Updates to the Kansas Life and Health Insurance Guaranty Association Act; HB 2787

HB 2787 amends the Kansas Life and Health Insurance Guaranty Association Act (Act) to incorporate the 2017 revisions to the National Association of Insurance Commissioners Life and Health Guaranty Association Model Act (Model Act). Among these revisions, the bill allocates long-term care insurance assessments equally between life insurance and health insurance members. The bill also includes health maintenance organizations (HMOs) as member insurers of the Kansas Life and Health Insurance Guaranty Association (Association). The bill makes technical and conforming amendments throughout to reflect the revisions to the Model Act. The bill also amends law relating to the Kansas Insurance Guaranty Association (KIGA).

Application of Provisions

The bill provides for all matters relating to the insolvency or impairment of any member insurer placed under an order of liquidation by a court of competent jurisdiction with a finding of insolvency before July 1, 2024, or for which the Association otherwise exercises its statutory powers and duties before July 1, 2024, including past, present, and future assessments and credits, to be governed by the provisions of the Act that were in effect before July 1, 2024. Such matters on or after July 1, 2024, will be governed by the provisions of the Act in effect on the date the actions are officially taken.

Purpose of the Kansas Life and Health Insurance Guaranty Association Act

The bill makes technical and conforming amendments to reflect the policies and plans included under the Act and to specify that the Association consists of member insurers.

Persons Provided Coverage; Policies and Contracts Specified

The Act does not provide coverage to a person who acquires rights to receive payments through a structured settlement factoring transaction, as defined in 26 USC § 5891(c)(3)(A), regardless of whether the transaction occurred before or after the effective date of that law.

The bill specifies that “health insurer,” as used in the Act, includes HMO subscriber contracts and certificates.

Definitions Pertaining to the Act

The bill modifies Act definitions and add definitions for terms including “extra-contractual claims” and “health benefit plan.”

The bill clarifies that “account” means any of the three accounts maintained by the Association: the health account, the life insurance account, or the annuity account.

The bill also amends the definition for “covered policy” to include “covered contract” and to mean any policy or contract for which coverage is provided under the Act.

The bill defines “extra-contractual claims” to include, for example, claims relating to bad faith in the payment of claims, punitive or exemplary damages, or attorney fees and costs.

The bill also defines “health benefit plan” to mean any hospital or medical expense policy or certificate, HMO subscriber contract, or any other similar health contract. “Health benefit plan” does not include:

- Accident-only insurance;
- Credit insurance;
- Dental-only insurance;
- Vision-only insurance;
- Medicare supplement insurance;
- Benefits for long-term care, home health care, community-based care, or any combination;
- Disability income insurance;
- Coverage for on-site medical clinics; and
- Specified disease, hospital confinement indemnity, or limited benefit health insurance if the types of coverage do not provide coordination of benefits and are provided under separate policies or certificates.

To the definition of “member insurer,” the bill adds HMOs and removes organizations that have a certificate or license limited to the issuance of charitable gift annuities. The bill also adds HMOs and certificates issued by member insurers to the definition of “provider.”

Kansas Life and Health Insurance Guaranty Association; Creation and Members

The bill amends the statute establishing the Association to reflect that member insurers could be licensed to conduct HMO business in Kansas.

The bill also amends the name of the health insurance account maintained by the Association to be “health account.”

Kansas Life and Health Insurance Guaranty Association Board of Directors; Selection and Approval

The bill removes a provision of law regarding the selection of the initial Board of Directors (Board). The bill specifies that the term of each member appointed and serving on the Board as of July 1, 2024, will continue until the expiration of each member's current term. Upon expiration of each member's term, the Commissioner of Insurance (Commissioner) will decide whether to continue each member's position on the Board or reduce the number of Board members.

On and after January 1, 2025, the Board will consist of no fewer than five, but no more than nine, appointed members. Members of the Board will be selected by member insurers subject to the approval of the Commissioner. Each member of the Board will be appointed for a term of three years except that members may be removable by the Commissioner for inefficiency, neglect of duty, or malfeasance.

