

ACT 75

S.B. NO. 1484

A Bill for an Act Relating to the Insurance Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 431, Hawaii Revised Statutes, is amended by adding to part IV of article 3 a new section to be appropriately designated and to read as follows:

“§431:3- Immunity. There shall be no liability on the part of, and no cause of action shall rise against, the State, the commissioner, or the insurance division or its employees, agents, or independent contractors for any action taken by them in the performance of their powers and duties under this part.”

SECTION 2. Chapter 431, Hawaii Revised Statutes, is amended by amending the title of part IV of article 3 to read as follows:

“[[PART IV.]] RISK-BASED CAPITAL FOR [LIFE AND HEALTH] INSURERS”

SECTION 3. Section 431:3-401, Hawaii Revised Statutes, is amended as follows:

(1) By adding two new definitions to be appropriately inserted and to read as follows:

““Life or health insurer” means any insurer that is within the definition of section 431:1-204 or 431:1-205 and is licensed under article 3, or a licensed property and casualty insurer writing only accident and health insurance.

“Property and casualty insurer” means any insurer that is within the definition of section 431:1-206, 431:1-207, 431:1-208, 431:1-209, 431:1-210, or 431:1-211 and is licensed under article 3, but shall not include monoline mortgage guaranty insurers, financial guaranty insurers, and title insurers.”

(2) By amending the definition of “adjusted risk-based capital report” to read as follows:

“Adjusted risk-based capital report” means a risk-based capital report which has been adjusted by the commissioner in accordance with section [431:3-402(c).] 431:3-402(e).”

(3) By amending the definition of “negative trend” to read as follows:

“Negative trend” means [a], with respect to a life or health insurer, negative trend over a period of time, as determined in accordance with the “trend test calculation” included in the risk-based capital instructions.”

(4) By amending the definition of “total adjusted capital” to read as follows:

““Total adjusted capital” means the sum of:

- (1) An insurer’s statutory capital and surplus[; and] as determined in accordance with the statutory accounting applicable to the annual financial statements required to be filed under section 431:3-301; and
- (2) Any other items that the risk-based capital instructions may provide.”

SECTION 4. Section 431:3-402, Hawaii Revised Statutes, is amended to read as follows:

“**[§431:3-402] Risk-based capital reports.** (a) Every domestic insurer, on or before each March 15 (the “filing date”), shall prepare and submit to the commissioner a report of its risk-based capital levels as of the end of the calendar year just ended, in a form and containing any information that is required by the risk-based capital instructions. In addition, every domestic insurer shall file its risk-based capital report:

- (1) With the National Association of Insurance Commissioners in accordance with the risk-based capital instructions; and
- (2) With the insurance commissioner in any state in which the insurer is authorized to do business, if the commissioner has notified the insurer of its request in writing, in which case the insurer shall file its risk-based capital report not later than the later of:
 - (A) Fifteen days from the receipt of notice to file its risk-based capital report with that state; or
 - (B) The filing date.

(b) [An] A life or health insurer’s risk-based capital shall be determined in accordance with the formula set forth in the risk-based capital instructions. The formula shall take into account and may adjust for the covariance [between] among the following, which shall be determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

- (1) The risk with respect to the insurer’s assets;
- (2) The risk of adverse insurance experience with respect to the insurer’s liabilities and obligations;
- (3) The interest rate risk with respect to the insurer’s business; and
- (4) All other business risks and any other relevant risks that are set forth in the risk-based capital instructions.

(c) A property and casualty insurer’s risk-based capital shall be determined in accordance with the formula set forth in the risk-based capital instructions. The formula shall take into account and may adjust for the covariance among the following, which shall be determined in each case by applying the factors in the manner set forth in the risk-based capital instructions:

- (1) Asset risk;
- (2) Credit risk;
- (3) Underwriting risk; and
- (4) All other business risks and such other relevant risks as are set forth in the risk-based capital instructions.

