

LEGISLATIVE NEWS FROM TEXAS

Burnie Burner, Esq.
Betty DeLargy, Esq.
(512) 474-1587

It was no surprise that the 78th session of the Texas Legislature dedicated a substantial portion of its attention to issues relating to the insurance industry. Huge increases in homeowners' insurance rates driven by the mold crisis, skyrocketing prices and diminishing availability of health insurance coverage, and the limiting crisis for health care providers in professional liability insurance and prompt payment for their services had every candidate, from both parties, demanding reform of insurance regulation. After the campaigns, the Legislature convened with the Republic in an historic session with Republicans maintaining solid majorities in both houses. The presiding officers of both the House and Senate were new to their jobs, as were the chairs of many key committees. From this volatile combination, the Legislature produced insurance reform bills addressing virtually every line of property and casualty insurance, employee benefits, and many other issues. In this paper, we will briefly summarize what we view as the most significant of the bills adopted by the Legislature in dealing with insurance issues. The Legislature also produced significant reforms in medical malpractice and Texas tort law, but we will leave those subjects for subsequent writers.

PROPERTY & CASUALTY

Senate Bill 14

Senate Bill 14 ("SB 14") is the most significant insurance reform legislation in Texas in over a decade. It radically changes the regulation of rates and forms for residential property insurance ("RPI") and personal automobile insurance ("PAI"). It also impacts virtually all other property and casualty lines and makes other significant revisions to Texas law. What follows is a summary of its most important provisions.

The bill became effective on June 11, 2003 when signed by the Governor. We will frequently refer to this date as the Effective Date to distinguish it from the many other dates on which provisions expire or become effective.

New Art. 5.142 applies to rates for RPI. Most companies that were previously exempt from some form of rate regulation, such as county mutuals, Lloyds, and reciprocals, are subject to this new statute, as well as to most other provisions of SB 14. Prior approval of rates is now required for all lines of RPI before use. The Commissioner of Insurance (the "Commissioner") has 30 days to approve or disapprove a rate filing with a 30-day extension at the option of the Commissioner. Any request for additional information by the Commissioner extends the approval period and the previously filed rate remains in effect until the new rate is approved. Disapproval of a rate filing requires specific notice and right to appeal, as does the withdrawal of approval. The Office of the Public Insurance Counsel ("OPIC") and the general public may intervene and request a hearing. A company must notify each policyholder if any rate increase exceeds 10% at renewal. This article expires December 1, 2004, only to be replaced by new file and use requirements for RPI rates.

New Art. 5.144 requires refund of excessive or discriminatory premiums or discounts. If the Commissioner determines that a rate is excessive or unfairly discriminatory, he may order a refund or require a future discount depending on the amount. This Article does **not** expire.

New Art. 5.171 prohibits rating territories that subdivide a county if the rate for one subdivision is greater than 15% higher than another. This article applies to all lines subject to Chapter 5, maybe. The Commissioner may allow greater differences for PAI and RPI only. The new territory restrictions do apply to county mutuals, Lloyds and reciprocals, but not until after January 1, 2004. This article does **not** expire.

For PAI, the bill continues existing Art. 5.101 (Benchmark) for PAI rates only until December 1, 2004, when PAI will also be subject to the file and use standard. This section expires December 1, 2004.

Policy forms for virtually all insurers and lines of property and casualty business are now subject to the prior approval of the Texas Department of Insurance ("TDI" or the "Department") under new Art. 5.145 and amended Art. 5.13-2. Most current forms may be used upon notification to the Commissioner. Forms must be in plain language as determined by the Flesch test. OPIC is authorized to comment on and participate in individual form filings.

