

HOUSE BILL REPORT

ESB 6240

As Reported by House Committee On:
Financial Institutions & Insurance
General Government Appropriations

Title: An act relating to forming joint underwriting associations.

Brief Description: Regulating joint underwriting associations.

Sponsors: Senators Keiser, Eide, Kauffman, Gordon and McDermott; by request of Insurance Commissioner.

Brief History:

Committee Activity:

Financial Institutions & Insurance: 2/17/10, 2/23/10 [DPA];
General Government Appropriations: 2/25/10 [DPA(FII)].

**Brief Summary of Engrossed Bill
(As Amended by House)**

- Grants the Insurance Commissioner the authority to create a market assistance plan for excess flood insurance.
- Grants the Insurance Commissioner the authority to create a joint underwriting authority for excess flood insurance.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: Do pass as amended. Signed by 9 members: Representatives Kirby, Chair; Kelley, Vice Chair; Bailey, Ranking Minority Member; Hurst, McCoy, Nelson, Roach, Santos and Simpson.

Minority Report: Do not pass. Signed by 2 members: Representatives Parker, Assistant Ranking Minority Member; Rodne.

Staff: Jon Hedegard (786-7127).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Flood Insurance.

In 1968 the federal government created the National Flood Insurance Program (NFIP) to limit flood damage and to provide coverage. According to the NFIP, approximately 32 insurers participate in the NFIP in Washington. There is no state oversight of the NFIP policies. The NFIP policies may be offered by participating insurers and their agents. Agents licensed in Washington who sell federal flood insurance policies are required by state law to comply with the minimum training requirements required by the Federal Emergency Management Agency. Flood insurance is not generally provided by the authorized insurance market. Flood damage is excluded in most private property insurance policies. Flood coverage may be available above the NFIP policy limits, often in the surplus lines markets.

The NFIP policy limits are generally as follows (higher limits of building coverage may be available in Alaska, Hawaii, the U.S. Virgin Islands, and Guam):

Building Coverage.

- single-family dwelling: \$250,000
- other residential: \$250,000
- non-residential: \$500,000

Contents Coverage.

- residential: \$100,000
- non-residential: \$500,000

Market Assistance Plans.

A Market Assistance Plan (MAP) is a voluntary mechanism by insurers writing casualty insurance in this state (in either the admitted or nonadmitted market) to provide casualty insurance for a class of insurance. The bylaws and method of operation of any MAP must be approved by the Insurance Commissioner (Commissioner) prior to its operation. A MAP must have a minimum of 25 insurers willing to insure risks within the designated class of insurance. The Commissioner can compel casualty insurers to participate to fulfill the quota. The Commissioner's requirement is a condition of continuing to do business in this state. The Commissioner's designation must be based on the insurer's premium volume of casualty insurance in this state. Essentially, a MAP does not provide or require coverage. Instead, it is a mechanism intended to allow the potential insured to have their application reviewed by the MAP participants.

Joint Underwriting Authorities.

A Joint Underwriting Authority (JUA) is a statutorily created entity authorized by the Legislature to provide coverage in specific markets where insurance is all but unavailable. A JUA is generally intended to solve issues of availability of insurance, though it may have some impact on affordability also. Once a JUA is authorized, the Commissioner usually has the authority to establish a nonprofit entity that provides insurance coverage to a specified class of prospective insureds. The JUA is comprised of insurers who can be compelled to participate as a condition of continuing to do business in this state. Those insurers are usually licensed to sell that type of product. To help fund the JUA, the Commissioner may impose monetary assessments. The Commissioner usually adopts a plan of operation by rule. That plan may be developed primarily by the Commissioner or the participating insurers. Administration of the JUA may be contracted to a servicing insurer. Rates and forms are

usually established by the JUA's member insurers. Those rates and forms are subject to the same standards as are applicable in the market. There are two statutorily created JUAs in the state:

- the Day Care JUA, established in 1986 but never activated; and
- the Midwives' JUA, created in 1993.

The Midwives' JUA.

