

SUBJECT: Unfair discrimination against insurance customers

COMMITTEE: Insurance — committee substitute recommended

VOTE: 7 ayes — Smithee, Duncan, Averitt, Counts, De La Garza, Dutton, G.  
Lewis

1 nay — Shields

1 present, not voting — Driver

WITNESSES: (*On original version*)

For — Rob Schneider, Consumers Union; Maxine Aaronson, Texas Neighborhoods Together; Bob Tapia; Kat Allison, ACORN; Lawrence DeMartino, San Antonio Coalition of Neighborhood Associations of Texas; Don Wilmarth, Dallas Homeowners League; Craig McDaniel, Dallas City Councilman; Ephesian Harden; Victoria Frayser, Houston Homeowners Association; Mary Wallace, San Antonio Coalition of Neighborhood Association; Nancy Epstein, Disability Policy Consortium; Toye Jackson, ACORN; Jesse Romero, MALDEF; Rosa Rosales, LULAC.

Against — Robert D. Simpson, State Farm Insurance Company; Will Davis, USAA; James L. Young, Statesman National Life Insurance Company; Robert W. Blevins, Texas Life Insurance Association; Jay Thompson, AFACT; Fred Werkenthin; Robert Sneed, Texas Land Title Association.

BACKGROUND: The Texas Department of Insurance (TDI) administers various programs designed to make different insurance more available to consumers, and the state limits certain discriminatory insurer practices in Insurance Code arts. 21.21-3 and 21.21.-5.

TDI administers the Texas Automobile Insurance Plan (TAIP), which is the state's assigned-risk plan for high risk drivers. TDI also administers the state Catastrophe Property Insurance Pool Act (CATPOOL), under Insurance Code art. 21.49, to provide insurance for Texas coastal homes against hurricane and other wind damage for which other coverage could

not be found. The association writes the policies, but all losses are borne by the state's residential property insurers.

The state also established a now-defunct market assistance program (MAP) for liability policies, under Insurance Code art. 21.49-12, to assist businesses that were having difficulty acquiring product liability policies. The program languished because fewer than 10 applications were received.

Recent concerns about limited availability of homeowners insurance for certain customers and about unfair discrimination by insurers in general spurred studies and action by the state. The Legislature enacted HB 1461 in 1993, which allowed TDI and the Office of the Public Insurance Counsel (OPIC) to study underwriting guidelines from insurance companies doing business in Texas (long a confidential area), from which OPIC released a study of the guidelines and their effects.

Former state insurance commissioner Rebecca Lightsey issued new anti-discrimination rules that are set to take effect June 1, 1995, but may be delayed by current commissioner Elton Bomer until September 1, 1995. A TDI hearing on implementation is set for Wednesday. These rules would prohibit discrimination and would require insurers to prove a risk of loss when they underwrite policies on the basis of geographic location, disability, sex or age. Consumers would be allowed to sue for triple damages.

**DIGEST:**

CSHB 1367 would repeal current anti-discrimination articles (Insurance Code arts. 21.21-3 and 21.21-5) and replace them with new prohibitions on unfair discrimination by any legal entity engaged in the business of insurance. The bill also would allow county mutual companies to write homeowners and other types of residential insurance, establish new programs to help areas designated as underserved and establish other requirements for studies and reporting.

**UNFAIR DISCRIMINATION**

The new anti-discrimination provisions, Insurance Code art. 21.21.6, would prohibit various types of insurance companies, organizations and agents from engaging in any practice of unfair discrimination.

**Definition.** "Unfair discrimination" would mean refusing to insure, refusing to continue to insure, limiting the amount, extent, or kind of coverage available, or charging an individual a different rate for the same coverage solely because of race, color, religion, national origin, age, gender, marital status, handicap or partial handicap.

An insurer could take marital status into account to determine eligibility for dependent benefits. In addition, the prohibition against discrimination because of handicap or partial handicap could not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy.

**Exceptions.** An insurer who refused to insure, charged a higher rate or limited coverage on the basis of age, gender, marital status or handicap or partial handicap would not be in violation if:

- different treatment was based upon sound underwriting or actuarial principles reasonably related to actual or anticipated loss experience,
- the prospective insured was required to maintain membership in a club or organization as a uniform requirement of the insurer, or
- different treatment was required by law.

**Sanctions.** Violators would be subject to Article 1.10 sanctions including administrative penalties up to \$25,000 and cease and desist procedures.