Credit scoring was an emotional and divisive issue during the session, resulting in new Art. 21.49-2U, which applies to personal insurance – PAI, RPI, plus residential fire, boats, personal watercraft, snowmobiles and RVs. The new statute prohibits:

- use of a credit score that constitutes unfair discrimination
- denial, cancellation or renewal of personal insurance (defined) solely on credit information
- adverse action solely for lack of a credit card
- use of absence of credit information or inability to determine credit information except when actuarially justified
- use of negative factors such as:
 - ? a credit inquiry not initiated by consumer
 - ? an insurance coverage inquiry
 - ? a collection account with medical industry code
 - ? multiple lender inquiries

An Insurer may use credit scoring for rates, rating classifications or underwriting criteria, provided it discloses the fact to consumers, but actions based on credit scores are subject to other limitations and disclosure. If an insurer takes an adverse action, it must notify the consumer within 30 days. Insurers using credit scoring must file their models with TDI and the information is not protected from disclosure by exceptions to the Open Records Act. In one of the most unusual provisions, insurers using credit scoring are required to indemnify their agents from claims arising out of its use. Consumer reporting agencies are prohibited from selling policy term information. The new law applies only to policies issued, delivered, or renewed after January 1, 2004. The Commissioner will set limits on rate differences based solely on credit score. This Article does **not** expire.

To give effect to its rate and form strategy, the Legislature moved the regulation of rates and forms of property and casualty insurance, except RPI and PAI, to Art. 5.13-2. This article previously applied only to commercial risks and provides for the file and use of rates while requiring the prior approval of forms, except for large risks. Only modest amendments were made to Art. 5.13-2 as of the Effective Date, and to make matters more confusing, those amendments expire on December 1, 2004, when the new, more comprehensive amendments spring to life.

These new amendments are virtually the same as prior amendments, except RPI and PAI are added and are now subject to the same rate and form regulation. Rate filing requirements are expanded and the Commissioner is given additional authority to provide small insurers with reduced filing requirements and to set a state rate index for non-standard PAI for those insurers that qualify. Once effective, this Article does **not** expire.

The Legislature heard many horror stories about industry underwriting practices, primarily relating to mold claims and the stigmatization of policyholders and property. They responded with several bills addressing underwriting guidelines. In SB 14, new sections 38.002 and 38.003 are added to regulate underwriting guidelines for PAI and RPI. Underwriting guidelines are defined as anything used to accept, reject, or classify a risk. Insurers are required to file underwriting guidelines with TDI and update filings with changes. Filings are subject to the Open Records Act, OPIC may obtain copies, and TDI and OPIC may disclose summaries that do not identify the insurer. For all other lines, current law is continued.

The FAIR Plan is among the largest writers of homeowners insurance in Texas and growing rapidly. New Art. 21.49A-1 was added to provide a revenue bond program for the FAIR Plan up to \$75 million. The proceeds are for use as reserves to pay expenses and to purchase reinsurance. Insurers are subject to service fees to service debt and assessments to fund deficits.

New Art. 1.02 applies rate standards to **all** property and casualty lines and **all** insurers. The rate standards are those previously listed plus just, fair, reasonable, and adequate measures.

New Art. 21.49-20 is added to establish the Property and Casualty Legislative Oversight Committee. The Committee is composed of seven members of the Legislature and will provide oversight of the Department.

Existing law is amended to provide the Commissioner with general rulemaking authority and specific authority to make rules to implement changes in federal law or regulation.

Art. 21.49-2B was amended to limit insurers' right to cancel within the first 60 days for homeowners' policies.

Other Property & Casualty Bills of Interest

HB 329 adds new Art. 21.21-11, which prohibits insurers, including surplus lines insurers, from certain underwriting decisions based on a previous mold claim or damage if the property is eligible for coverage. The property is eligible if the mold damage is remediated and a certificate of remediation has been issued by a licensed remediator or if the property is inspected by an independent assessor or adjuster and found to be mold free. It also adds new Chapter 1958 to the Occupations Code, which requires the licensing of mold assessors and remediators. The new law exempts property owners and government entities from civil liability if the property has been remediated and a certificate has been issued or it is inspected and found to be mold free.

The bill was effective September 1, 2003; however, no license is required of assessors or remediators until the rules for licensing have been adopted.

