY: Former 1976 Code Section 38‑29‑30 [1962 Code Section 37‑1402; 1971 (57) 351; 1986 Act No. 426, Section 2] recodified as Section 38‑21‑30 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑30 [1962 Code Section 37‑562; 1972 (57) 2776] recodified as Section 38‑29‑30 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1470.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 213, 215.

**SECTION 38‑29‑40.** Application of chapter.

 (1) This chapter applies to direct life insurance policies, accident and health insurance policies, annuity contracts, and contracts supplemental to life and accident and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this State at any time.

 (2) This chapter does not apply to:

 (a) Any policy or contract or part thereof under which the risk is borne by the policyholder.

 (b) Any policy or contract or part thereof assumed by the impaired insurer under a contract of reinsurance, other than reinsurance for which assumption certificates have been issued.

 (c) Any policy or contract issued by assessment mutuals, fraternals, and nonprofit hospital and medical service plans.

 (d) A policy or contract or part of it to the extent that the assessments required by Section 38‑29‑80 with respect to the policy or contract are preempted by federal or state law.

HISTORY: Former 1976 Code Section 38‑29‑40 [1962 Code Section 37‑1403; 1971 (57) 351] recodified as Section 38‑21‑40 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑40 [1962 Code Section 37‑563; 1972 (57) 2776] recodified as Section 38‑29‑40 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631; 2008 Act No. 348, Section 11, eff June 16, 2008.

Library References

Insurance 1487.

Westlaw Topic No. 217.

C.J.S. Insurance Section 220.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Annuities Section 2, Definition.

NOTES OF DECISIONS

In general 1

1. In general

Reserve deposit fund agreements (RDFA) that retirement plan trustees purchased from life insurer were not “annuities” or “contracts supplemental to annuity contracts” and, therefore, were not covered by the Life and Accident and Health Insurance Guaranty Act; even though the agreements obligated the insurer either to sell annuities to plan trustees for the benefit of retiring employees or to return funds for use in purchasing an annuity, they only provided an option to purchase annuities since the trustee was needed to enter into a separate contract in order to initiate a stream of payments to a retiring employee. South Carolina Life and Accident and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C. 2001) 344 S.C. 436, 545 S.E.2d 270. Annuities 17; Annuities 30; Insurance 1487

Insurance Commissioner’s alleged approval of an insurer’s sale of contracts as annuities would be entitled to some deference, but would not be dispositive on whether the contracts were annuities covered by the Life and Accident and Health Insurance Guaranty Act. South Carolina Life and Accident and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C. 2001) 344 S.C. 436, 545 S.E.2d 270. Annuities 17; Annuities 30; Insurance 1487

Life and Accident and Health Insurance Guaranty Association Act was not intended to cover every product insurance carriers sell; rather legislature has authorized insurance guaranty association (IGA) to take legal action to avoid payment of improper claims. South Carolina Life and Acc. and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C.App. 1998) 331 S.C. 268, 500 S.E.2d 193, rehearing denied, certiorari granted, affirmed 344 S.C. 436, 545 S.E.2d 270. Insurance 1487; Insurance 1494

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Even if Insurance Department approved, as annuities, reserve deposit fund agreements (RDFA) that retirement plan trustees purchased from life insurer, that interpretation was not controlling on courts. South Carolina Life and Acc. and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C.App. 1998) 331 S.C. 268, 500 S.E.2d 193, rehearing denied, certiorari granted, affirmed 344 S.C. 436, 545 S.E.2d 270. Annuities 17; Annuities 30

Where insurance company was insolvent and under a final order of rehabilitation prior to July 14, 1972, the effective date of the act creating the Life and Health Insurance Guaranty Association (former Code 1962 Sections 37‑561 et seq. [former Code 1976 Sections 38‑17‑10 et seq.]), it was accordingly an impaired insurer prior to said date, thus rendering the guaranty provisions of former Code 1962 Section 37‑565(6)(b) [former Code 1976 Section 38‑17‑20(6)(b)] inapplicable to insurer’s policyholders. South Carolina Ins. Commission v. South Carolina Life and Health Ins. Guaranty Ass’n. (S.C. 1976) 267 S.C. 378, 228 S.E.2d 273.