Powers and Duties of the Kansas Life and Health Insurance Guaranty Association; Mandatory Payment of Certain Claims

The bill allows the Association to provide substitute coverage for policies and contracts covered by the Association and allows the Association to have the authority to file for rate or premium increases. The bill requires the rates for reissued or substitute policies or contracts to be at actuarially justified rates.

Insolvent Insurer—Temporary Moratorium and Moratorium Charge

If a member insurer is an insolvent insurer, continuing law authorizes the Association to take certain actions. The bill adds, in carrying out these duties, that the Association may, in the event of a temporary moratorium or moratorium change imposed by the receivership court on payment of cash values or policy loans or on any other right to withdraw funds held in conjunction with policies or contracts out of the assets of the impaired or insolvent insurer, defer the payment of cash values, policy loans, or other rights by the Association for the period of the moratorium or moratorium charge imposed by the receivership court, except for claims covered by the Association to be paid in accordance with a hardship procedure established by the liquidator or rehabilitator and approved by the receivership court.

Insolvent Insurer—Deposit Held and Benefit of Creditors

The bill provides that a deposit in Kansas, held pursuant to law or required by the Commissioner for the benefit of creditors, including policyholders or contract holders, not turned over to the domiciliary liquidator upon the entry of a final order of liquidation or order approving a rehabilitation plan of a member insurer domiciled in Kansas or in a reciprocal state, must be promptly paid to the Association. The Association is entitled to retain a portion of any amount paid equal to the percentage determined by dividing the aggregate amount of policyholders' or contract holders' claims in Kansas related to that insolvency and will remit to the domiciliary receiver the amount paid to the Association less the amount retained. Any amount paid to and retained by the Association will be treated as a distribution of estate assets pursuant to applicable state receivership law dealing with early access disbursements.

Impaired or Insolvent Insurer—Subrogation Rights; Covered Obligations and Recovery

The bill grants the Association all common-law rights of subrogation available to the impaired or insolvent insurer policyholder or contract holder, beneficiary, enrollee, or payee of a policy or contract including, without limitation, in the case of a structured settlement annuity, any rights of the owner, beneficiary, or payee of the annuity, to the extent of benefits received pursuant to the Act against a person originally or by succession responsible for the losses arising from the personal injury relating to the annuity or payment, excepting any such person responsible solely by reason of serving as an assignee regarding a qualified assignment pursuant to 26 USC § 130.

If the preceding provisions are invalid or ineffective with respect to any person or claim for any reason, the amount payable by the Association with respect to the related covered obligations will be reduced by the amount realized by any other person with respect to the person or claim that is attributable to the policies or contracts, or portion thereof, covered by the Association.

The bill also provides that, if the Association has provided benefits with respect to a covered obligation and a person recovers amounts to which the Association has rights, then the person will pay to the Association the portion of the recovery attributable to the policies or contracts, or portion thereof, covered by the Association.

The bill removes a provision of law that states the contractual obligations of the impaired or insolvent insurer for which the Association becomes, or may become, liable are as great as but no greater than the contractual obligations of the impaired or insolvent insurer would have been in the absence of an impairment of insolvency unless those obligations are reduced as permitted by the Act.

Exclusions from Coverage

To the list of policies or contracts the Association does not provide coverage for, the bill adds:

- A multiple employer welfare arrangement, as defined in 29 USC § 1144;
- A portion of a policy or contract to the extent that the assessments required by the Act with respect to the policy or contract are preempted by federal or state law;
- An obligation that does not arise under the express written terms of the policy or contract issued by the member insurer to the enrollee, certificate holder, contract holder, or policyholder, including, without limitation:
  - Claims based on marketing materials;
  - Claims based on side letters, riders, or other documents that were issued by the member insurer without meeting applicable policy or contract form filing or approval requirements;

- Misrepresentations of or regarding policy or contract benefits;
- Extra contractual claims; or
- A claim for penalties or consequential or incidental damages;

- A contractual agreement that establishes the member insurer's obligations to provide a book value accounting guaranty for defined contribution benefit plan participants by reference to a portfolio of assets that is owned by the benefit plan or its trustee and, in each case, is not an affiliate of the member; or

- Structured settlement annuity benefits to which a payee or beneficiary has transferred the payee's or beneficiary's rights in a structured settlement factoring transaction, which, under 26 USC § 5891(c)(3)(A), means a transfer of structured settlement payment rights, including portions of structured settlement payments, made for consideration by means of sale, assignment, pledge, or other form of encumbrance or alienation for consideration.