## **COUNTY MUTUAL COMPANIES**

CShB 1367 would allow qualifying county mutual insurance companies to write all lines of personal liability insurance, residential fire insurance, residential allied lines insurance, homeowners insurance and farm and ranch owners insurance.

## **PROPERTY PROTECTION PROGRAM**

**Underserved areas.** The commissioner could designate areas as underserved for residential property insurance. The commissioner would

have to consider whether residential property insurance was reasonably available to a substantial number of owners of insurable property in the area.

**Policy forms.** The bill would require the commissioner to adopt underserved area policy forms to include a basic policy covering fire and allied lines perils with endorsements providing additional coverages at the option of the insured. All insurers authorized to write and writing residential property insurance in this state would be authorized to write insurance on the specialized forms and, if doing business in an underserved area, would be required to offer the specialized coverage.

**Rates.** The rates would be subject to the applicable statutory provisions relating to the respective insurers.

**Taxes.** Premiums collected by the insurance company would not be subject to taxation under Insurance Code art. 4.10. The premiums would not be considered net direct premiums, which are gross direct written premiums less return premiums upon cancelled contracts.

## **GROUP INSURANCE**

All insurers authorized to write and writing private passenger auto insurance or residential property insurance in this state could write such insurance on a group basis in areas designated by the commissioner as underserved. In making the designation, the commissioner would need to consider whether such insurance was reasonably available to a substantial number of insurable risks. The rates would be subject to the applicable statutory provisions relating to the respective insurers.

## **MAP**

The bill would repeal the market assistance program provisions and instead authorize the commissioner to establish a voluntary market assistance program to assist Texans in obtaining residential property insurance coverage in areas designated as underserved. A market assistance program division in TDI would be created if the commissioner established a MAP.

**Plan of operation.** The bill would require that the plan of operation indicate types of coverage, policy forms and terms application forms, eligibility and overall operation of the program. The bill would require the plan of operation to include the following provisions:

- applications could only be accepted from agents duly licensed by TDI;
- applications would need to be addressed to the MAP and be accompanied by a current nonrenewal or cancellation notice and a current declination letter from at least one other insurer, or two declination letters if the person did not have insurance;
- each insurer, participating voluntarily, would have the right to individually evaluate the risk and apply the rates allowable in this code;
- each insurer would have the option of providing a premium quote;
- an insurer would need to make its premium quote, indicate its refusal to quote, or make a request for additional time within 30 days of receiving the application;
- if a premium quote was made, the applicant's agent would be notified by the program and
- an applicant could not apply to the program again for the same coverage if the applicant lost the original coverage because of nonpayment or submission of a fraudulent claim.

**Mandatory programs.** The plan of operation would have to contain criteria under which the commissioner could make insurer participation in the program mandatory.

**Executive committee.** The program would be administered by an executive committee composed of nine members (five insurance industry representatives who are full-time employees of an authorized insurer, two public members and two licensed local recording agents) appointed by the commissioner.

The bill would require the executive committee to submit a plan of operation to the commissioner for adoption. If the executive committee failed to submit a suitable plan within 180 days following the effective date of this act, or if the committee failed to submit suitable amendments, TDI would submit a plan and/or amendments to the commissioner for adoption.

**Periodic review.** Information concerning the number and type of applications received and placed would be collected. The executive committee would review the demand for and performance of the program six months after the approval of the plan of operation, and at least annually thereafter. The executive committee would report to the commissioner as to the necessity of the voluntary program, the need for establishment of a mandatory program, or the need for establishment of a FAIR Plan.

## **FAIR PLAN**

If residential property insurance was not reasonably available in the voluntary market to a substantial number of insurable risks in all or any part of the state, and at least 50 percent of applicants to the MAP could not be placed in the previous 12 months, the commissioner could establish a fair access to insurance requirements (FAIR) plan. Each insurer providing residential property insurance would be required to participate.

**Governing committee.** The governing committee of the FAIR Plan Association would develop and administer the plan of operation. The committee would be composed of nine members (five insurance industry representatives who are full-time employees of an authorized insurer, two public members and two licensed local recording agents) appointed by the commissioner.

**Plan of operation.** The plan would include the following provisions:

- establishment of a FAIR Plan Association to issue residential property insurance in the association's name and to distribute the losses and expenses in the writing of such insurance;
- all insurers writing residential property insurance would be required to participate in the writings, expenses, profits, and losses of the association;

- a participating insurer would be entitled to receive credit for voluntarily written similar insurance in a designated underserved area and
- underwriting devices, including the use of deductibles, would be established as well as charges to members to fund the association and maximum limits of liability to be placed through the program.