**SECTION 38‑29‑50.** Association created; membership as a condition of authority to transact insurance; accounts; supervision.

 (1) There is created a nonprofit legal entity to be known as the South Carolina Life and Accident and Health Insurance Guaranty Association. All member insurers are and must remain members of the association as a condition of their authority to transact insurance in this State. The association shall perform its functions under the plan of operation established and approved under Section 38‑29‑90 and shall exercise its powers through a board of directors established under Section 38‑29‑60. For purposes of administration and assessment, the association shall maintain three accounts:

 (a) the accident and health insurance account;

 (b) the life insurance account; and

 (c) the annuity account.

 (2) The association is under the immediate supervision of the department and is subject to the applicable insurance laws of this State.

HISTORY: Former 1976 Code Section 38‑29‑50 [1962 Code Section 37‑1404; 1971 (57) 351; 1986 Act No. 426, Section 3] recodified as Section 38‑21‑50 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑50 [1962 Code Section 37‑566; 1972 (57) 2776] recodified as Section 38‑29‑50 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1472, 1480, 1483.

Westlaw Topic No. 217.

C.J.S. Insurance Section 214.

**SECTION 38‑29‑60.** Board of directors.

 (1) The board of directors of the association shall consist of not less than five nor more than nine members serving terms as established in the plan of operation. Member insurers shall select the members of the board subject to the director’s approval. Any vacancies on the board must be filled for the remaining period of the term in the manner described in the plan of operation.

 (2) In approving selections or in appointing members to the board, the director shall consider, among other things, whether all member insurers are fairly represented.

 (3) Members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board of directors, but members of the board may not otherwise be compensated by the association for their services.

HISTORY: Former 1976 Code Section 38‑29‑60 [1962 Code Section 37‑1405; 1971 (57) 351; 1986 Act No. 426, Section 4] recodified as Section 38‑21‑60 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑60 [1962 Code Section 37‑567; 1972 (57) 2776] recodified as Section 38‑29‑60 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1471.

Westlaw Topic No. 217.

**SECTION 38‑29‑70.** Powers and duties of Association.

 In addition to the powers and duties enumerated in other sections of this chapter:

 (1) If a domestic insurer is an impaired insurer, the association may, prior to an order of liquidation or rehabilitation and subject to any conditions imposed by the association other than those which impair the contractual obligations of the impaired insurer and approved by the impaired insurer and the director or his designee:

 (a) Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, all the covered policies of the impaired insurer.

 (b) Provide monies, pledges, notes, guarantees, or other means as are proper to effectuate subitem (a) and assure payment of the impaired insurer’s contractual obligations pending action under subitem (a).

 (c) Loan money to the impaired insurer.

 (2) If a foreign or alien insurer is an impaired insurer, the association may prior to an order of liquidation, rehabilitation, or conservation, with respect to the covered policies of residents and subject to any conditions imposed by the association other than those which impair the contractual obligations of the impaired insurer and approved by the impaired insurer and the director or his designee:

 (a) Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, the impaired insurer’s covered policies of residents.

 (b) Provide monies, pledges, notes, guarantees, or other means as are proper to effectuate subitem (a) and assure payment of the impaired insurer’s contractual obligations to residents pending action under subitem (a).

 (c) Loan money to the impaired insurer.

 (3) If a domestic insurer is an impaired insurer under an order of liquidation or rehabilitation, the association shall, subject to the approval of the director or his designee:

 (a) Guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the impaired insurer’s covered policies.

 (b) Assure payment of the impaired insurer’s contractual obligations.

 (c) Provide money, pledges, notes, guarantees, or other means as are reasonably necessary to discharge its duties. If the association fails to act within a reasonable period of time, the director or his designee has the powers and duties of the association under this chapter with respect to the domestic impaired insurer.

 (4) If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the association shall, subject to the approval of the director or his designee:

 (a) Guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of residents.

