

PROJECT HISTORY - 2021

GUIDELINE FOR ADMINISTRATION OF LARGE DEDUCTIBLE POLICIES IN RECEIVERSHIP (#1980)

1. Description of the Project, Issues Addressed, etc.

In 2018, the Receivership Large Deductible Workers' Compensation (E) Working Group of the Receivership and Insolvency (E) Task Force was given charges in response to issues arising out of the *2016 Workers' Compensation Large Deductible Study* by the NAIC/International Association of Industrial Accident Boards and Commissioners (IAIABC) Joint (C) Working Group to recommend possible enhancements to the U.S. receivership regime.

In 2018, the Working Group heard presentations from the National Conference of Insurance Guaranty Funds (NCIGF) and nine states/insurers with experience with a receivership involving large deductible workers' compensation. The Working Group also conducted a survey of states' laws, practices and recommendations, to which 27 states responded. It was clear through this work that having statutory authority specific to large deductible workers' compensation products in receiverships was key to the successful resolution of these insurers. As a result of its work, on Nov. 16, 2018, the Working Group presented the Task Force with its recommendation regarding statutory authority.

The Working Group recommended state adoption of clear statutory authority that articulates the respective rights and responsibilities of the various parties in large deductible workers' compensation business receiverships. Having clear statutory authority in place can avoid much of the confusion, and sometimes expensive and prolonged litigation, for both the receiver and the guaranty funds. Clear statutory authority can also avoid collections delays that dilute recoveries.

Based on the study, the Working Group recommended that states adopt statutory authority regarding large deductible workers' compensation products in receiverships. Prior to the development of the new guideline, there were two options available:

- 1) *Insurer Receivership Model Act* (#555—IRMA) Section 712—Administration of Loss Reimbursement Policies; or
- 2) NCIGF Model Large Deductible Legislation.

Twelve states have adopted the NCIGF model using varying language (California, Florida, Indiana, Illinois, Louisiana, Michigan, Missouri, New Jersey, Pennsylvania, Texas, Utah and West Virginia). Most of these states follow the NCIGF approach and have amended their insurance liquidation acts to clarify the following when to secure competing claims such as deductible amounts owed the insurer and retroactive premium balances: 1) the ownership of the deductible reimbursements or collateral drawdowns; 2) claims-handling matters; 3) collection responsibility; and 4) allocation of collateral.

After recommending to the Task Force that states adopt clear statutory, the Working Group discussed differences between Model #555 and the NCIGF model during 2019 and 2020. While Section 712 is part of Model #555, it was the opinion of the Working Group that the alternative language to Section 712 should be drafted as a guideline because it does not meet the two-pronged test to be a model law. Therefore, the Working Group agreed to draft a new model guideline for the Administration of Large Deductible Policies in Receivership as an alternative to Model #555, Section 712—Administration of Loss Reimbursement Policies. The new model guideline is based largely on the principles and structure of the NCIGF model with certain modifications.

2. Name of Group Responsible for Drafting the Model and States Participating

The Receivership and Insolvency (E) Task Force is responsible for Model #555. The 2020 members of the Task Force are: Texas (Chair), District of Columbia (Vice Chair), Alaska, American Samoa, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee and Utah.

The Receivership Large Deductible Workers' Compensation (E) Working Group evaluated the issues and drafted the draft model guideline relating to Section 712 of Model #555 based on the NCIGF principles from the NAIC model (available on the NCIGF website).

The 2020 members of the Working Group are: Pennsylvania (Co-Chair); Oklahoma (Co-Chair), Alaska, Arkansas, Florida, Georgia, Illinois, Maine, Missouri, Nebraska, New Jersey, New Mexico and Texas.

An informal drafting group was formed in 2020 consisting of Donna Wilson (OK), Toma Wilkerson (FL), Robert Wake (ME), James Kennedy (TX), Barbara Cox (NCIGF) and Rowe Snider (Locke Lord LLP).

3. Project Authorized by What Charge and Date First Given to the Group

The Receivership Large Deductible Workers' Compensation (E) Working Group of the Receivership and Insolvency (E) Task Force was given the follow charge beginning in 2018:

"Study states' receivership laws and practices regarding receivership of insurers with significant books of large deductible workers' compensation business, and evaluate the need for a model act/rule, or amendments to existing models, that governs the rights and duties of the various parties regarding large deductible business in insolvencies, including, but not limited to, consideration of a provision that expressly permits the collection of large deductibles from insureds during an insolvency proceeding. Provide any other recommendations for possible enhancements to the U.S. receivership regime based on this study."

