

AN ACT  
RELATING TO TITLE INSURANCE; ENACTING THE TITLE INSURANCE  
GUARANTY ACT; AMENDING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--Sections 1 through 18 of this act may be cited as the "Title Insurance Guaranty Act".

Section 2. PURPOSE.--The purpose of the Title Insurance Guaranty Act is to provide a mechanism for continuation of coverage and payment of covered claims under certain title insurance policies, to avoid excessive delay in payment and avoid financial loss to policyholders because of insolvency of a title insurer, to assist in detection and prevention of title insurer insolvencies and to provide an association to assess the cost of such protection among title insurers.

Section 3. SCOPE.--The Title Insurance Guaranty Act applies to all insurers authorized to transact title insurance business in New Mexico.

Section 4. DEFINITIONS.--As used in the Title Insurance Guaranty Act:

A. "account" means an account created by Section 5 of the Title Insurance Guaranty Act;

B. "association" means the title insurance guaranty association;

C. "covered claim" means an unpaid claim of an insured in excess of one thousand dollars (\$1,000) covered under and not in excess of the applicable limits of a title insurance policy insuring land located in New Mexico issued by an insolvent insurer, if the insurer is found insolvent

pursuant to Paragraph (2) of Subsection D of this section after the effective date of the Title Insurance Guaranty Act. Subject to applicable policy limits, the association's liability for covered claims shall not exceed two hundred fifty thousand dollars (\$250,000) per claim and does not include any amount in excess of two hundred fifty thousand dollars (\$250,000) per claim. The total amount that may be recovered from the association by a claimant for all covered claims shall not exceed five hundred thousand dollars (\$500,000). "Covered claim" does not include an amount due by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, as subrogation recoveries or otherwise; provided, that a claim asserted against a person insured by an insolvent insurer that, if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, would be a covered claim, may be filed directly with the receiver of the insolvent insurer. In no event may any such claim be asserted in a legal or administrative action against the insolvent insurer's insured unless that claim is based on the insured's fraud. "Covered claim" does not include the amount of a claim that an insured recovers from any person, including an agent, regardless of whether an assignment is taken. "Covered claim" does not include supplementary payment obligations, including but not limited to adjustment fees and expenses, attorney fees and expenses and court costs, nor does it include punitive, exemplary, extracontractual or bad-faith damages awarded by a court judgment against an insurer;

D. "insolvent insurer" means an insurer:

(1) authorized to transact title insurance business in New Mexico at the time the title insurance policy was issued; and

(2) against which an order of liquidation with a finding of insolvency has been entered after the effective date of the Title Insurance Guaranty Act by a court of competent jurisdiction in the insurer's state of domicile, or in this state, which has not been stayed or been the subject of a writ of supersedeas or other comparable order;

E. "member insurer" means any insurer authorized to transact title insurance business in New Mexico;

F. "net written premiums" means gross premiums written in this state on title insurance policies. "Net written premiums" does not include premiums on contracts between insurers or reinsurers;

G. "person" means an individual or other legal entity;

H. "superintendent" means the superintendent of insurance; and

I. "title insurance policy" or "policy" means those terms as defined in Section 59A-30-3 NMSA 1978 with respect to policies issued on land located in New Mexico.

Section 5. ORGANIZATION OF ASSOCIATION.--All member insurers shall remain members of the association as a condition of their authority to transact insurance in this state. The association may take the form of any appropriate legal entity under New Mexico law, including a corporation, partnership or unincorporated association, as approved by the superintendent. For purposes of administration and

assessment, the association shall have two separate accounts:

- A. the administrative account; and
- B. the title guaranty account.

Section 6. BOARD OF DIRECTORS.--

A. The association's board of directors shall consist of not less than five nor more than eleven appointed members serving terms as provided in the association's plan of operation, and the superintendent or his designated representative as an ex-officio member. Appointed board members shall be selected by member insurers, subject to the superintendent's approval. A majority of the appointed members shall be employed by member insurers. Vacancies shall be filled for the remaining term by majority vote of the remaining board members, subject to the superintendent's approval.