**Powers of the association.** The association would be authorized to issue policies of insurance and endorsements in its own name and to act on behalf of all participating insurers in connection with said policies. The participating insurers would be liable to the association for the expenses and liabilities incurred by the association. Each insurer would be required to participate in the writings, expenses, profits, and losses of the association in the proportion that its net direct premiums written bear to the aggregate net direct premiums written by all insurers. Net direct premiums means gross direct written premiums less return premiums upon cancelled contracts written on residential property. Any action by an insured could be brought only against the association.

**Property inspection.** An applicant twice denied residential property insurance by insurers would be entitled to an inspection of the property by the Inspection Bureau, the organization designated by the association to make inspections. The bill requires that the applicant be informed in writing whether the property meets the reasonable underwriting standards in the plan of operation. If so, a policy would be written. If not, the applicant would be eligible for one reinspection 60 days after the initial inspection.

**Rates.** Rates would be set in an amount sufficient to carry all claims to maturity and to meet expenses. The commissioner would need to approve or state reasons for disapproval of the rates proposed by the association within 60 days.

**Judicial review.** An applicant could appeal to the association, then the commissioner, and then under the Administrative Procedures Act.

**Immunity.** Insurers, the inspection bureau, the association, the governing committee and the commissioner would be immune from liability with regard to inspections, acts or omissions, statements or findings.

**Assessments.** Each insurer would be subject to an assessment by the association in the event of a deficit, for which each insurer could charge a premium surcharge on every property insurance policy issued by it on property in this state for three years.

**Sanctions.** Violations of this act by the association, inspection bureau or insurer would be subject to sanctions authorized in Insurance Code art. 1.10, including administrative penalties of up to \$25,000 and cease and desist procedures.

**Annual report.** The association would submit an annual report to the commissioner every March 31 of the following year, and the report would be public record.

**Power of commissioner.** The commissioner would be responsible for supervising the association and inspection bureau and, among other things, would have free access to the books of the association and inspection bureau and could summon and examine witnesses having knowledge of those operations.

**Task force.** The commissioner could establish a task force to study the feasibility of instituting various property insurance initiatives in this state.

The bill would take effect immediately if approved by two-thirds of the membership of each house.

SUPPORTERS  
SAY:

CSHB 1367 would provide a comprehensive approach to dealing with the problem of "redlining" and of unfair insurance discrimination in general to assure that coverage is available to consumers.

**Redlining.** Redlining refers to a practice that, intentionally or unintentionally, results in different geographic areas being treated differently when the different treatment is not related to risk. This happens in all forms of insurance, including auto and homeowners insurance.



CSHB 1367 would curb that practice by firmly prohibiting unfair discrimination in all areas of insurance and by mandating the availability of residential property insurance (through a MAP or FAIR plan) if insurers do not willingly offer to insure.

A report by OPIC found that non-risk related factors such as location, race, income, or home value are strongly correlated to residential property coverage, or lack thereof. In Austin, the greater the minority population in a zip code, the less likely a home in that zip code is covered by standard homeowners insurance. In Dallas, a person is less likely to have standard homeowners insurance on a home in a zip code with a majority of low value homes. Many companies will not sell a standard homeowners policy if the house is worth \$50,000 or less. Based on that guideline, over half the homes in Texas would not be insurable.

A study of underwriting guidelines that insurance companies use to select policyholders reveals that insurance companies systematically refuse to insure homes based on the number of claims, the age and location of the home and the occupation and the lifestyle and marital status of the applicant. Some insurance companies do not insure homes that are more than 10 years old. This restriction is particularly hard on the elderly, residents of older neighborhoods and rural consumers.

Underwriting studies in 1994 found that companies representing 60 percent of the market restrict coverage for homes located in poor neighborhoods, near commercial property or in high crime areas. Again, the common factor in all of these underwriting guidelines is that none of them can be shown to correlate to risk of loss. Also important is that homeowners insurance is not an option for most homeowners; it is required by their mortgage company.

Auto insurance is more often denied minorities and poor people by zip code even though it is obvious that bad drivers do not all live in the same neighborhood. Other studies of auto insurance guidelines show that some companies deny coverage or charge higher rates to oil field workers, taxi drivers, politicians, police officers and others simply because of their jobs.