 (b) Assure payment of the impaired insurer’s contractual obligations to residents.

 (c) Provide monies, pledges, notes, guarantees, or other means as are reasonably necessary to discharge its duties. If the association fails to act within a reasonable period of time, the director or his designee has the powers and duties of the association under this chapter with respect to the foreign or alien impaired insurer.

 (5) Liens may be imposed as long as the association:

 (a) In carrying out its duties under items (3) and (4), requests that there be imposed policy liens, contract liens, moratoriums on payments, or other similar means. These liens, moratoriums, or similar means may be imposed if the director or his designee finds that the amounts which can be assessed under this chapter are less than the amounts needed to assure full and prompt performance of the impaired insurer’s contractual obligations or that the economic or financial conditions as they affect member insurers are sufficiently adverse to render the imposition of policy or contract liens, moratoriums, or similar means to be in the public interest and approves the specific policy liens, contract liens, moratoriums, or similar means to be used.

 (b) Before being obligated under items (3) and (4) of this section, requests, subject to the approval of the director or his designee, that there be imposed temporary moratoriums or liens on payments of cash values and policy loans.

 (6) The association has no liability under this section for any covered policy of a foreign or alien insurer whose domiciliary jurisdiction or state of entry provides by statute or regulation for residents of this State protection substantially similar to that provided by this chapter for residents of other states. In addition, the association has no liability under this chapter for covered policies of a domestic insurer for residents of another state unless the other state has a guaranty association that provides protection to South Carolina residents substantially similar to that provided by this chapter for residents of other states.

 (7) The association may render assistance and advice to the director or his designee, upon his request, concerning rehabilitation, payment of claims, continuations of coverage, or the performance of other contractual obligations of an impaired insurer.

 (8) The association has the authority to appear before any court in this State with jurisdiction over an impaired insurer concerning which the association is or may become obligated under this chapter. This authority extends to all matters germane to the powers and duties of the association, including, but not limited to, proposals for reinsuring or guaranteeing the covered policies of the impaired insurer and the determination of the covered policies and contractual obligations.

 (9) Any person receiving benefits under this chapter is considered to have assigned his rights under the covered policy to the association to the extent of the benefits received because of this chapter whether the benefits are payments of contractual obligations or continuation of coverage. The association may require an assignment to it of these rights by any payee, policy or contract owner, beneficiary, insured, or annuitant as a condition precedent to the receipt of any rights or benefits conferred by this chapter upon that person. The association is subrogated to these rights against the assets of any impaired insurer, and the subrogation rights of the association have the same priority against the assets as that possessed by the person entitled to receive benefits under this chapter.

 (10) The contractual obligations of the impaired insurer for which the association becomes or may become liable are the same as the contractual obligations of the impaired insurer would have been in the absence of an impairment, but the association has no liability with respect to any portion of a covered policy to the extent that the policy’s benefits to any one person exceed an aggregate of three hundred thousand dollars.

 (11) The association may:

 (a) Enter into contracts that are necessary or proper to carry out the provisions and purposes of this chapter.

 (b) Sue or be sued, including taking any legal actions necessary or proper for recovery of any unpaid assessments under Section 38‑29‑80.

 (c) Borrow money to effect the purposes of this chapter. Any notes or other evidence of indebtedness of the association not in default shall be legal investments for domestic insurers and may be carried as admitted assets.

 (d) Employ or retain persons necessary to handle the financial transactions of the association and to perform other functions as become necessary or proper under this chapter.

 (e) Negotiate and contract with any liquidator, rehabilitator, conservator, or ancillary receiver to carry out the powers and duties of the association.

 (f) Take legal action necessary to avoid payment of improper claims.

 (g) Exercise, for the purposes of this chapter and to the extent approved by the director or his designee, the powers of a domestic life or accident and health insurer, but in no case may the association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of the impaired insurer.