B. Board members may be reimbursed from the administrative account for any reasonable and necessary expenses incurred in their capacities as board members, but the amount of such reimbursement shall not exceed guidelines provided by the approved plan of operation.

Section 7. DUTIES AND POWERS OF THE ASSOCIATION.--

A. The association shall:

(1) be obligated to the extent of covered claims arising from policies of an insolvent insurer issued prior to the finding of insolvency, except that the association shall not be obligated as to policies replaced by another title insurance policy that covers the claim. In no event shall the association be obligated to a policyholder in an amount in excess of the obligation of the

insolvent insurer under the policy;

(2) be deemed the insolvent insurer to the extent of the insurer's obligation on covered claims and to such extent shall have all rights, duties and obligations of the insurer as if the insurer had not become insolvent; provided that the association shall have no liability for any past claims based on negligence of the insurer or its agents in searching and reporting the condition of a title, on bad faith of the insolvent insurer, on the closing of any transaction or for exemplary or punitive damages;

(3) pay for the administration and operation of the association from the administrative account, through proceeds received from an annual guaranty fee to be collected in the amounts and manner established by rule of the superintendent;

(4) allocate claims payments, loss and adjustment expense and administrative expense to the appropriate accounts and assess member insurers, separately for each account, amounts necessary to pay the association's obligations subsequent to an insolvency. Assessments shall not be made in a year in which guaranty fee proceeds, together with unencumbered account balances and other assets, will be sufficient to satisfy the association's obligations. Assessments shall be made against each member insurer in the proportion that the member insurer's net written premiums for the last full calendar year bears to net written premiums of all member insurers for that calendar year. Each member insurer shall be notified of the assessment not later than thirty days before it is due. No member insurer may be assessed in a year an amount greater

than two percent of that member insurer's net written premiums for the preceding calendar year. If it appears that the maximum assessment available, together with unencumbered account balances and other assets, will be insufficient in a year to make all necessary payments, the association's obligations shall be paid pro rata and the unpaid portion shall be paid as soon as additional assessment proceeds or other funds become available. The association may pay claims in an order that it deems reasonable, including payments as claims are received or by groups or categories of claims. The association may exempt or defer, in whole or in part, the assessment of a member insurer if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority in any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer acting as a servicing facility may set off against an assessment any authorized payments made on covered claims and expenses incurred in the payment of the claims by such member insurer if they are chargeable to the account for which the assessment is made;

(5) investigate claims and adjust, compromise, settle and pay covered claims to the extent of the association's obligations, and deny all other claims. The association may review settlements, releases and judgments to which the insolvent insurer or its insureds are parties to determine the extent to which such settlements, releases and judgments may be properly contested;

(6) notify such persons as the

superintendent may direct pursuant to Section 9 of the Title Insurance Guaranty Act;

(7) receive, handle, adjust and pay claims through its employees or through one or more insurers or other persons designated as servicing facilities, subject to the superintendent's approval; provided that a member insurer may decline any such designation;

(8) reimburse each servicing facility for obligations of the association paid by the facility and for reasonable expenses incurred by the facility for handling claims on behalf of the association, and pay other expenses of the association authorized by the Title Insurance Guaranty Act; and

(9) refund excess funds in an account to member insurers in proportion to the contribution of each member insurer to that account, when the board of directors estimates that the assets in the account will exceed the liabilities for the coming year.

B. The association may:

(1) employ persons or contract with servicing facilities necessary to handle claims and to perform other association duties;

(2) borrow funds necessary to effectuate the purposes of the Title Insurance Guaranty Act in accordance with the plan of operation, subject to the superintendent's approval;

(3) sue or be sued, and intervene in any court or other forum having jurisdiction over an insolvent insurer or its insureds;

(4) negotiate and enter into contracts

necessary to carry out the purposes of the Title Insurance Guaranty Act; and

(5) perform all other acts necessary or proper to effectuate the purposes of the Title Insurance Guaranty Act.