The bill further provides that these exclusions from coverage do not apply to any portion of a policy or contract, including a rider, that provides long-term care or any other health insurance benefits.

The bill also states that, for the purposes of the Act, benefits provided by a long-term care rider to a life insurance policy or annuity contract are considered the same type of benefits as the base life insurance policy or annuity contract to which it relates.

Powers and Duties of the Kansas Life and Health Insurance Guaranty Association

The bill adds to the powers and duties of the Association, including to:

- Exercise, for the purposes of the Act and to the extent approved by the Commissioner, the powers of an HMO;

- Organize itself as a corporation or in other legal form permitted by the laws of Kansas;

- Request information from a person seeking coverage from the Association in order to aid the Association in determining its obligations under the Act with respect to the person, and the person is required to promptly comply with the request;

- In accordance with the terms and conditions of the policy or contract, file for actuarially justified rate or premium increases for any policy or contract for which it provides coverage under the Act; and

- Take other necessary or appropriate action to discharge its duties and obligations or exercise its powers under the Act.

The bill states that at any time within 180 days of the date of the order of liquidation, the Association may elect to succeed to the rights and obligations of the ceding member insurer that relate to policies, contracts, or annuities covered, in whole or in part, by the Association, in each case under any one or more reinsurance contracts entered into by the insolvent insurer and its reinsurers and selected by the Association. Any such assumption would be effective as of the date of the order of liquidation. The election would be effected by the Association or the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA), on its behalf, sending written notice with return receipt requested to the affected reinsurers.

To facilitate the earliest practicable decision about whether to assume any of the contracts of reinsurance, and in order to protect the financial position of the estate, the receiver and each reinsurer of the ceding member insurer must make available upon request to the Association or to NOLHGA on its behalf as soon as possible after commencement of formal delinquency proceedings:

- Copies of in-force contracts of reinsurance and all related files and records relevant to the determination of whether such contracts should be assumed; and

- Notices of any defaults under the reinsurance contracts or any known event or condition that with the passage of time could become a default under the reinsurance contracts.

Reinsurance Contracts Assumed by the Kansas Life and Health Insurance Guaranty Association

The bill makes the Association responsible for all unpaid premiums due under the reinsurance contracts for periods both before and after the date of the order of liquidation and responsible for the performance of all other obligations to be performed after the date of the order of liquidation, in each case relating to policies, contracts, or annuities covered, in whole or in part, by the Association. The Association is permitted to charge policies, contracts, or annuities covered in part by the Association, through reasonable allocation methods, the costs for reinsurance in excess of the obligations of the Association, and is required to provide notice and an accounting of these charges to the liquidator.

The Association is entitled to any amounts payable by the reinsurer under the reinsurance contracts with respect to losses or events that occur in periods after the date of the order of liquidation and that relate to policies, contracts, or annuities covered, in whole or in part, by the Association, provided that, upon receipt of any such amounts, the Association is obliged to pay to the beneficiary under the policy, contract, or annuity on account of which the amounts were paid a portion of the amount equal to the lesser of:

- The amount received by the Association; and

- The excess of the amount received by the Association over the amount equal to the benefits paid by the Association on account of the policy, contract, or annuity less the retention of the insurer applicable to the loss or event.

The bill further specifies that, within 30 days following the Association's election (election date), the Association and each reinsurer under contracts assumed by the Association will calculate the net balance due to or from the Association under each reinsurance contract as of the election date with respect to policies, contracts, or annuities covered, in whole or in part, by the Association. This calculation gives full credit to all items paid by either the member insurer or its receiver or the reinsurer prior to the election date. The reinsurer will pay the receiver any amounts due for losses or events prior to the date of the order of liquidation, subject to any set-off for premiums unpaid for periods prior to the date, and the Association or reinsurer will pay any remaining balance due the other, in each case within five days of the completion of the aforementioned calculation. Any disputes over the amounts due to either the Association or the reinsurer will be resolved by arbitration pursuant to the terms of the affected reinsurance contracts or, if the contract contains no arbitration clause, as otherwise provided by law. If the receiver has received any amounts due to the Association, the receiver must remit such amounts to the Association as promptly as practicable.