HISTORY: Former 1976 Code Section 38‑29‑70 [1962 Code Section 37‑1406; 1971 (57) 351; 1986 Act No. 426, Section 5] recodified as Section 38‑21‑70 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑70 [1962 Code Section 37‑568; 1972 (57) 2776; 1977 Act No. 69 Section 2] recodified as Section 38‑29‑70 by 1987 Act No. 155, Section 1; 1988 Act No. 326, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1473.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 216 to 217.

NOTES OF DECISIONS

In general 1

1. In general

Life and Accident and Health Insurance Guaranty Association Act was not intended to cover every product insurance carriers sell; rather legislature has authorized insurance guaranty association (IGA) to take legal action to avoid payment of improper claims. South Carolina Life and Acc. and Health Ins. Guar. Ass’n v. Liberty Life Ins. Co. (S.C.App. 1998) 331 S.C. 268, 500 S.E.2d 193, rehearing denied, certiorari granted, affirmed 344 S.C. 436, 545 S.E.2d 270. Insurance 1487; Insurance 1494

**SECTION 38‑29‑80.** Assessments.

 (1) For the purpose of providing the funds necessary to carry out the powers and duties of the association, the board of directors shall assess the member insurers, separately for each account, at times and for amounts as the board finds necessary. Payment is due thirty days after written notice to the member insurers.

 (2) There are three classes of assessments, as follows:

 (a) Class A assessments are made for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer.

 (b) Class B assessments are made to the extent necessary to carry out the powers and duties of the association under Section 38‑29‑70 with regard to a domestic impaired insurer.

 (c) Class C assessments are made to the extent necessary to carry out the powers and duties of the association under Section 38‑29‑70 with regard to a foreign or alien impaired insurer.

 (3) Assessments must be determined as follows:

 (a) The amount of any Class A, Class B, or Class C assessment for each account must be determined by the board based on the amounts necessary to satisfy the obligation of the association under this chapter.

 (b) Class A assessments must be divided equally among all members not to exceed one hundred dollars per assessment. Class C assessments against member insurers for each account must be in the proportion that the premiums received on business in this State by each assessed member insurer on policies covered by each account bear to the premiums received on business in this State by all assessed member insurers.

 (c) Class B assessments for each account must be made separately for each state in which the domestic impaired insurer was authorized to transact insurance at any time, in the proportion that the premiums received on business in that state by the impaired insurer on policies covered by that account bear to those premiums received in all of those states by the impaired insurer. The assessments against member insurers must be in the proportion that the premiums received on business in each of these states by each assessed member insurer on policies covered by each account bear to those premiums received on business in each state by all assessed member insurers.

 (d) Assessments for funds to meet the requirements of the association with respect to an impaired insurer may not be made until necessary to implement the purposes of this chapter. Classification of assessments under subsection (2) of this section and computation of assessments under subsection (3) of this section must be made with a reasonable degree of accuracy, recognizing that exact determinations may not always be possible.

 (4) The association may abate or defer, in whole or in part, the assessment of a member insurer if, in the opinion of the board, payment of the assessment would endanger the ability of the member insurer to fulfill its contractual obligations. The total of all assessments upon a member insurer for each account may not in any one calendar year exceed four percent of the insurer’s premiums in this State on the policies covered by the account.

 (5) In the event an assessment against a member insurer is abated or deferred, in whole or in part, because of the limitations set forth in subsection (4) of this section, the amount by which the assessment is abated or deferred may be assessed against the other member insurers in a manner consistent with the basis for assessments set forth in this section. If the maximum assessment, together with the other assets of the association in either account, does not provide in any one year in either account an amount sufficient to carry out the responsibilities of the association, the necessary additional funds must be assessed as soon thereafter as permitted by this chapter.

 (6) The board may, by an equitable method as established in the plan of operation, refund to member insurers the amount by which the assets of the account exceed the amount the board finds is necessary to carry out during the coming year the obligations of the association with regard to that account, including assets accruing from net realized gains and income from investments. Refunds to member insurers must be in proportion to the contribution of the insurer to that account. A reasonable amount may be retained in any account to provide funds for the continuing expenses of the association and for future losses if refunds are impractical.