Section 8. PLAN OF OPERATION.--

A. The association shall submit to the superintendent a plan of operation and amendments to the plan necessary or suitable to ensure the fair, reasonable and equitable administration of the association. The plan of operation and amendments shall become effective upon the superintendent's written approval. If, at any time, the association fails to submit the plan or suitable amendments to the superintendent, he shall, after notice and hearing, adopt necessary or advisable rules to effectuate the provisions of the Title Insurance Guaranty Act. The rules shall continue in force until the superintendent modifies them or they are superseded by a plan or amendments submitted by the association and approved by the superintendent.

B. All member insurers shall comply with the association's plan of operation.

C. The association's plan of operation, among other things, shall establish all procedures for conducting the association's business, for handling its assets, for receiving, handling, adjusting and paying claims, for keeping records and for the conduct of other activities necessary to carry out the association's powers and duties.

D. The association's plan of operation may provide that any of the association's powers and duties,



except those specified in Paragraph (3) of Subsection A and Paragraph (2) of Subsection B of Section 7 of the Title Insurance Guaranty Act, be delegated to a corporation, association or other organization that performs or will perform functions similar to those of the association in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility and paid for performing any other function.

Section 9. DUTIES AND POWERS OF SUPERINTENDENT.--

A. The superintendent shall:

(1) promptly forward to the association a copy of any complaint or petition seeking an order of liquidation with a finding of insolvency against a title insurer;

(2) notify the association that a title insurer has been found to be an insolvent insurer not later than three days after he receives notice of the finding; and

(3) upon request of the board of directors, provide the association with a statement of the net written premiums of each member insurer.

B. The superintendent may:

(1) require that the association or an insolvent insurer's licensed New Mexico agents notify the insurer's New Mexico insureds and other interested parties of the finding of insolvency and of their rights under the Title Insurance Guaranty Act. Notification shall be made by mail at the last known address; provided that if sufficient information for notification by mail is not available, notice by publication in one or more newspapers of general circulation in the state shall be sufficient;

(2) suspend or revoke, after notice and hearing, a member insurer's certificate of authority if the insurer fails to pay any assessment within thirty days after it was due or fails to comply with the association's plan of operation. In the alternative, the superintendent may impose a civil penalty not to exceed five percent of the unpaid assessment per month; provided that no civil penalty shall be less than one hundred dollars (\$100) per month; and

(3) revoke the designation of any servicing facility if he finds that claims are not being handled satisfactorily.

Section 10. EFFECT OF PAID CLAIMS.--

A. A person recovering under the Title Insurance Guaranty Act shall be deemed to have assigned his rights and claims under the insolvent insurer's policy to the association to the extent of his recovery from the association. Every insured seeking the protection of the Title Insurance Guaranty Act shall cooperate with the association to the same extent as required to cooperate with the insurer. The association shall have no cause of action against an insured for sums it has paid out except such causes of action as the insurer would have had. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims by the association do not operate to reduce the liability of the insured to the receiver, liquidator or statutory successor for unpaid assessments.

B. The court having jurisdiction shall grant claims assigned pursuant to Subsection A of this section and the claims expenses of the association or similar

organization in another state the same priority as the claims had before assignment. The association may make application to the court for reimbursement of such claims and expenses and, upon proper application, the court shall order appropriate disbursement to be made.

C. The association shall, within the time set by the receivership court, file with the receiver or liquidator of the insolvent insurer, statements of paid claims and claims expense and reserves for unpaid claims and claims expense.

Section 11. NONDUPLICATION OF RECOVERY.--A person having a claim under any other title insurance policy that is not an insolvent insurer's policy, which is also a covered claim, shall first exhaust his rights under such other title insurance policy. An amount payable for a covered claim shall be reduced by the amount of any recovery under such other title insurance policy.

Section 12. PREVENTION OF INSOLVENCIES.--

A. To aid in the detection and prevention of title insurer insolvencies, the association's board of directors may, upon majority vote:

(1) make recommendations to the superintendent for the detection and prevention of insolvencies; and

(2) respond to requests by the superintendent to discuss and make recommendations regarding the status of a member insurer whose financial condition may be hazardous to policyholders or the public.

Recommendations pursuant to this paragraph shall not be available for public inspection.