(d) An excess of capital over the amount produced by the risk-based capital requirements contained in this part and the formulas, schedules, and instructions referenced in this part is desirable in the business of insurance. Accordingly, insurers shall seek to maintain capital above the risk-based capital levels required by this part. Additional capital is used and useful in the business of insurance and helps to secure an insurer against various risks inherent in, or affecting, the business of insurance and not accounted for or only partially measured by the risk-based capital requirements contained in this part.

[(c)] (e) If a domestic insurer files a risk-based capital report which, in the judgment of the commissioner, is inaccurate, then the commissioner shall adjust the risk-based capital report to correct the inaccuracy and shall notify the insurer of the adjustment. The notice shall contain a statement of the reason for the adjustment. A risk-based capital report as so adjusted is referred to as an adjusted risk-based capital report.”

SECTION 5. Section 431:3-403, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

- “(a) “Company action level event” means any of the following events:
- (1) The filing of a risk-based capital report by an insurer which indicates that:
 - (A) The insurer’s total adjusted capital is greater than or equal to its regulatory action level risk-based capital but less than its company action level risk-based capital; or
 - (B) [The] If a life or health insurer, the insurer has total adjusted capital which is greater than or equal to its company action level risk-based capital but less than the product of its authorized control level risk-based capital and 2.5, and has a negative trend;
 - (2) The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the occurrence of the event in paragraph [(1)(A) or (B),] (1), if the insurer does not challenge the adjusted risk-based capital report under section 431:3-407; or
 - (3) If, pursuant to section 431:3-407, the insurer challenges an adjusted risk-based capital report that indicates the occurrence of the event in paragraph [(1)(A) or (B) under section 431:3-407,] (1), the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer’s challenge.
- (b) In the event of a company action level event, the insurer shall prepare and submit to the commissioner a [comprehensive financial] risk-based capital plan which shall:
- (1) Identify the conditions in the insurer which contribute to the company action level event;
 - (2) Contain proposals of corrective actions which the insurer intends to take and would be expected to result in the elimination of the company action level event;
 - (3) Provide projections of the insurer’s financial results in the current year and at least the four succeeding years, both in the absence of proposed corrective actions and giving effect to the proposed corrective actions, including projections of statutory operating income, net income, capital, and surplus. The projections for both new and renewal business may include separate projections for each major line of business and separately identify each significant income, expense, and benefit component;
 - (4) Identify the key assumptions having an impact on the insurer’s projections and the sensitivity of the projections to the assumptions; and
 - (5) Identify the quality of, and problems associated with, the insurer’s business, including but not limited to its assets, anticipated business growth and associated surplus strain, extraordinary exposure to risk, mix of business, and use of reinsurance in each case, if any.”

SECTION 6. Section 431:3-404, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) “Regulatory action level event” means, with respect to any insurer, any of the following events:

- (1) The filing of a risk-based capital report by the insurer which indicates that the insurer’s total adjusted capital is greater than or equal to its authorized control level risk-based capital but less than its regulatory action level risk-based capital;
- (2) The notification by the commissioner to an insurer of an adjusted risk-based capital report that indicates the occurrence of the event in paragraph (1), if the insurer does not challenge the adjusted risk-based capital report under section 431:3-407;
- (3) If, pursuant to section 431:3-407, the insurer challenges an adjusted risk-based capital report that indicates the occurrence of the event in paragraph (1) [under section 431:3-407], the notification by the commissioner to the insurer that the commissioner has, after a hearing, rejected the insurer’s challenge;
- (4) The failure of the insurer to file a risk-based capital report by the filing date, unless the insurer has provided an explanation for the failure which is satisfactory to the commissioner and has cured the failure within ten days after the filing date;
- (5) The failure of the insurer to submit a risk-based capital plan to the commissioner within the time set forth in section 431:3-403(c);
- (6) Notification by the commissioner to the insurer that:
 - (A) The risk-based capital plan or revised risk-based capital plan submitted by the insurer is, in the judgment of the commissioner, unsatisfactory; and
 - (B) The notification constitutes a regulatory action level event with respect to the insurer, if the insurer has not challenged the determination under section 431:3-407;
- (7) If, pursuant to section 431:3-407, the insurer challenges a determination by the commissioner under paragraph (6) [pursuant to section 431:3-407], the notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the challenge;
- (8) Notification by the commissioner to the insurer that the insurer has failed to adhere to its risk-based capital plan or revised risk-based capital plan, but only if the failure has a substantial adverse effect on the ability of the insurer to eliminate the [regulatory] company action level event in accordance with its risk-based capital plan or revised risk-based capital plan and the commissioner has so stated in the notification, and if the insurer has not challenged the determination under section 431:3-407; or
- (9) If, pursuant to section 431:3-407, the insurer challenges a determination by the commissioner under paragraph (8) [pursuant to section 431:3-407], the notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the challenge[, unless the failure of the insurer to adhere to its risk-based capital plan or revised risk-based capital plan has no substantial adverse effect on the ability of the insurer to eliminate the regulatory action level event with respect to the insurer].”