Whether the availability of insurance is being limited by unfair discrimination or underwriting guidelines unrelated to risk, CSHB 1367 would attempt to solve the availability problem.

**Unfair discrimination.** The prohibition against unfair discrimination in CSHB 1367 would expand protections currently in Insurance Code arts. 21.21-5 and 21.21-3 to prohibit unfair discrimination in the issuance of any kind of insurance, including homeowners, and in policy renewals. The provisions would deter unfair discrimination while also allowing the insurance industry reasonable means to assess risk and make decisions based on risk.

For example, an insurer would not be considered to have violated the prohibited discriminatory acts if the act was based upon "sound underwriting or actuarial principles reasonably related to actual or anticipated loss experience." This would take into account the possibility that upon recognition of a new dread epidemic, such as AIDS, a health insurer would be able to insure people based upon anticipated losses, since past losses could not be actuarially analyzed.

Many criteria for insuring are based on common sense. Even though a hurricane may not have hit South Padre Island in many years, making the actuarial tables deceiving, it would be common sense to presume that a big one will eventually hit, and this would be considered a sound underwriting principle. Although this provision would allow insurance companies some leeway, they know that with homeowners insurance at least, they would be forced into a FAIR program if they continue to discriminate and unfairly limit availability.

Excluding a private cause of action against violators of the unfair discrimination provisions is a sound idea for a number of reasons. First, TDI should be able to try to resolve the situation before lawsuits are brought. It is interesting to note that not a single claim has been brought before TDI based on the unfair discrimination laws, arts. 22.21-5 and 22.21-3, already on the books. Second, availability, not punishment, should be the focus, and the MAP and FAIR Plan should provide the necessary availability in the homeowner arena. Third, an abundance of lawsuits in an

area could actually exacerbate the availability problem because insurance companies would be skittish about insuring in that area.

**County mutuals.** Allowing county mutual insurance companies to write among other things, homeowners insurance, would make more insurance policies available to the people who cannot acquire standard insurance.

**Property protection program.** Allowing insurance companies to provide policies that meet the needs of high risk homes would allow many more people the opportunity to be covered by insurance. The commissioner would adopt policy forms that would allow an insurance company to sell basic insurance in an underserved area that might not include certain coverage on the house. For example, an older home might need a new roof to become insured. If the home were in an underserved area, the insurance company could sell a policy that excluded roof coverage. This would be beneficial for many Texans who would not be able to afford the major repair to get standard insurance. In addition, this program would give a tax break to those selling these policies as an incentive to continue offering this kind of valuable insurance.

**Market assistance programs.** The MAP would allow applicants in underserved areas to be matched with an insurer willing to insure their residence. This would be of great benefit since it is suspected that the main cause of unavailability may be really be just lack of marketing on the part of insurers in underserved areas.

A survey of 1,000 black and Hispanic Americans in five major cities showed that 95.7 percent of those who felt discriminated against by insurers had never actually been turned down for any type of insurance. Most insurers would be willing to insure a residence as long as they believe they will make money on the transaction. The MAP would get the word out that insurance is available to people in the underserved areas. Insurance companies would be able to provide a premium quote on the same coverage basis for which it normally provides insurance and would benefit from the extra business.

Moreover, if the voluntary MAP does not sufficiently match people with insurers, then the commissioner could impose a mandatory MAP by which all insurers would be required to participate.

**FAIR Plan.** The commissioner could establish the FAIR Plan which would set up an association to issue insurance in its name if the MAP program could not place 50 percent of its applicants and if residential property insurance remains unavailable. It is unlikely that this system would have to be implemented since insurance companies would start issuing residential insurance in underserved areas to avoid this result. The FAIR program would require that all insurers writing residential property insurance in this state participate in the writings, expenses, profits, and losses of the association, similar to their participation in the Catpool plan on the coast for hurricane and other wind insurance.

OPPONENTS  
SAY:

This bill proposes an ineffective attempt to address redlining, unfair discrimination and unfair underwriting principles that have resulted in insurance availability. CSHB 1367 would replace the current unfair-discrimination prohibition with a weaker one, encourage the use of substandard policies, unfairly provide tax breaks to the companies that write substandard policies and provide only tenuous guidelines for implementing the FAIR program, which should be implemented immediately. Victims of unfair practices would only end up with substandard insurance at higher prices.