If the Association or receiver, on the Association's behalf, within 60 days of the election date, pays the unpaid premiums due for periods both before and after the election date that relate to policies, contracts, or annuities covered, in whole or in part, by the Association, the bill provides that the reinsurer is not entitled to terminate the reinsurance contracts for failure to pay premiums and is not entitled to set off any unpaid amounts due under other contracts or unpaid amounts due from parties other than the Association against amounts due to the Association.

During the period from the date of the order of liquidation until the election date, or, if the election date does not occur, until 180 days after the date of the order of liquidation:

- Neither the Association nor the reinsurer have any rights or obligations under reinsurance contracts that the Association has the right to assume, whether for periods before or after the date of the order of liquidation;
- The reinsurer, the receiver, and the Association will, to the extent practicable, provide each other data and records reasonably requested; and
- Provided that once the Association has elected to assume a reinsurance contract, the parties' rights and obligations are be governed by provisions of the Act.

If the Association does not elect to assume a reinsurance contract by the election date, the bill provides that the Association has no rights or obligations, in each case for periods both before and after the date of the order of liquidation, with respect to the reinsurance contract.

When policies, contracts or annuities, or covered obligations are transferred to an assuming insurer, reinsurance on the policies, contracts, or annuities may be transferred by the Association, subject to the following:

- Unless the reinsurer and the assuming insurer agree otherwise, the reinsurance contract transferred will not cover any new policies of insurance, contracts, or annuities in addition to those transferred;

- The obligations will no longer apply with respect to matters arising after the effective date of the transfer; and

- Notice will be given in writing, with return receipt requested, by the transferring party to the affected reinsurer no less than 30 days prior to the effective date of the transfer.

The bill further specifies that the provisions of this subsection regarding reinsurance contracts and proceeds supersede the provisions of any state law or any affected reinsurance contract that provides for or requires any payment of reinsurance proceeds, on account of losses or events that occur in periods after the date of the order of liquidation, to the receiver of the insolvent insurer or any other person. The receiver remains entitled to any amounts payable by the reinsurer under the reinsurance contracts with respect to losses or events that occur in periods prior to the date of the order of liquidation, subject to applicable setoff provisions.

Except as otherwise provided, the bill states that nothing in this subsection regarding reinsurance contracts and proceeds:

- Alters or modifies the terms and conditions of any reinsurance contract;

- Abrogates or limits any rights of any reinsurer to claim the reinsurer is entitled to rescind a reinsurance contract;

- Gives a policyholder, contract owner, enrollee, certificate holder, or beneficiary an independent cause of action against a reinsurer that is not otherwise set forth in the reinsurance contract;

- Limits or affects the Association's rights as a creditor of the estate against the assets of the estate; or

- Applies to reinsurance agreements covering property or casualty risks.

The Board has discretion and can exercise reasonable business judgment to determine the means by which the Association is to provide the benefits of the Act in an economical and efficient manner.

The bill provides that, where the Association has arranged or offered to provide the benefits of the Act to a covered person under a plan or arrangement that fulfills the Association's obligations under the Act, the person is not entitled to benefits from the Association in addition to or other than those provided under the plan or arrangement.

The venue in a suit against the Association arising under the Act is in Shawnee County. The Association is not required to give an appeal bond that relates to a cause of action arising under the Act.

The bill removes a provision that provides for the Association to succeed to the rights of the insolvent insurer under certain circumstances.

Assessment of Member Insurers to Provide Funds for Administration of Kansas Life and Health Insurance Guaranty Association

The bill removes a provision from law stating non-*pro rata* assessments cannot exceed $300 per member insurer in any calendar year.

The bill also exempts assessments related to long-term care insurance from provisions regarding the allocation for class B assessments. The bill provides for the amount of the class B assessment for long-term care insurance written by the impaired or insolvent insurer to be allocated according to a methodology included in the plan of operation and approved by the Commissioner. The bill requires the methodology to provide for 50 percent of the assessment to be allocated to accident and health member insurers and 50 percent to be allocated to life and annuity member insurers.

