CHAPTER 13: ARIZONA PROPERTY AND CASUALTY INSURANCE GUARANTY FUND

OVERVIEW

In 1977, the Arizona Legislature established the Arizona Property and Casualty Insurance Guaranty Fund (“the Fund”). From its inception, the objective of the Fund was to protect Arizona claimants and policyholders from financial loss due to the insolvency of an insurance company. To achieve this objective, the legislature made the Fund liable to the same extent the insolvent insurance company would have been liable under the policy had it remained solvent. *See* ***Arizona Prop. & Cas. Ins. Guar. Fund v. Herder***, 156 Ariz. 203, 205, 751 P.2d 519, 521 (1988) (*citing* ***Treffenger v. Arizona Ins. Guar. Ass’n***, 22 Ariz. App. 153, 524 P.2d 1326 (1974)). Thus, when an insolvency occurs, the Board activates the Fund, which then “steps into the shoes” of the insolvent insurance company to indemnify and defend its Arizona insureds.

FINANCING THE FUND (A.R.S. § 20-666)

To finance the Fund, the Fund evaluates the losses of the insolvent carrier and makes assessments against all other property and casualty insurers in Arizona. These assessments are then used to pay the claims made against the Fund, as well as the Fund’s expenses. Although the Fund is administered through the Department of Insurance under the auspices of the state, the money used does not include tax dollars. However, the member insurers do receive a tax credit for the assessment.

REQUIREMENTS TO COLLECT FROM THE FUND (A.R.S. § 20-661 & A.R.S. § 20-667)

Because the Fund’s resources are limited, the statute mandates six minimum requirements before a claimant may collect against the Fund:

1. The claimant or insured must be a resident of Arizona at the time of the loss. Where a property loss occurs, this requirement can be met if the property is permanently located in Arizona;
2. The carrier must be authorized to transact business in Arizona either when the policy was issued or when the loss occurred;
3. The carrier must be adjudged insolvent by a court of competent jurisdiction;
4. The claim amount must be in excess of $100;
5. The loss must be covered by the insolvent carrier’s policy; and
6. The claim must arise within the statutorily prescribed period.

THE FUND'S RIGHTS, OBLIGATIONS, AND DUTIES (A.R.S. § 20-664)

As mentioned above, when the Fund participates in a covered claim, it steps into the same position held by the insolvent carrier. In doing so, it assumes the same rights, duties, and obligations that the insolvent carrier had under the policy. Consequently, the Fund owes the insured of the insolvent carrier three duties: (1) to indemnify where a covered claim is involved; (2) to defend; and (3) to treat settlement proposals with equal consideration. See ***Arizona Prop. & Cas. Ins. Guar. Fund v. Helme***, 153 Ariz. 129, 137, 735 P.2d 451, 459 (1987) (stating that the insolvent carrier's policy language is controlling for coverage). Likewise, the insured has a duty to cooperate with the Fund under the terms of standard insurance policies.

Once the Fund takes over the role formerly held by the insolvent carrier, the Fund becomes authorized to investigate the claims brought against it and to "adjust, compromise, settle and pay covered claims to the extent of the Fund's obligation." A.R.S. § 20-664(A)(1). Indeed, the Fund becomes authorized to negotiate and become a party to such contracts as are necessary to terminate the Fund's obligation, and becomes empowered to deny all non-covered claims. To this end, the Fund may also initiate litigation to determine its obligations. *See Helme*, 153 Ariz. at 133, 735 P.2d at 455; *Herder*, 156 Ariz. at 208, 751 P.2d at 524.