 (7) It is proper for any member insurer, in determining its premium rates and policy owner dividends as to any kind of insurance within the scope of this chapter, to consider the amount reasonably necessary to meet its assessment obligations under this chapter.

 (8) The association shall issue to each insurer paying an assessment under this chapter a certificate of contribution, in a form prescribed by the director or his designee, for the amount so paid. All outstanding certificates are of equal dignity and priority without reference to amounts or dates of issue. A certificate of contribution may be shown by the insurer in its financial statement as an asset in the form and for the amount, if any, and period of time as the director or his designee may approve.

HISTORY: Former 1976 Code Section 38‑29‑80 [1962 Code Section 37‑1407; 1971 (57) 351; 1986 Act No. 426, Section 5A] recodified as Section 38‑21‑80 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑80 [1962 Code Section 37‑569; 1972 (57) 2776; 1977 Act No. 69 Section 3; 1980 Act No. 345, Section 2] recodified as Section 38‑29‑80 by 1987 Act No. 155, Section 1; 1988 Act No. 326, Section 2; 1993 Act No. 181, Section 631.

Library References

Insurance 1485.

Westlaw Topic No. 217.

C.J.S. Insurance Section 214.

**SECTION 38‑29‑90.** Plan of operation.

 (1) The association shall submit to the department a plan of operation and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the association. The plan of operation and any amendments become effective upon the written approval of the director or his designee. If the association fails to submit suitable amendments to the plan, the director or his designee shall, after notice and hearing, adopt and promulgate reasonable amendments necessary or advisable to effectuate the provisions of this chapter. These amendments must continue in force until modified by the director or his designee or superseded by amendments submitted by the association and approved by the director or his designee.

 (2) All member insurers shall comply with the plan of operation.

 (3) The plan of operation shall, in addition to requirements enumerated elsewhere in this chapter:

 (a) Establish procedures for handling the assets of the association.

 (b) Establish the amount and method of reimbursing members of the board of directors under Section 38‑29‑60.

 (c) Establish regular places and times for meetings of the board of directors.

 (d) Establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors.

 (e) Establish the procedure whereby selections for the board of directors must be made and submitted to the department director.

 (f) Establish any additional procedures for assessments under Section 38‑29‑80.

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

 (4) The plan of operation may provide that any or all powers and duties of the association, except those under Section 38‑29‑70(11)(c) and Section 38‑29‑80, are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this association, or its equivalent, in two or more states. Such a corporation, association, or organization must be reimbursed for any payments made on behalf of the association and must be paid for its performance of any function of this association. A delegation under this subsection takes effect only with the approval of both the board of directors and the department director or his designee and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this chapter.

HISTORY: Former 1976 Code Section 38‑29‑90 [1962 Code Section 37‑1408; 1971 (57) 351; 1986 Act No. 426, Section 6] recodified as Section 38‑21‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑90 [1962 Code Section 37‑570; 1972 (57) 2776] recodified as Section 38‑29‑90 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1476.

Westlaw Topic No. 217.

**SECTION 38‑29‑100.** Duties and powers of director; suspension or revocation of certificate of authority; appeals from board of directors; notice to interested persons of effect of chapter.

 In addition to the duties and powers enumerated elsewhere in this chapter:

 (1) The director or his designee:

 (a) Shall notify the board of directors of the existence of an impaired insurer not later than three days after a determination of impairment is made or he receives notice of impairment.

 (b) Shall, upon request of the board of directors, provide the association with a statement of the premiums in the appropriate states for each member insurer.

 (c) Shall, when an impairment is declared and the amount of the impairment is determined, serve a demand upon the impaired insurer to make good the impairment within a reasonable time. Notice to the impaired insurer constitutes notice to its shareholders, if any. The failure of the insurer to comply promptly with the demand does not excuse the association from the performance of its powers and duties under this chapter.

 (d) Must, in any liquidation or rehabilitation proceeding involving a domestic insurer, be appointed as the liquidator or rehabilitator. If a foreign or alien member insurer is subject to a liquidation proceeding in its domiciliary jurisdiction or state of entry, the director or his designee must be appointed conservator.