Continuing law authorizes the Association to 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 endangers the ability of the member insurer to fulfill its contractual obligations. The bill adds a provision requiring, once the conditions that caused a deferral have been removed or rectified, the member insurer to pay all assessments that were deferred pursuant to a repayment plan approved by the Association.

Protest of Assessments

The bill requires a member insurer that wishes to protest all or part of an assessment to pay, when due, the full amount of the assessment as set forth in the notice provided by the Association. The payment would be available to meet Association obligations during the pending of the protest or any subsequent appeal. Payment must be accompanied by a written statement that the payment is made under protest and include a brief statement of the grounds for the protest.

Within 60 days following the payment of an assessment under protest by a member insurer, the bill requires the Association to notify the protesting member insurer, in writing, of its determination with respect to the protest unless the Association notifies the member insurer that additional time is required to resolve the issues raised by the protest.

Within 30 days after a final decision has been made, the bill requires the Association to notify the protesting member insurer in writing of that final decision. Within 60 days of receipt of notice of the final decision, the protesting member insurer may appeal the final action to the Commissioner.

As an alternative to rendering a final decision with respect to a protest based on a question regarding the assessment base, the bill authorizes the Association to refer protests to the Commissioner for a final decision, with or without a recommendation from the Association. If the protest or appeal on the assessment is upheld, the amount paid in error or excess will be returned to the member insurer. Interest on a refund due a protesting member insurer will be paid at the rate actually earned by the Association.

The Association may request information of member insurers in order to aid in the exercise of its power and member insurers are required to comply with a request.

Kansas Life and Health Insurance Guaranty Association Plan of Operation

To the list of requirements the Association must include in its plan of operation, the bill adds:

- Establishing procedures whereby a director may be removed for cause, including in the case where a member insurer director becomes an impaired or insolvent insurer; and

- Requiring the Board to establish a policy and procedures for addressing conflicts of interest.

Powers of the Commissioner of Insurance; Final Action or Order and Judicial Review

The bill specifies that any final action of the Board or the Association could be appealed to the Commissioner.

The bill removes a provision stating that, if a member company is appealing an assessment, the amount assessed is paid to the Association and available to meet Association obligations during the pending of an appeal and that if the appeal is upheld, the amount paid in error is returned to the member insurer.

The bill adds a provision stating a final action or order of the Commissioner is subject to judicial review in a court of competent jurisdiction in accordance with the laws of Kansas that apply to the actions or orders of the Commissioner.

Duties of the Commissioner of Insurance and Kansas Life and Health Insurance Guaranty Association Board of Directors for the Detection and Prevention of Impairments and Insolvencies

The bill adds detection and prevention of insolvencies to the duties of the Commissioner. It also adds to the duties of the Commissioner that the Commissioner notify the commissioners of all other states, territories of the United States, and the District of Columbia when the Commissioner revokes or suspends a certificate of authority or makes formal orders for the security of contract holders or certificate holders.

The bill removes a section of law stating the Board, upon majority vote, may request that the Commissioner order an examination of any member insurer which the Board in good faith believes may be an impaired or insolvent insurer, as well as provisions regarding notification, cost, and the release of the examination report. The bill also removes provisions directing the Board, at the conclusion of any insurer insolvency in which the Association is obligated to pay covered claims, to prepare a report to the Commissioner regarding the history and causes of such insolvency.

Liability for Unpaid Assessments of Insureds of an Impaired or Insolvent Insurer

The bill entitles the Association or other similar associations, as a creditor of the impaired or insolvent insurer, to receive a disbursement of assets out of the marshaled assets, from time to time as the assets become available to reimburse it, as a credit against contractual obligations under the Act. If the liquidator has not, within 120 days of a final determination of insolvency of a member insurer by the receivership court, made an application to the court for the approval of a proposal to disburse assets out of marshaled assets to guaranty associations having obligations because of the insolvency, then the Association may be entitled to make application to the receivership court for approval of its own proposal to disburse these assets.