COVERAGE UNDER THE FUND (A.R.S. § 20-661 & A.R.S. § 20-667)

A "covered claim" is one that would have been covered by the insolvent carrier's policy had it remained solvent. *See Helme*, 153 Ariz. at 133, 735 P.2d at 455. Accordingly, the Fund must analyze the insolvent carrier's policy to determine if coverage exists to decide whether the Fund should provide protection for the insured. In addition to having a claim that is covered under the policy, the claimant must also meet the statutory requirements as discussed above. If the claim is one that deserves protection by the Fund, then the Fund will become liable for the loss, but only to the extent the insolvent carrier would have been under the policy. *See Treffenger*, 22 Ariz. App. at 154, 524 P.2d at 1327; *e.g.,* ***Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund***, 184 Ariz. 610, 911 P.2d 616 (Ct. App. 1995). Regardless of the policy limits, however, the Fund will not become liable for an amount greater than $300,000. Arizona law requires the Fund to consider a covered claim that is more than $100, which means each claim is subject to a $100 statutory deductible. Finally, the Fund's obligations extend only to claims arising during the policy period of the insolvent carrier, not to exceed thirty (30) days after the date of insolvency.

MULTIPLE COVERAGE PROBLEMS UNDER THE FUND (A.R.S. § 20-673)

Under A.R.S. § 20-673, all applicable coverage available through other policies issued by solvent carriers must be exhausted before the Fund is required to pay a covered claim. *See Herder*, 156 Ariz. at 203, 751 P.2d at 524. In other words, all claimants are required to pursue any "other available insurance" which may also cover their loss. This usually means uninsured motorist coverage and underinsured motorist coverage, but also includes health insurance, workers' compensation insurance, and other types of insurance that may cover the insured. *See* ***Jangula v. Ariz. Prop. & Cas. Ins. Guar. Fund***, 207 Ariz. 468, 471, 88 P.3d 182, 185 (Ct. App. 2004). The court of appeals, however, held unconstitutional that portion of A.R.S. § 20-673(D) which

provided: "Such claimant shall have not claim against the insured of the insolvent carrier or the fund if the full amount of uninsured motorist coverage was not recovered by such claimant." That portion violated Ariz. Const. Article 18, Section 6 ("the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."). ***McKinney v. Aldrich***, 123 Ariz. 488, 490, 600 P.2d 1120, 1122 (Ct. App. 1979).

Where any other policy of insurance applies to a claim, the policy issued by the insolvent carrier is deemed by statute to be "excess" coverage. In this situation, the Fund will take an offset for the full amount of other coverage available to a claimant before paying a claim, even if the claimant did not exhaust the coverage. *See* ***Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund***, 189 Ariz. 433, 442-43, 943 P.2d 793, 802-03 (Ct. App. 1997). In addition, although there are no subrogation rights against the Fund or the insured of an insolvent insurer, subrogation is permitted against the ancillary or domiciliary receiver of the insolvent insurer. Furthermore, when the Fund pays its insured for an uninsured or underinsured claim, the Fund may subrogate against the third-party tortfeasors who caused the injuries to the insured.

THE FUND'S IMMUNITY (A.R.S. § 20-675)

A.R.S. § 20-675 immunizes the Fund from tort claims, such as bad faith and misrepresentation. *See* ***Wells Fargo Credit Corp. v. Ariz. Prop. & Cas. Ins. Guar. Fund***, 165 Ariz. 567, 572-73, 799 P.2d 908, 913-14 (Ct. App. 1990); *McKinney.* Specifically, according to A.R.S. § 20-675(A), the Fund shall have no liability, and no cause of action shall arise against any member carrier, the Fund's board, or its agents or employees, "for any action taken in the performance of their powers and duties pursuant to [A.R.S. § 20-661, -680]." However, an issue arises whether this immunity was intended to apply to the individual members of the board, agents, and employees of the Fund.