SECTION 7. Section 431:3-404, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) In determining corrective actions, the commissioner may take into account any relevant factors with respect to the insurer based upon the commis-

sioner's examination or analysis of the assets, liabilities, and operations of the insurer, including but not limited to the results of any sensitivity tests undertaken pursuant to the risk-based capital instructions. The risk-based capital plan or revised risk-based capital plan shall be submitted:

- (1) Within forty-five days after the occurrence of the regulatory action level event;
- (2) If the insurer challenges an adjusted risk-based capital report pursuant to section 431:3-407 and the challenge is not frivolous in the judgment of the commissioner, within forty-five days after the notification to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge; or
- (3) If the insurer challenges a revised risk-based capital plan [under section 431:3-407,] pursuant to section 431:3-407 and the challenge is not frivolous in the judgment of the commissioner, within forty-five days after notification to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge."

SECTION 8. Section 431:3-405, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

- “(a) “Authorized control level event” means any of the following events:
- (1) The filing of a risk-based capital report by the insurer which indicates that the insurer's total adjusted capital is greater than or equal to its mandatory control level risk-based capital but less than its authorized control level risk-based capital;
 - (2) The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the occurrence of the event in paragraph (1), if the insurer does not challenge the adjusted risk-based capital report under section 431:3-407;
 - (3) If, pursuant to section 431:3-407, the insurer challenges an adjusted risk-based capital report that indicates the occurrence of the event in [section 431:3-407(1),] paragraph (1), notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge;
 - (4) The failure of the insurer to respond in a manner satisfactory to the commissioner to a corrective order; provided the insurer has not challenged the corrective order under section 431:3-407; or
 - (5) If the insurer has challenged a corrective order under section 431:3-407 and the commissioner, after a hearing, has rejected the challenge or modified the corrective order, the failure of the insurer to respond in a manner satisfactory to the commissioner to the corrective order subsequent to rejection or modification by the commissioner.”

SECTION 9. Section 431:3-406, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§431:3-406~~]]~~ **Mandatory control level event.** (a) “Mandatory control level event” means any of the following events:

- (1) The filing of a risk-based capital report which indicates that the insurer's total adjusted capital is less than its mandatory control level risk-based capital;
- (2) Notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the occurrence of the event in para-