 (2) The director or his designee may suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the director or his designee may impose the penalties provided in Section 38‑2‑10.

 (3) Any action of the board of directors or the association may be appealed to the Administrative Law Court as provided by law by any member insurer if the appeal is taken within thirty days of the action being appealed.

 (4) The liquidator, rehabilitator, or conservator of an impaired insurer may notify all interested persons of the effect of this chapter.

HISTORY: Former 1976 Code Section 38‑29‑100 [1962 Code Section 37‑1408.1; 1971 (57) 351] repealed by 1986 Act No. 426, Section 23; Former 1976 Code Section 38‑17‑100 [1962 Code Section 37‑571; 1972 (57) 2776] recodified as Section 38‑29‑100 by 1987 Act No. 155, Section 1; 1988 Act No. 374, Section 11; 1993 Act No. 181, Section 631.

Library References

Insurance 1473.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 216 to 217.

**SECTION 38‑29‑110.** Detection and prevention of insurer impairments.

 To aid in the detection and prevention of insurer impairments:

 (1) The board of directors shall, upon majority vote, notify the director or his designee of any information indicating a member insurer may be unable or potentially unable to fulfill its contractual obligations.

 (2) The board of directors may, upon majority vote, request that the director or his designee order an examination of a member insurer which the board in good faith believes may be unable or potentially unable to fulfill its contractual obligations. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by the director or his designee. The cost of the examination must be paid by the association and the examination report must be treated as are other examination reports. In no event may the examination report be released to the board of directors of the association prior to its release to the public, but this does not excuse the director or his designee from his obligation to comply with item (3) of this section. The director or his designee shall notify the board of directors when the examination is completed. The request for an examination must be kept on file by the department, but it is not open to public inspection prior to the release of the examination report to the public. It must be released at that time only if the examination discloses that the examined insurer is unable or potentially unable to meet its contractual obligations.

 (3) The director or his designee shall report to the board of directors when he has reasonable cause to believe that a member or licensed insurer may be unable or potentially unable to fulfill its contractual obligations.

 (4) The board of directors may, upon majority vote, make reports and recommendations to the director, his designee, and the department upon any matter germane to the solvency, liquidation, rehabilitation, or conservation of a member insurer. These reports and recommendations are not open to public inspection.

 (5) The board of directors may, upon majority vote, make recommendations to the director, his designee, and the department for the detection and prevention of insurer impairments.

 (6) The board of directors shall, at the conclusion of an insurer impairment in which the association carried out its duties under this chapter or exercised any of its powers under this chapter, prepare a report on the history and causes of the impairment, based on the information available to the association, and submit the report to the department.

HISTORY: Former 1976 Code Section 38‑29‑110 [1962 Code Section 37‑1409; 1971 (57) 351; 1986 Act No. 426, Section 7] recodified as Section 38‑21‑100 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑110 [1962 Code Section 37‑572; 1972 (57) 2776] recodified as Section 38‑29‑110 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1477.

Westlaw Topic No. 217.

**SECTION 38‑29‑120.** Appointment of special deputy for director.

 The association may recommend the appointment of a person to serve as a special deputy to act for the director or his designee and under his supervision in the liquidation, rehabilitation, or conservation of a member insurer.

HISTORY: Former 1976 Code Section 38‑29‑120 [1962 Code Section 37‑1410; 1971 (57) 351] recodified as Section 38‑21‑110 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑120 [1962 Code Section 37‑573; 1972 (57) 2776] recodified as Section 38‑29‑120 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1471.

Westlaw Topic No. 217.

**SECTION 38‑29‑130.** Assessment liability of insureds not reduced; records of Association; Association considered creditor of impaired insurer; distribution of assets of impaired insurer; unfair trade practice; recovery procedure.

 (1) Nothing in this chapter may be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability.