B. The superintendent shall report to the association's board of directors when he has reasonable cause to believe that a title insurer may be insolvent or in a financial condition hazardous to its policyholders or the public. The report, and subsequent meetings, activities, recommendations and decisions of the board of directors as required or permitted in this subsection, shall not be open to the public or available for public inspection.

C. At the conclusion of a domestic title insurer insolvency for which the association was obligated to pay covered claims, the association's board of directors may prepare a report on the history and causes of such insolvency, based on the information available to the association, and submit the report to the superintendent. The report, and subsequent meetings, activities, recommendations and decisions of the board of directors as required or permitted in this section, shall not be open to the public or available for public inspection.

Section 13. EXAMINATION OF ASSOCIATION--FINANCIAL REPORTS.--The association is subject to the superintendent's examination and regulation pursuant to Chapter 59A, Article 4 NMSA 1978. The board of directors shall submit, not later than June 30 each year, a financial report for the preceding calendar year prepared by an independent certified public accountant acceptable to the superintendent. The financial report shall be in a form approved by the superintendent.

Section 14. APPEALS.--

A. An insured whose claim is denied in whole or in part by the association may request the receivership court, or the ancillary receivership court in this state, to

review the association's decision. The request for review shall be filed within thirty days after the date of denial. The receivership court and ancillary receivership court in this state shall have exclusive jurisdiction of all such claims. The decision of the court shall be binding on both the claimant and the association.

B. A member insurer may appeal to the superintendent from any action of the association's board of directors by filing a notice of appeal within thirty days after the date of the action appealed from.

C. A final order of the superintendent pursuant to Subsection B of this section is subject to judicial review by an action in the district court of Santa Fe county to set aside the order as unlawful or not supported by substantial evidence. If judicial review is not sought within thirty days after the date of the superintendent's order, the order shall be final and not subject to appeal.

Section 15. RECOGNITION OF ASSESSMENT IN RATES.--The title insurance rates and premiums promulgated by the superintendent shall include amounts sufficient to recoup within three years after assessment a sum equal to the amounts paid to the association by the member insurers, less amounts returned to the member insurers by the association. Rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurers. The entire amount of any such recoupment shall be passed through to insurers.

Section 16. IMMUNITY--CONFIDENTIALITY.--

A. There shall be no liability on the part of, and no cause of action of any nature shall exist against, a

member insurer, the association or its agents or employees, the board of directors, an individual director or the superintendent or his representative for an action taken by them in connection with carrying out their powers and duties under the Title Insurance Guaranty Act or failure to prevent any insolvency. The association shall defend all actions alleging such liability except that the attorney general shall defend any such actions against the superintendent or his representatives.

B. The meetings, activities, recommendations and decisions of the board of directors pursuant to the Title Insurance Guaranty Act shall not be open to the public or available for public inspection; provided that no representative of a member insurer shall be excluded from a meeting of the board of directors, with the exception of a representative of an insolvent insurer.

Section 17. STAY OF PROCEEDINGS--REOPENING OF DEFAULT JUDGMENTS.--All proceedings in which the insolvent insurer is a party or is obligated to represent a party in a court in New Mexico shall be stayed for not to exceed six months from the date of a finding of insolvency to permit proper representation by the association of all pending causes of action. As to covered claims arising from a judgment under a decision, verdict or finding resulting from the default of the insolvent insurer or its failure to defend an insured, the association, either on its own behalf or on behalf of the insured, may apply to have the judgment, order, decision, verdict or finding set aside by the same court, administrator or arbitrator that made it and may defend against the claim on its merits.

Section 18. TERMINATION--DISTRIBUTION OF FUNDS.--

A. The superintendent shall by order terminate the operation of the association if he finds, after hearing, that there is in effect a statutory or voluntary plan that:

(1) is a permanent plan that is adequately funded or for which an adequate means of funding is provided; and

(2) extends or will extend, to New Mexico title insurance policyholders and residents, protection and benefits with respect to insolvent insurers not less favorable than the protection provided under the Title Insurance Guaranty Act.