SB 127 adds new Art. 5.35-4, which restricts the use of claims history of water damage, resulting from appliances, in underwriting. Underwriting guidelines may not use prior appliance related claims in determining whether to insure, renew or cancel a policy or to set the rate if the prior claim has been properly remediated and certified, unless the person or the property has a history of such claims. The restrictions apply only to policies issued or delivered after the Effective Date.

The bill includes new Art. 21.55A for RPI only, which authorizes the Commissioner to adopt rules to regulate the prompt payment of water damage.

Finally, the bill adds new Art. 21.07-5, which specifies the requirements and procedures for licensing of Public Adjusters. Many common abuses in public adjusting are prohibited and some significant consumer safeguards are included in the bill.

HB 124 adds Art. 5.35-2, which provides that RPI insurers covering loss of or damage to jewelry with the option to pay *either* the stated value of the jewelry or the amount required to purchase “like kind and quality” items to cover claims. The new law applies to policies issued after January 1, 2004.

HB 1131 amends the Occupations Code by adding new Chapter 2306, which relates to insurer interests in repair facilities. This bill prohibits insurers from owning or acquiring any interest in a repair facility. This bill was effective September 1, 2003.

HB 1338 amends Art. 21.48A to prohibit a lender from requiring a borrower to purchase insurance on a home, manufactured home or mobile home in an amount that exceeds the replacement value of the dwelling and contents. The value of the land may not be included. The bill applies only to loans entered into on or after January 1, 2004.

HB 1865 adds new Art. 5.41-3, authorizing an insurer to write commercial property insurance for a group of businesses or an association that constitutes a large risk. The bill also amends current Art. 5.57A to extend the group purchase of workers’ compensation insurance to two or more members of a trade association. The purpose of this bill is to allow the expansion of existing group programs for trade associations to include members other than those engaged in the same or similar businesses. This bill was effective June 20, 2003.

HB 2095 adds a new chapter to the Labor Code, Chapter 407A, to provide that an unincorporated business association or business trust composed of five or more private employers may establish a workers’ compensation self-insurance group. This bill was effective September 1, 2003.

Buried in the language of Representative Mike Krusee’s large transportation bill, **HB 3588**, is a provision that directs the Texas Department of Public Safety (“DPS”) and the TDI to conduct a joint study on the feasibility and practicality of a “database interface software system” whereby the DPS could check a common insurer database to see whether a particular motorist has automobile insurance. This bill was effective September 1, 2003.

SB 113 adds new Art. 5.43 to allow RPI insurers to provide discounts to insureds who have gone at least three years without filing a claim. This bill was effective June 20, 2003.

SB 115 adds new Art. 5.45 to require RPI insurers to provide written notice to their insureds of any changes in the wording or effect of a policy offered to the insured upon renewal. SB 115 also amends Art. 5.35 of the Code to provide that any insurer that uses its own form or endorsement to assist the Commissioner in promulgating a “comparison form” to tell consumers how the new proprietary form differs from other related forms. These changes apply to all policies written at least 30 days after effective date, June 20, 2003.

HEALTH PLANS AND MANAGED CARE

This legislative session, proclaimed as the insurance reform session, did not have the usual impact on health insurance and related plans, except in some very specific areas. There was some tinkering with health insurance coverage issued to employers, especially in the area of small employer cooperatives. After an interim committee study of mandated benefits and aggressive lobbying by business interests, bills were passed that allow some loosening of state mandated benefits for health insurance plans. There was a lot of activity in the managed care area, mostly driven by the medical provider lobby. By far, the most important bill for managed care and probably for health insurance is SB 418, the revisions to the prompt pay statutes in the Texas Insurance Code (the “Code”), which was ably summarized by Tom Bond and Suzanne Spradley in the September 2003 FORC Journal.

Health Coverage – Insured Plans and Policies

Every session, since the enactment of small employer reform in 1993, has produced bills that refine and add to the small employer requirements. This session was no exception, although the focus of those bills was in two primary areas. One was the availability of small employer cooperatives. Two bills attempt to broaden the use of cooperatives and make coverage more affordable to the employers in the cooperatives. The third bill, SB 541, impacts more than employer policies, but it has specific provisions affecting small employer plans. That bill creates new “mandate free” plans, which are not really mandate free, that may be offered in individual and non-employer group markets as well as employer group markets.