 (2) Records must be kept of all negotiations and meetings in which the association or its representatives are involved to discuss the activities of the association in carrying out its powers and duties under Section 38‑29‑70. Records of these negotiations or meetings must be made public only upon the termination of a liquidation, rehabilitation, or conservation proceeding involving the impaired insurer, upon the termination of the impairment of the insurer, or upon the order of a court of competent jurisdiction. Nothing in this subsection (2) limits the duty of the association to render a report of its activities under Section 38‑29‑140.

 (3) For the purpose of carrying out its obligations under this chapter, the association is considered to be a creditor of the impaired insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to Section 38‑29‑70(9). All assets of the impaired insurer attributable to covered policies must be used to continue all covered policies and pay all contractual obligations of the impaired insurer as required by this chapter. Assets attributable to covered policies, as used in this subsection (3), are that proportion of the assets which the reserves that should have been established for those policies bear to the reserve that should have been established for all policies of insurance written by the impaired insurer.

 (4) With respect to distributing assets:

 (a) Prior to the termination of any liquidation, rehabilitation, or conservation proceeding, the court may take into consideration the contributions of the respective parties, including the association, the shareholders, policy owners of the impaired insurer, and any other party with a bona fide interest, in making an equitable distribution of the ownership rights of the impaired insurer. In this determination, consideration must be given to the welfare of the policyholders of the continuing or successor insurer.

 (b) No distribution to stockholders, if any, of an impaired insurer may be made until and unless the total amount of assessments levied by the association with respect to the insurer has been fully recovered by the association.

 (5) It is a prohibited unfair trade practice for any person to make use in any manner of the protection afforded by this chapter in the sale of insurance.

 (6) The recovery procedure shall provide that:

 (a) If an order for liquidation or rehabilitation of a domestic insurer has been entered, the receiver appointed under the order has a right to recover on behalf of the insurer, from any affiliate that controlled it, the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation or rehabilitation subject to the limitations of items (b), (c), and (d) of this subsection (6).

 (b) No such dividend is recoverable if the insurer shows that when paid the distribution was lawful and reasonable and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

 (c) Any person who was an affiliate that controlled the insurer at the time the distributions were paid is liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared is liable up to the amount of distributions he would have received if they had been paid immediately. If two persons are liable with respect to the same distributions, they are jointly and severally liable.

 (d) The maximum amount recoverable under this section is the amount needed in excess of all other available assets of the impaired insurer to pay the contractual obligations of the impaired insurer.

 (e) If any person liable under item (c) is insolvent, all its affiliates that controlled it at the time the dividend was paid are jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate.

HISTORY: Former 1976 Code Section 38‑29‑130 [1962 Code Section 37‑1411; 1971 (57) 351] recodified as Section 38‑21‑120 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑130 [1962 Code Section 37‑574; 1972 (57) 2776] recodified as Section 38‑29‑130 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1471, 1486.

Westlaw Topic No. 217.

**SECTION 38‑29‑140.** Examination and regulation of Association; annual reports.

 The association is subject to examination and regulation by the department. The board of directors shall annually submit to the department, by May first, a financial report for the preceding calendar year in a form approved by the director or his designee and a report of its activities during the preceding calendar year.

HISTORY: Former 1976 Code Section 38‑29‑140 [1962 Code Section 37‑1412; 1971 (57) 351; 1986 Act No. 426, Section 8] recodified as Section 38‑21‑130 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑140 [1962 Code Section 37‑575; 1972 (57) 2776] recodified as Section 38‑29‑140 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1480, 1481.

Westlaw Topic No. 217.

**SECTION 38‑29‑150.** Exemption of Association from fees and taxes.

 The association is exempt from payment of all fees and all state, county, and municipal taxes.

HISTORY: Former 1976 Code Section 38‑29‑150 [1962 Code Section 37‑1413; 1971 (57) 351; 1986 Act No. 426, Section 9] recodified as Section 38‑21‑140 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑150 [1962 Code Section 37‑576; 1972 (57) 2776] recodified as Section 38‑29‑150 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Taxation 2326.

Westlaw Topic No. 371.

C.J.S. Taxation Sections 289, 326 to 327.

**SECTION 38‑29‑160.** Showing certificate of contribution as asset; offset of write‑off against tax liability; payment of certain refunds to State.