4. A General Description of the Drafting Process (e.g., drafted by a subgroup, interested parties, the full group, etc.). Include any parties outside the members that participated.

The Receivership Large Deductible Workers' Compensation (E) Working Group, chaired by Donna Wilson (OK) and Laura Lyon Slaymaker (PA), drafted the model guideline. Open conference calls were held where interested parties participated. The information drafting group included four state insurance regulators and two industry volunteers.

5. A General Description of the Due Process (e.g., exposure periods, public hearings or any other means by which widespread input from industry, consumers and legislators was solicited).

- a. The Working Group held five open conference calls between August 2018 and November 2018 where it: 1) heard presentations from the NCIGF; 2) heard presentations from nine states and insurers with experience with a receivership involving large deductible workers' compensation; and 3) reviewed survey results from 27 states regarding their laws, practices and recommendations.
- b. The Working Group began by amending the NCIGF model as an alternative approach to Section 712 of Model #555. The Working Group held five open meetings between February 2019 and December 2019. During its Dec. 2, 2019, meeting, the Working Group exposed a new draft model guideline for a 60-day public comment period ending Jan. 31, 2020. The guideline is an alternative approach to Model #555, Section 712 based on the NCIGF model and amended to reflect administrative fees, a state-specific citation for the definition of "large deductible" and the guaranty association entitlement to the net

amount of the reimbursement. In conjunction with the model guideline, NAIC legal staff drafted a memorandum explaining the difference between a guideline and a model law.

- c. The Working Group received two comment letters during the exposure period from Maine and the NCIGF.
- d. The Working Group met via open meeting March 2, 2020 and formed a drafting group to further amend the draft guideline to address comments received. The drafting group met four times between March 2020 and September 2020.
- e. On Sept. 30, 2020, via open meeting, the Working Group exposed a revised draft Guideline for Administration of Large Deductible Policies in Receivership for a 30-day period ending Oct. 30, 2020. The revised guideline was re-drafted based largely on the principles and structure of the NCIGF model with certain modifications. It is based on the principles rather than the NCIGF model because the NCIGF model approach has been adopted by several states using varying language. The NCIGF model has evolved over time based on additional experiences from insolvencies and continues to be modified as warranted by the NCIGF.
- f. All exposure drafts were distributed to more than 120 interested parties and posted to the Working Group's public web page. Barbara Cox (NCIGF) and Rowe Snider (Locke Lord LLP) actively participated in the drafting group.
- g. The Working Group adopt the guideline on Nov. 5, 2020.
- h. The Receivership and Insolvency (E) Task Force adopted the guideline on Nov. 19, 2020.
- i. The Financial Condition (E) Committee adopted the guideline at the Fall National Meeting on Dec. 8, 2020.
- j. The Executive (EX) Committee and Plenary adopted the guideline at the Spring National Meeting on Apr 14, 2021.

6. A Discussion of the Significant Issues (items of some controversy raised during the due process and the group's response).

Deductible Reimbursements and Collateral

The primary distinction between the NCIGF and Model #555, Section 712—Administration of Loss Reimbursement Policies, is the issue of deductible reimbursements and collateral. Twelve states have adopted large deductible policy laws based on the NCIGF model principles using varying language. It should be noted that no state has enacted the reinsurance approach described below in Model #555. Therefore, it was the decision of the Working Group to include the NCIGF approach to collateral within the Guideline.

- The NCIGF model “secured claim” approach: Claims within the deductible are primarily the obligation of the policyholder. Under this approach, deductible reimbursements are earmarked to pay those claims, and any collateral posted by or on behalf of the policyholder is held to ensure that those claims are paid. Accordingly, when the guaranty association takes pays a claim within the deductible, it earns the benefit of the reimbursement due from the policyholder and the right to draw on the collateral, if necessary, or to initiate a draw by the receiver, for the benefit of the guaranty fund.
- Model #555 Section 712 “reinsurance” approach: The insurer’s obligation to pay all covered claims and the policyholder’s obligation to reimburse the insurer are unconditional and each is

independent of the other. Under this approach, deductible reimbursements are a general asset of the estate and the guaranty fund only benefits from the deductible reimbursements in proportion to its share as a creditor of the estate. The receiver has the right to collect all deductible reimbursements, drawing on collateral as necessary. Any reimbursements paid to the guaranty association are treated as early access distributions and offset from future recoveries from the estate.

7. Any Other Important Information (e.g., amending an accreditation standard).

None