Small & Large Employer Plans

HB 897 requires a carrier, which contracts with a small employer coalition, to treat the coalition as a single small employer for all purposes, including benefit elections.

SB 10 allows the formation of cooperatives with small employers only or, at the option of the cooperatives, with small and large employers. Once an employer joins, the employer must stay in the cooperative for two years unless the employer can prove financial hardship according to Commissioner rules. The cooperative is not subject to state mandated benefits, with the exception of the mandated coverage for diabetes, or to the limitations for non-PPO benefits vs. PPO benefits. A cooperative composed only of small employers is considered a single employer and must be treated as such for purposes of premium rates and issuance and renewal of coverage.

SB 541 allows health insurance plans with something less than the full slate of mandated benefits and allows greater distinction in plans between PPO and non-PPO benefits.

It also prohibits a compensation arrangement that excludes from compensation or pays a lesser percentage on the additional premium charged to a small employer because of health status or bases compensation on a flat amount per employee or employer group.

Other Insurance Provisions

HB 508 requires 60-day prior notice of a rate increase on group insurance.

HB 1268 allows an insurer that issues a group or individual Medicare supplement policy to offer an outpatient prescription drug benefit plan.

HB 1446 allows coverage of dependents, who are full-time students, age 25 and older.

HBs 1797, 1798, 1799 and 1800 allows the insurance contract, whether group certificate, HMO evidence of coverage or group life policy, to be delivered by electronic means.

HCR 90 requests Congress to broaden the availability of Medical Savings Accounts to allow large employers to implement programs and to increase the account contribution limits and lower the minimums for the annual deductible.

SB 611 prohibits an insurance company from using an individual's social security number on an ID card, unless the individual has requested it in writing, effective March 1, 2005.

Texas Health Insurance Risk Pool

SB 467 revises the Risk Pool statute for eligibility of persons qualifying under the Federal Trade Adjustment Reform Act. It also adds four types of health insurance premium, previously exempt from assessment, to assessment by the Pool. Those four categories of health insurance are short term insurance, accident insurance, fixed indemnity insurance, including hospital indemnity insurance, and other limited benefit insurance, including specified disease insurance.

MANAGED CARE

In addition to SB 418, the "prompt pay" bill, there were other managed care bills. They consisted of the usual types, such as adding categories of providers to the list of providers who must be included as eligible providers for purposes of the insurance plan.

HB 1095 allows the standardized form for verification of provider credentials to be used for advance practice nurses and physician assistants.

HB 1163 requires carriers, which offer PPO or HMO coverage policies, to allow podiatrists to participate as network providers.

HB 3109 provides that physician or health care provider information in an application for an Independent Review Organization license is confidential.

SB 494 requires a carrier, which offers PPO or HMO products and which maintains a web site, to list on the site its network providers.

SB 752 extends the expiration date of the statute, allowing physicians to jointly negotiate managed care contracts from September 1, 2003 to September 1, 2007.

SB 769 allows licensed surgical assistants to directly bill patients and third party payors.

SB 857 requires a managed care plan, which includes network therapeutic optometrists for routine eye examinations, to allow the optometrists to provide other services.

SB 879 adds a time frame in which an HMO or Utilization Review Agent must provide or arrange for a health care service that was the subject of a favorable decision on an adverse determination.

Other

SB 14 adds new Art. 21.21-6, making it a state jail felony for criminal negligence for any officer or director of a life or health company to offer any coverage at a premium based on race, color, religion or national origin or to collect a premium based on any such classifications. The limitation period was also extended to 2 years and the discovery rule was specifically incorporated into the statute.

SB 681 amends Chapter 1107 to provide new guidelines for determining minimum non-forfeiture amounts for certain annuity contracts. This bill was effective June 20, 2003.