 (1) Unless a longer period has been allowed by the director or his designee, a member insurer, at its option, has the right to show a certificate of contribution as an asset in the form approved by the director or his designee pursuant to Section 38‑29‑80(8) at percentages of the original face amount approved by the director or his designee, for calendar years as follows:

 one hundred percent for the calendar year of issuance;

 eighty percent for the first calendar year after the year of issuance;

 sixty percent for the second calendar year after the year of issuance;

 forty percent for the third calendar year after the year of issuance;

 twenty percent for the fourth calendar year after the year of issuance;

 zero percent for the fifth calendar year after the year of issuance and thereafter.

 (2) The insurer may offset the amount written off by it in a calendar year under subsection (1) against its premium (or income) tax liability to this State accrued with respect to business transacted in that year.

 (3) Any sums acquired by refund, pursuant to Section 38‑29‑80(6), from the association which have previously been written off by contributing insurers and offset against premium (or income) taxes as provided in subsection (2) of this section and are not then needed for purposes of this chapter must be paid by the association to the department and by him deposited with the State Treasurer for credit to the general fund of this State.

HISTORY: Former 1976 Code Section 38‑29‑160 derived from 1962 Code Section 37‑1414; 1971 (57) 351 recodified as Section 38‑21‑160 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑160 [1962 Code Section 37‑577; 1972 (57) 2776] recodified as Section 38‑29‑160 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1470.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 213, 215.

**SECTION 38‑29‑170.** Immunity from liability for action taken under chapter.

 There is no liability on the part of, and no cause of action of any nature may arise against, any member insurer or its agents or employees, the association’s agents or employees, members of the board of directors, or the director or his representatives for any action taken by them in the authorized performance of their powers and duties under this chapter. This section does not relieve the association of any of its liability.

HISTORY: Former 1976 Code Section 38‑29‑170 [1962 Code Section 37‑1415; 1971 (57) 351; 1986 Act No. 426, Section 12] recodified as Section 38‑21‑180 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑170 [1962 Code Section 37‑578; 1972 (57) 2776] recodified as Section 38‑29‑170 by 1987 Act No. 155, Section 1; 1988 Act No. 379, Section 3; 1993 Act No. 181, Section 631.

Library References

Insurance 1478, 1482.

Westlaw Topic No. 217.

C.J.S. Insurance Section 214.

**SECTION 38‑29‑180.** Stay of proceedings involving impaired insurer; setting aside default judgment.

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

HISTORY: Former 1976 Code Section 38‑29‑180 [1962 Code Section 37‑1416; 1971 (57) 351] recodified as Section 38‑21‑190 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑180 [1962 Code Section 37‑579; 1972 (57) 2776] recodified as Section 38‑29‑180 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1385, 1471, 1486.

Westlaw Topic No. 217.

**SECTION 38‑29‑190.** Final date for filing claims.

 The court shall fix a date, not less than four months from the date of the order, as the last day for the filing of claims, together with proper proofs thereof, with the association and shall prescribe the notice that must be given to insureds and claimants of the date. Prior to the date fixed the court may extend the time for the filing of claims.

HISTORY: Former 1976 Code Section 38‑29‑190 [1962 Code Section 37‑1417; 1971 (57) 351; 1986 Act No. 426, Section 13] recodified as Section 38‑21‑200 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑185 [1977 Act No. 69 Section 4] recodified as Section 38‑29‑190 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.

Library References

Insurance 1504(2).

Westlaw Topic No. 217.

C.J.S. Insurance Section 225.

**SECTION 38‑29‑200.** Construction.

 This chapter must be liberally construed to effect the purpose under Section 38‑29‑30 which constitutes an aid and guide to interpretation.

HISTORY: Former 1976 Code Section 38‑29‑200 [1962 Code Section 37‑1418; 1971 (57) 351] recodified as Section 38‑21‑210 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑17‑190 [1962 Code Section 37‑564; 1972 (57) 2776] recodified as Section 38‑29‑200 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 631.