**Unfair discrimination.** Current law requires that sound actuarial principles be used if an insurer refuses to renew a policy based on disability, sex or age. The bill would allow an insurer to refuse to insure or refuse to renew a policy based on disability, sex or age if the decision were based on sound underwriting principles reasonably related to anticipated loss experience. While actuarial principles clearly require a basis in proven risk, sound underwriting principles might include a marketing strategy. In addition, anticipated loss based on assumptions about the future could be very arbitrary, while the entire purpose of laws against unfair discrimination is to prevent people from arbitrary assumptions based on sex or disability or other group designation.

In addition, the bill would allow insurers to discriminate on the basis of geographic location, although this is prohibited under current law. The bill would add that for a discriminatory act to be prohibited, it must have been done "solely" on the basis of the discrimination. Any decision to refuse insurance based even in part on discrimination should be prohibited. Another disturbing provision in the bill would allow insurers to discriminate if they required membership in a club or group as a condition of insurance. There is nothing that would prevent groups from forming to discriminate.

Moreover, the bill should provide a private cause of action for victims to recover damages. Although availability is the main goal, victims should be able to be compensated for wrongs done to them. The likely reason no complaints have been made is that the people most often discriminated against are not able to afford to pursue their action. Sometimes, a lawsuit is the only thing that will convince a major company not to discriminate.

**County mutuals.** It is inappropriate to allow county mutual companies to write homeowners insurance. These companies provide auto insurance at extremely high rates to people who cannot acquire standard coverage. The assumption that only high risk people turn to county mutuals is mistaken. Many people who have been discriminated against are covered by county mutuals. The state should not abet setting higher cost insurance for these victims of discrimination. The state should help assure people of finding standard homeowners insurance at a standard cost, and this is not the way to do that.

**Property Protection Program.** This provision would allow insurers to offer substandard coverage. Instead of requiring insurers to provide standard residential insurance, it would allow insurers to offer substandard "basic" policies that exclude coverage for theft, roof, living expenses if displaced by fire, or other contingencies. People buy insurance to be protected from major losses, and yet this bill would not afford people insurance that would fully protect them. These areas are underserved but not necessarily high risk. Providing substandard insurance would be inappropriate in this situation.

In addition, the bill would encourage insurers to write substandard policies by giving them a tax break. Even county mutuals that would issue homeowners policies at exorbitant rates would be eligible for tax breaks. These benefits to the insurers would be to the detriment of the homeowner who deserves standard coverage.

**MAP.** The MAP programs would likely prove ineffective since the bill would not require that the insurers change their underwriting guidelines. The same people that do not qualify now would not qualify under the MAP. If a person owns a home older than 10 years the likelihood of rejection through MAP would still be high.

The MAP program's effectiveness would also be limited by its voluntary nature and the lack of guidelines for implementing a mandatory system. In addition, the executive committee should include more than two public members to monitor the program's effectiveness and the bill should require that data on MAP be provided to OPIC so the public could monitor progress.

**FAIR plan.** The FAIR plan might not ever be implemented under the vague criteria outlined in the bill, even though implementation might be crucial. For instance, what if the MAP program were such a dismal failure due to lack of promotion that only 100 people apply and at least 50 percent of the applicants were not placed. This would not provide a good indicator of availability.

In addition, the plan would provide only "residential property insurance," which would not include liability coverage or coverage for indirect losses such as hotel expenses if displaced. Homeowners insurance does provide those important types of coverage.

The governing committee should include more than two public members to monitor the program's effectiveness.

OTHER  
OPPONENTS  
SAY:

The FAIR program might put companies that specialize in low value/high risk policies out of business because all potential applicants would apply to the FAIR plan instead.

NOTES:

The authors plan to accept floor amendments that would:

- eliminate the word "solely" in the definition of unfair discrimination;
- restore a prohibition against discrimination based on location;
- change the word "handicap" to "disability,"
- clarify that the Catpool plan, which is similar to FAIR and generally provides insurance for wind related storms such as hurricanes to coastal homeowners, would be separate from the property protection program, the group insurance program, MAP or FAIR plan proposed by this bill;
- provide a time period for evaluating the mandatory MAP to see if the FAIR plan should be implemented;
- make the definition of "residential property" consistent;
- change "different" to "unaffiliated" to clearly distinguish insurers;
- change the judicial review provision to be consistent with other Insurance Code review processes, and
- provide that originating and issuing agents share commissions.

The original version only addressed discrimination and did not include provisions for a property protection program, group insurance, MAP or FAIR Plan.