B. If the association's operation is terminated, the association, as soon as possible, shall distribute the balance of money and assets remaining, after discharge of the functions of the association with respect to prior insurer insolvencies not covered by another plan, to member insurers that are then writing title insurance policies in this state, pro rata upon the basis of the aggregate of payments and assessments made by the respective insurers during the five years next preceding the date of the order.

Section 19. Section 59A-30-6 NMSA 1978 (being Laws 1985, Chapter 28, Section 6) is amended to read:

"59A-30-6. PREMIUMS--AGENCY AGREEMENTS--DUTY TO FIX RATES--EXCEPTION.--

A. The superintendent shall promulgate the premium rates of title insurers and title insurance agents for title insurance policies and the percentage of premium to be retained by title insurers under agency agreements, except that premium rates for reinsurance as between title

insurers shall not be promulgated by the superintendent. No premium that has not been promulgated by the superintendent shall be charged for any title insurance policy. The superintendent shall not promulgate charges of title insurers and title insurance agents other than premium rates for title insurance policies and the percentage of premium to be retained by title insurers under agency agreements.

B. The superintendent shall promulgate additional premium rates for searches or examinations of title conducted or performed for the purpose of issuance of a title insurance policy when the search or examination involves more than one chain of title or other unusual complexity.

C. Premium rates promulgated by the superintendent shall not be excessive, inadequate or unfairly discriminatory and shall contain an allowance permitting a profit that is not unreasonable in relation to the riskiness of the business of title insurance. Premium rates may include an allowance for recoupment of assessments made pursuant to the Title Insurance Guaranty Act."

Section 20. Section 59A-30-11 NMSA 1978 (being Laws 1985, Chapter 28, Section 11) is amended to read:

"59A-30-11. UNDERWRITING STANDARDS AND RECORD RETENTION.--

A. No title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title using an abstract plant meeting the requirements of Section 59A-12-13 NMSA 1978 and has caused to be made a determination of insurability of title in



accordance with sound underwriting practices. The duty to search and examine imposed by this section is solely for the purpose of enhancing the financial stability of title insurers for the benefit of insureds under title insurance policies. The New Mexico Title Insurance Law is not intended and should not be construed to create any duty to search and examine that runs to the benefit of, or to create any right or cause of action in favor of, any person other than a title insurer.

B. Evidence of the examination of title and determination of insurability shall be preserved and retained in the files of the title insurer or its title insurance agent for a period of not less than fifteen years after the title insurance policy has been issued. Instead of retaining the original evidence, the title insurer or title insurance agent may in the regular course of business establish a system whereby all or part of the evidence is recorded, copied or reproduced by any process that accurately and legibly reproduces or forms a durable medium for reproducing the contents of the original. This subsection shall not apply to:

(1) a title insurer assuming liability through a contract of reinsurance; or

(2) a title insurer acting as coinsurer if one of the other coinsuring title insurers has complied with this section."

Section 21. Section 59A-30-14 NMSA 1978 (being Laws 1985, Chapter 28, Section 14) is amended to read:

"59A-30-14. OTHER PROVISIONS APPLICABLE.--To the extent not in conflict with the New Mexico Title Insurance

Law, the following articles and provisions of the Insurance Code shall also apply to title insurers, title insurance agents and the business of title insurance:

- Article 1. Scope of Code; Initial Definitions; General Penalty.
  - Article 2. Insurance Division.
  - Article 4. Examinations, Hearings and Appeals.
  - Article 5. Authorization of Insurers and General Requirements.
  - Article 6. Fees and Taxes.
  - Article 7. Kinds of Insurance; Limits of Risk; Reinsurance.
  - Article 8. Assets and Liabilities.
  - Article 9. Investments.
  - Article 10. Administration of Deposits; Trusteed Assets of alien Insurer.
  - Article 11. Licensing Procedures, Agents, Solicitors, Brokers, Adjusters and Others.
  - Article 12. Insurance Agents, Brokers and Solicitors.
  - Article 15. Unauthorized Insurers.
  - Article 16. Trade Practices and Frauds.
  - Article 34. Domestic Stock and Mutual Insurers.
  - Article 37. Insurance Holding Companies.
- Title Insurance Guaranty Act." =====

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