Summary Documents; Disclaimer

Regarding summary documents the Association prepares describing the general purpose and limitations of the Act, the bill requires the disclaimer to include:

- The types of policies or contracts for which guaranty funds will provide coverage;
- An explanation of rights available and procedures for filing a complaint to allege a violation of any provisions of the Act; and
- Sources for information about the financial condition of insurers provided that the information is not proprietary and is subject to disclosure under Kansas public records law.

The bill also requires a member insurer to retain evidence of compliance with the requirements of the summary document for so long as the policy or contract for which the notice is given remains in effect.

Certificates of Contributions as Assets

The bill provides that a member insurer that is exempt from taxes could recoup its assessments by a surcharge on its premiums in a sum reasonably calculated to recoup the assessments over a reasonable period of time, as approved by the Commissioner. Amounts are not considered premiums for any other purpose, including the computation of gross premium tax, the medical loss ratio, or agent commission. If a member insurer collects excess surcharges, the bill requires the member insurer to remit the excess amount to the Association, and the excess amount is applied to reduce future assessments in the appropriate account.

Stay of Proceedings for Impaired or Insolvent Insurers

For all proceedings in which the impaired or insolvent insurer is a party in any court in Kansas, the bill extends the stay from 60 days to 180 days from the date an order of liquidation, rehabilitation, or conservation is final to permit proper legal action by the Association.

Repeal of Act Construction Provision

The bill repeals a section of the Act pertaining to the construction of the original Act (KSA 40-3004).

Definitions Pertaining to the Kansas Insurance Guaranty Association

The bill updates the definition of "covered claim" to include claim obligations that arose through the issuance of an insurance policy by a member insurer, which are later allocated, transferred, merged into, novated (replaced with a new contract), assumed by, or otherwise made the sole responsibility of a member or nonmember insurer if:

- The original member insurer has no remaining obligation on the policy after the transfer;
- A final order of liquidation with a finding of insolvency has been entered against the insurer that assumed the member's coverage obligations by a court of competent jurisdiction in the insurer's state of domicile;
- The claim would have been a covered claim if the claim had remained the responsibility of the original member insurer, and the order of liquidation had been entered against the original member insurer with the same claim submission and liquidation date; and
- In cases where the member's coverage obligations were assumed by a nonmember insurer, the transaction received prior regulatory or judicial approval.

The bill also defines the term "cybersecurity insurance," which includes, for the purposes of KIGA, first- and third-party coverage, in a policy or endorsement, written on a direct, admitted basis for losses and loss mitigation arising out of or relating to data privacy breaches, unauthorized information network security intrusions, computer viruses, ransomware, cyber extortion, identity theft, and similar exposures.

Kansas Insurance Guaranty Association Board of Directors

The bill provides for, on and after January 1, 2025, the KIGA Board of Directors (KIGA Board) to have no fewer than seven members and no more than nine members. In accordance with this provision, the bill provides for members of the KIGA Board serving as of July 1, 2024, to continue their terms until their expiration. The bill authorizes the Commissioner to decide, upon expiration of a member's term, whether to continue the member's position or reduce the total number of KIGA Board members.

The bill also establishes that members of the KIGA Board are selected by member insurers, subject to the approval of the Commissioner, and serve a term of three years, but may be removed by the Commissioner for inefficiency, neglect of duty, or malfeasance.

Cybersecurity Insurance Obligation

The bill amends language regarding the limitation of the KIGA's exposure in the event of a cybersecurity claim. The bill does not require KIGA to pay more than $300,000 for all first- and third-party claims under a policy or endorsement providing, or that is found to provide, cybersecurity insurance coverage and arising out of, or related to, a single insured event, regardless of the number of claims made or the number of claimants.

Kansas Insurance Guaranty Association Duties

The bill also authorizes KIGA to provide covered policy benefits and service as part of its duties.

Exhaustion of Rights Under an Insurance Policy

Under continuing law, a claimant filing a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer that is also a covered claim is required to exhaust the claimant's right under the policy. The bill adds any right under a life insurance policy as an exception to the reduction of claim process.

Additionally, the bill further clarifies that the claim may be reduced by the lesser of:

- KIGA's covered claim limit;
- The amount of the judgment on the settlement of the claim; or
- Policy limits of the insolvent insurer's policy.