- graph (1), if the insurer does not challenge the adjusted risk-based capital report under section 431:3-407; or
- (3) If, pursuant to section 431:3-407, the insurer challenges an adjusted risk-based capital report that indicates the occurrence of the event [under section 431:3-407(1),] in paragraph (1), notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge.
- (b) In the event of a mandatory control level event[.];
- (1) With respect to a life or health insurer, the commissioner shall take any actions that are necessary to cause the insurer to be placed under regulatory control under article 15. In that event, the mandatory control level event shall be deemed sufficient grounds for the commissioner to take action under article 15, and the commissioner shall have the rights, powers, and duties with respect to the insurer as are set forth in article 15. In the event the commissioner takes actions pursuant to an adjusted risk-based capital report, the insurer shall be entitled to the protections that are afforded to insurers under section 431:15-201. Notwithstanding any of the foregoing, the commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level event may be eliminated within the ninety-day period[.]; or
- (2) With respect to a property and casualty insurer, the commissioner shall take any actions that are necessary to cause the insurer to be placed under regulatory control under article 15, or, in the case of an insurer that is writing no business and is running-off its existing business, may allow the insurer to continue its run-off under the supervision of the commissioner. In either event, the mandatory control level event shall be deemed sufficient grounds for the commissioner to take action under article 15, and the commissioner shall have the rights, powers, and duties with respect to the insurer as are set forth in article 15. In the event the commissioner takes actions pursuant to an adjusted risk-based capital report, the insurer shall be entitled to the protections that are afforded to insurers under section 431:15-201. Notwithstanding any of the foregoing, the commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level event may be eliminated within the ninety-day period.'

SECTION 10. Section 431:3-407, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§431:3-407~~]]~~ **Hearing.** (a) The insurer shall have the right to a hearing pursuant to chapter 91 upon being notified of any of the following:

- (1) Notification to an insurer by the commissioner of an adjusted risk-based capital report;
- (2) Notification to an insurer by the commissioner that:
 - (A) The insurer's risk-based capital plan or revised risk-based capital plan is unsatisfactory; and
 - (B) The notification constitutes a regulatory action level event with respect to the insurer;
- (3) Notification to any insurer by the commissioner that the insurer has failed to adhere to its risk-based capital plan or revised risk-based capital plan and that the failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event with

respect to the insurer in accordance with its risk-based capital plan or revised risk-based capital plan; or

- (4) Notification to an insurer by the commissioner of a corrective order with respect to the insurer.

(b) The insurer shall have the right to a confidential hearing exempt from chapter 92, on the record, and pursuant to chapter 91, at which the insurer may challenge any determination or action by the commissioner. The insurer shall notify the commissioner of its request for a hearing within five days after receiving the notification by the commissioner pursuant to subsection (a). Upon receipt of the insurer's request for a hearing, the commissioner shall set a date for the hearing, which date shall be no less than ten days, nor more than thirty days, after the date of the insurer's request."

SECTION 11. Section 431:3-408, Hawaii Revised Statutes, is amended to read as follows:

“[[§431:3-408]] Confidentiality and prohibition on announcements[.]; prohibition on use in ratemaking. (a) All risk-based capital reports (to the extent the information therein is not required to be set forth in a publicly available annual statement schedule) and risk-based capital plans (including the results or report of any examination or analysis of an insurer performed pursuant to this part and any corrective order issued by the commissioner pursuant to examination or analysis) with respect to any domestic insurer or foreign insurer which are filed with the commissioner, constitute information that might be damaging to the insurer if made available to its competitors, and therefore shall be kept confidential by the commissioner. This information shall not be made public or be subject to subpoena, other than by the commissioner and then only to enforce actions taken by the commissioner pursuant to this part or any other provision of the insurance laws of this State.

(b) The comparison of an insurer's total adjusted capital to any of its risk-based capital levels is a regulatory tool which may indicate the need for possible corrective action with respect to the insurer and is not intended as a means to rank insurers generally. Therefore, except as otherwise required under this part, the making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio or television station, or in any other way, an advertisement, announcement, or statement containing [[an[]] assertion, representation, or statement with regard to the risk-based capital levels of any insurer, or of any component derived in the calculation, by any insurer, agent, broker, or other person engaged in any manner in the insurance business would be misleading and is therefore prohibited; provided that if any materially false statement with respect to the comparison regarding an insurer's total adjusted capital to its risk-based capital levels (or any of them) or an inappropriate comparison of any other amount to the insurer's risk-based capital levels is published in any written publication and the insurer is able to demonstrate to the commissioner with substantial proof the falsity of the statement, or the inappropriateness, as the case may be, then the insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

(c) The risk-based capital instructions, risk-based capital reports, adjusted risk-based capital reports, risk-based capital plans, and revised risk-based capital plans are intended solely for use by the commissioner in monitoring the solvency of insurers and the need for possible corrective action with respect to insurers and shall

not be used by the commissioner for ratemaking, nor considered or introduced as evidence in any rate proceeding, nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance which an insurer or any affiliate is authorized to write.”