The JUA providing midwifery and birth center malpractice insurance was activated after a MAP did not resolve market issues. The Midwives' JUA is governed by a board of representatives from member insurers, the service insurer, and other industry licensees. Board members are appointed by the Commissioner. Standards for eligibility for coverage are established by rule. Member insurers are insurers that have a certificate of authority to write medical malpractice, general casualty insurance, or both in Washington. Under state law, all member insurers are liable for the assessment for the startup costs of the JUA. Any ongoing assessment is based on "direct premiums earned" in Washington for "medical malpractice" and for specific "other liability" on the member insurer's most recent annual statement. By rule, member insurers reporting zero "direct premiums earned" in those areas are not assessed.

Summary of Amended Bill:

Definitions.

"Dam" is defined as a U.S. Army Corps of Engineers dam in a county with a population over one million people.

"Excess flood insurance" is defined as "insurance against loss, including business interruption, arising from flood that is in excess of the limit of liability insurance offered" by the NFIP. Excess flood insurance does not include coverage for personal lines.

"Personal lines" are defined to include:

- private passenger automobile coverage;
- homeowner's coverage and renter's coverage;
- dwelling property coverage;
- earthquake coverage for a residence or personal property;
- personal liability and theft coverage;
- personal inland marine coverage; and
- mechanical breakdown coverage for personal auto or home appliances.

Personal lines are excluded from the definitions of "casualty insurance" and "property insurance."

Market Assistance Plans.

The Commissioner must by rule require insurers authorized to write property insurance in this state to form a MAP to assist persons located in an area protected by a dam that are unable to purchase excess flood or business interruption insurance in an adequate amount from either the admitted or nonadmitted market. The bylaws and method of operation of any

MAP must be approved by the Commissioner prior to its operation. A MAP must have a minimum of 25 insurers willing to insure risks within the class designated by the Commissioner. If 25 insurers do not voluntarily agree to participate, the Commissioner may require certain insurers to participate in a MAP as a condition of continuing to do business in this state. This requirement may be imposed on property insurers, casualty insurers, or insurers licensed to sell property and casualty insurance. The Commissioner must make such a requirement to fulfill the quota of at least 25 insurers. The Commissioner must make his or her designation on the basis of the insurer's premium volume of property insurance in this state.

Establishment of a JUA for Excess Flood Insurance.

The Commissioner may establish a JUA for Excess Flood Insurance (Flood JUA) to provide excess flood insurance for damages arising from the failure of a dam or from efforts to prevent the failure of a dam. The Commissioner must hold a hearing before forming a Flood JUA. A Flood JUA may not begin underwriting operations until the Commissioner finds that:

- a MAP is inadequate because fewer than four admitted or surplus lines insurers are offering excess flood insurance, exclusive of personal insurance;
- persons, businesses, or service providers cannot buy excess flood insurance through the voluntary market; or
- there are so few insurers selling excess flood insurance that a competitive market does not exist.

A finding by the Commissioner may be appealed. The determination that four or more admitted or surplus lines insurers are offering excess flood insurance, exclusive of personal insurance, is prima facie evidence that a competitive market does exist.

Qualifications to be Insured Under the Flood JUA.

If a Flood JUA is formed, a person that is unable to obtain excess flood insurance because it is unavailable in the voluntary market or because the market is not competitive is eligible to apply to an association for insurance. A Flood JUA may decline to insure persons that present an extraordinary risk because of the nature of their operations, property condition, past claims experience, or inadequate risk management. However, the mere location of the property does not constitute an extraordinary risk. Any denial of coverage must include:

- a statement of the actual reason for declination; and
- a statement that the applicant may appeal the decision to the Commissioner.

If the Commissioner finds that the decision to decline coverage is not supported by the criteria, the Commissioner may require the Flood JUA to provide coverage. A decision of the Commissioner to provide or to decline to provide coverage may be appealed administratively.

Member Insurers.

Every insurer that has a certificate of authority to write either casualty or property insurance, or both, in this state must be a member of the Flood JUA as a condition of its authority to continue to transact business in this state. Surety insurance is excluded from the definitions of "property insurance" and "casualty insurance."

Governing Board.

