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Senate Bill 707 (Substitute S-2 as passed by the Senate)

Sponsor: Senator Dick Posthumus

Committee: Commerce and Technology

Date Completed: 6-8-88

RATIONALE

In December 1987, the Michigan Court of Appeals ruled that the Catastrophic Claims Association (CCA) is a State agency and, as such, is bound by the rule-making requirements of the Administrative Procedures Act (APA). Accordingly, the Court held that the CCA's plan of operation had to be repromulgated as a rule to be effective (League General Insurance Company v Catastrophic Claims Association, 165 Mich App 278). Some people believe that the Court was wrong in applying the APA to the Association and that the Insurance Code should be amended to reverse this decision and preclude a similar ruling in relation to other insurance associations.

CONTENT

The bill would amend the Insurance Code to validate retroactively any plan of operation adopted by an "association or facility" created under the Code as a nonprofit organization of insurer members, and to validate any premium or assessment levied against an insurer member. The bill specifies that such an association or facility, or its board of directors, would not be a State agency, its money would not be State money, its records would be exempt from the Freedom of Information Act. Premiums or assessments levied by an association or facility, or a premium or assessment of a similar association or facility formed under a law in force outside this State, would not be a "burden or special burden" for purposes of the retaliatory tax or included in determining the aggregate amount a foreign insurer must pay under that tax. Organizations the bill would apply to are the Worker's Compensation Placement Facility, the Basic Property Insurance Association, the Catastrophic Claims Association, the Automobile Insurance Placement Facility, the Life and Health Insurance Guaranty Association, and the Property and Casualty Guaranty Association.

The bill also specifies that it is "intended to codify...and validate the actions and long-standing practices taken by the associations and facilities...retroactively; "to rectify the misconstruction of the applicability of the Administrative Procedures Act...by the Court of Appeals in League General Insurance Company v Catastrophic Claims Association"; and to assure that the associations and facilities mentioned in the bill, and their boards of directors, were not treated as a State Agency or public body.

MCL 500.134

BACKGROUND

The Court of Appeals in League General affirmed the trial court's order holding that the Catastrophic Claims Association "was a State agency under the Administrative Procedures Act, that its plan of operation was null and void and of no effect because it was not properly

promulgated under the APA, and that premium assessments charged member insurers under the plan of operation were unenforceable until [the CCA] adopted valid rules under the APA". The Court went on to say, "An examination of the CCA's character and relation to the state reveals that the association was created by statute, that the Commissioner of Insurance appoints the director and serves as ex officio member of the board of directors, and that the CCA levies mandatory assessments against its members and has the power to adopt rules and hear complaints... Finally, the CCA's function reveals characteristics of a state agency as well."

As the Court of Appeals described it, the CCA is an unincorporated nonprofit association created under the Insurance Code to indemnify insurance companies for catastrophic claims or the ultimate loss sustained under personal protection insurance coverages in excess of \$250,000. Each insurer writing automobile no-fault insurance in Michigan must belong to the CCA, which is authorized to cover the expected cost of catastrophic claims and the CCA's expenses. The insurers may charge each policyholder directly for the CCA assessment.

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS**Supporting Argument**

The League General litigation has created uncertainty regarding the status of the associations and facilities named in the bill, and the Court of Appeal's reasoning in regard to the Catastrophic Claims Association could be applied to these other entities as well. Uncertainty about their status makes all of the associations and facilities vulnerable to members' refusing to participate if they become dissatisfied about some element of the operation. Unnecessary litigation, and being subjected to the APA's rule-making process, obviously would disrupt the functioning of these facilities. In order to ensure that they continue to provide the coverage and protection to the public for which they were created, their status as nongovernmental entities should be confirmed.

Supporting Argument

The bill would make it clear that payments made to the named facilities and associations would not be included when determining the retaliatory tax (which requires an out-of-state insurer to pay the same rate a Michigan-based insurer would have to pay in the foreign insurer's state). This issue was not directly addressed when the retaliatory tax provisions were revised by Public Act 261 of 1987.

S.B. 707 (6-8-88)

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.