SECTION 12. Section 431:3-409, Hawaii Revised Statutes, is amended to read as follows:

“[[§431:3-409]] Supplemental provisions[.]; rules; exceptions. [The provisions of this] (a) This part [are] is supplemental to any other laws of this State, and shall not preclude or limit any other powers or duties of the commissioner under those laws, including, but not limited to [[article 15]].

(b) The commissioner may adopt rules necessary for the implementation of this part.

(c) The commissioner may exempt from the application of this part any domestic property and casualty insurer which:

- (1) Writes direct business in this State;
- (2) Writes direct annual premiums of \$2,000,000 or less; and
- (3) Assumes no reinsurance in excess of five per cent of direct premiums written.”

SECTION 13. Section 431:3-410, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) In the event of a company action level event [or], regulatory action level event, or authorized control level event with respect to any foreign insurer as determined under the risk-based capital statute applicable in the state of domicile of the insurer, or if no risk-based capital provision is in force in that state, under this part, if the insurance commissioner of the state of domicile of the foreign insurer fails to require the foreign insurer to file a risk-based capital plan in the manner specified under the risk-based capital law of that state, or if no risk-based capital provision is in force in that state, under section 431:3-403, the commissioner may require the foreign insurer to file a risk-based capital plan with the commissioner. In this event, the failure of the foreign insurer to file a risk-based capital plan with the commissioner shall be grounds to order the insurer to cease and desist from writing new insurance business in this State.”

SECTION 14. Section 431:3-413, Hawaii Revised Statutes, is amended to read as follows:

“[[§431:3-413]] Phase-in provision. (a) For risk-based capital reports required to be filed by life or health insurers with respect to 1994, the following requirements shall apply in lieu of sections 431:3-403, 431:3-404, 431:3-405, and 431:3-406:

- (1) In the event of a company action level event with respect to a domestic insurer, the commissioner shall take no regulatory action hereunder;
- (2) In the event of a regulatory action level event under section 431:3-404(a)(1), (2), or (3), the commissioner shall take the actions required under section 431:3-403;
- (3) In the event of a regulatory action level event under section 431:3-404(a)(4), (5), (6), (7), (8), or (9), or an authorized control level event, the commissioner shall take the actions required under section 431:3-404 with respect to the insurer; and

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- (4) In the event of a mandatory control level event with respect to an insurer, the commissioner shall take the actions required under section 431:3-405 with respect to the insurer.
- (b) For risk-based capital reports required to be filed by property and casualty insurers with respect to 1997, the following requirements shall apply in lieu of sections 431:3-403, 431:3-404, 431:3-405, and 431:3-406:
 - (1) In the event of a company action level event with respect to a domestic insurer, the commissioner shall take no regulatory action hereunder;
 - (2) In the event of a regulatory action level event under section 431:3-404(a)(1), (2), or (3), the commissioner shall take the actions required under section 431:3- 403;
 - (3) In the event of a regulatory action level event under section 431:3-404(a)(4), (5), (6), (7), (8), or (9), or an authorized control level event, the commissioner shall take the actions required under section 431:3-404 with respect to the insurer; and
 - (4) In the event of a mandatory control level event with respect to an insurer, the commissioner shall take the actions required under section 431:3-405 with respect to the insurer.”

SECTION 15. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 16. This Act shall take effect upon its approval.

(Approved April 23, 1997.)

Note

1. Edited pursuant to HRS §23G-16.5.