The governing board (board) must consist of seven persons:

- Three board members must be member insurers appointed by insurance associations. At least one of the insurers must be a domestic insurer.
- Four board members must be residents. They may not be employed by, serve on the board of directors of, or have a substantial ownership interest in any insurer. One member is appointed by the Commissioner. One member is appointed by the King County Council. One member is appointed by the Association of Washington Cities, to represent one or more of the following municipal governments: Auburn, Kent, Renton, or Tukwila. One member is appointed by the board of directors of the Center for Advanced Manufacturing Puget Sound.

Original board members must be appointed to serve an initial term of three years and may be appointed for a second term. There is a process for members of the board to be removed by the board. Board members have a fiduciary duty to the policyholders of the Flood JUA.

Board members must not be compensated but may be reimbursed for expenses incurred to attend meetings. Indemnification by the Flood JUA is required for costs and expenses in connection with the defense of any action or suit related to the performance of duties for:

- board members of the Flood JUA;
- officers or employees of the Flood JUA; and
- member insurers.

Indemnification is not available for willful misconduct.

The board may select one or more persons to manage the operations of the Flood JUA. A manager must be authorized to transact insurance in the state and have demonstrated expertise in excess flood insurance.

Plan of Operation.

The board must adopt a Plan of Operation (Plan) within 30 days of its appointment. The Plan may take effect only after review by the Commissioner. The Commissioner may recommend changes. The changes must be approved by the board, or a written explanation of the rejected changes must be provided to the Commissioner. A Plan may be amended. All amendments must be approved by the Commissioner and a majority of the board.

Rates.

The Flood JUA must use rates that comply with chapter 48.19 RCW and that have been approved by the Commissioner. An actuarial analysis must accompany a rate filing.

Coverage Limits.

The Flood JUA may offer policies with coverage limits of up to \$5 million. There is an aggregate exposure cap of \$250 million for all in-force policies. The board and the Commissioner must equitably apportion policies within these limitations.

Unfair Practices.

A Flood JUA must comply with the provisions of the chapter in the Insurance Code that address unfair practices.

Annual Statement and Reporting.

A Flood JUA must file a statement annually with the Commissioner that contains information about the Flood JUA's transactions, financial condition, and operations during the preceding year. The statement must be in the form and in a manner approved by the Commissioner. The Commissioner may require a Flood JUA to furnish additional information.

Examinations.

The Commissioner may examine the transactions, financial condition, and operations of a Flood JUA. A Flood JUA is responsible for the total costs of its examinations.

Taxes and the Liability of the Guaranty Fund.

A Flood JUA is exempt from payment of all fees and all taxes levied by the state or any of its subdivisions, except taxes levied on real or personal property.

A Flood JUA is not a member of the guaranty fund created in the Washington Insurance Guaranty Association Act. The guaranty fund created under chapter 48.32 RCW, the state, and any political subdivisions are not responsible for losses sustained by the Flood JUA.

Funding of a Flood JUA.

A Flood JUA is funded by premiums paid by persons insured by the Flood JUA.

A Flood JUA may assess its members to pay past and future financial obligations of the Flood JUA not funded by premiums. An assessed insurer must pay within 30 days after it receives notice of the assessment. If an insurer does not pay an assessment in a timely manner:

- the assessment accrues interest at the maximum legal rate until it is paid in full. The interest is paid to the Flood JUA;
- the Flood JUA may collect the assessment in a civil action and must be awarded its attorneys' fees if it prevails;
- the Commissioner may suspend, revoke, or refuse to renew an insurer's certificate of authority; and
- the Commissioner may fine the insurer up to \$10,000.

Duration of a Flood JUA.

A Flood JUA may operate for a period of five years. At the end of the five-year period, the Flood JUA must be dissolved unless the Legislature authorizes its continued operation. Prior to the ending of the five-year period, the Commissioner or the board may hold a hearing and determine that:

- excess flood insurance is available in the voluntary market;
- excess flood insurance is available through a MAP; or
- a competitive market exists.

After such a finding, the Commissioner or the board must order the Flood JUA to end its underwriting operations.

Dissolution of a Flood JUA.

If the Commissioner or the board orders a Flood JUA to end all underwriting operations, the Commissioner must supervise the dissolution of the Flood JUA, including settlement of all financial and legal obligations and distribution of any remaining assets.

Rule-making Authority.

The Commissioner may adopt all rules needed to implement and administer this chapter and to ensure the efficient operation of the Flood JUA, including but not limited to rules:

- creating sample Plans;
- requiring or limiting certain policy provisions;
- regarding the basis and method for assessing members of the Flood JUA; and
- establishing the order in which the assets of a dissolved Flood JUA must be distributed.

Report to the Legislature.

The board and the Commissioner must annually report to the Legislature beginning on January 31, 2011, and continuing through the subsequent year after a Flood JUA is dissolved.

Surplus Lines.

A Flood JUA is not a part of the market that must be included in a surplus lines broker's search before the broker may sell surplus lines coverage.

The act expires on December 31, 2016.

Amended Bill Compared to Engrossed Bill:

New definitions are added and existing definitions are modified. "Dam" is defined as a U.S. Army Corps of Engineers dam in a county with a population over one million people. "Personal insurance" is defined. Personal insurance is excluded from the definitions of "excess flood insurance," "casualty insurance," and "property insurance." It is clarified that a Flood JUA will not compensate board members for their service. References to the Green River area are removed.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) This bill and the companion are close in substance. The most important issue remaining is whether or not personal lines should be included. This bill spreads the risk to personal lines. The bill addresses a crisis in the Green River area. If flooding occurs, it would have a massive impact on the economy. There are billions of dollars and many good jobs at stake. Employers are having some difficulty in finding flood insurance. They must

be given access to insurance. This is a jobs bill. It is necessary for the employers and employees in the area. The bill has been well worked. This committee held an extensive hearing on the companion. The bill requires a MAP before a JUA. The House version of the bill is a little more flexible in terms of definitions.

(With concerns) If a JUA requires an assessment, the Senate bill would impose a surcharge on every person with auto or homeowner's insurance in the state.

(Opposed) Insurers oppose the bill but would like to note that the Senate bill has been greatly improved since introduction. There have been several worthwhile changes, including the aggregate and individual policy limits on coverage and the objective standards that must be used before triggering a JUA. All of those features are in the House and Senate bills and all are appreciated. Many states have specific language on recoupment of assessments and that would be a welcome addition. The House bill has some additional features that make it a better bill than the Senate bill. These include the additional language regarding board compensation. The Senate and House amendments have improved their respective bills. The House bill is better than the Senate bill before the committee. The personal lines exclusion in the House bill is an important change that should be added to the Senate bill. Spreading commercial risk to personal lines is a bad idea. The amendments in the bill passed by the House should be included in this bill. The MAP requirement is very important. That process is likely to work and a JUA may never be needed. While the bill is much improved and can be improved more, it is still a problem for insurers.

(Available for questions) The Commissioner has always assumed that a MAP would be utilized before a JUA. That requirement probably should have been in the original bill. The Commissioner intends to hit the ground running on the implementation of a MAP. Ideally, the MAP will place all applicants. If not, a JUA may be necessary.

Persons Testifying: (In support) Senator Keiser, prime sponsor; and Doug Levy, Cities of Kent and Renton.

(With concerns) Jim Bricker, PEMCO Mutual Insurance Company.

(Opposed) Mel Sorensen, Property Casualty Insurers Association of America; Jean Leonard, Washington Insurers and State Farm; Carrie Tellefson, Progressive Insurance; and Cliff Webster, American Insurance Association.

(Available for questions) Drew Bouton, Office of the Insurance Commissioner.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Financial Institutions & Insurance. Signed by 10 members: Representatives Darneille, Chair; Takko, Vice Chair; Blake, Dunshee, Hudgins, Kenney, Pedersen, Sells, Van De Wege and Williams.

Minority Report: Do not pass. Signed by 4 members: Representatives McCune, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Klippert and Short.

Staff: Sara del Moral (786-7118).

Summary of Recommendation of Committee On General Government Appropriations Compared to Recommendation of Committee On Financial Institutions & Insurance:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) This is a good bill; the cities of Kent and Renton support it.

(Opposed) None.

Persons Testifying: Doug Levy, Cities of Kent and Renton.

Persons Signed In To Testify But Not Testifying: None.