According to A.R.S. § 20-675(B), the Fund shall indemnify its board, agents, and employees against all expenses incurred in the defense of any action, suit or proceeding based on these persons' actions taken pursuant to their powers and duties. But if such persons are "finally adjudged" to have breached a duty involving gross negligence, bad faith, dishonesty, willful malfeasance or reckless disregard of the responsibilities of his or her office, the Fund will not provide indemnification. Further, an attorney hired by the Fund to represent the insured is not the Fund's "agent" for immunity and indemnification purposes, and can be sued for malpractice. ***Barmat v. John & Jane Doe Partners A-D***, 155 Ariz. 519, 520, 747 P.2d 1218, 1219 (1987). Thus, when the immunity and indemnification principles of A.R.S. § 20-675(A) and (B) are read together, it appears that the Fund has absolute immunity from suit while individual board members, agents, and employees of the Fund may not be immunized from suit if they act willfully in violation of their appointed duties.

The court of appeals discussed the wide scope of the Fund's immunity from tort liability in ***Bills v. Ariz. Prop. & Cas. Ins. Guar. Fund***, 194 Ariz. 488, 498-99, 984 P.2d 574, 584-85 (1999). The court analyzed whether the Fund's statutory immunity from bad-faith liability violated the Arizona Constitution's anti-abrogation and no-damage limitation provisions. The court held that the Fund's statutory immunity was constitutional because suing the Fund for bad faith was not a

fundamental right, and the Fund's immunity rationally furthered the state's legitimate interest in preserving the Fund's financial integrity.

SUBROGATION RIGHTS (A.R.S § 20-673)

While A.R.S. § 20-259.01(I) allows subrogation in the uninsured motorist context, the legislature has abrogated that right of subrogation in situations where a person's "uninsured" status is caused by the insolvency of the insurance carrier. Particularly, under A.R.S. § 20-673(D), insurance carriers "have no right of subrogation against the insured of the insolvent carrier or against the Fund for any amount paid by such insurer under uninsured motorist coverage." Similarly, under A.R.S. § 20-672(A), the Fund acquires no right of action against the insured of the insolvent carrier for any sums it has paid.

STAY OF PROCEEDINGS (A.R.S. § 20-676)

Once an insurance carrier is deemed insolvent, the Fund is entitled to an automatic six-month stay of all legal proceedings against the insolvent insurer and its insureds. At the request of any party with a showing of good cause, the court may shorten or lengthen the stay. For the Fund, the simple logic in this stay is to allow the newly acquired adjusting company and defense counsel time to properly prepare a defense for the insured. Other interested parties can seek leave of court to shorten or extend the stay to re-evaluate their respective positions in light of the Fund technically "stepping into the shoes" of the insolvent insurer, but also being entitled to additional offsets and credits for "other insurance" the insolvent carrier would not have had the benefit of exploiting in the legal proceedings. Additionally, the Fund is entitled to set aside any "judgments under any decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured." As a result, the Fund is entitled to start a proceeding over and provide a proper defense for its newly acquired insured. Nonetheless, the Fund cannot extend the time for filing a notice of appeal by utilizing the stay. Particularly, where the insurance company becomes insolvent after a judgment has been entered against its insured, and no appeal is ultimately filed before the expiration of the 30 days required by Rule 9(a), Arizona Rules of Civil Appellate Procedure, the Fund will be bound by the judgment. ***Arizona Prop. & Cas. Ins. Guar. Fund v. Lopez***, 177 Ariz. 1, 2-3, 864 P.2d 558, 559-60 (Ct. App. 1993).

CASE LAW

Maricopa County v. Fed. Ins. Co., 157 Ariz. 308, 310, 757 P.2d 112, 114 (Ct. App. 1988) (excess carriers do not become primary if primary insurer becomes insolvent).

Betancourt v. Ariz. Prop. & Cas. Ins. Guar. Fund, 170 Ariz. 296, 297-98, 823 P.2d 1304, 1305-06 (Ct. App. 1991) (a settlement between claimant and insolvent carrier is binding on the Fund, but only if: (1) Plaintiff's case was dismissed due to settlement; (2) The statute of limitations has run on plaintiff's claims; and (3) the Fund took no action to preserve plaintiff's claim.) Note: Even if the prior settlement is found binding on the Fund, the Fund is still entitled to an offset for other insurance available to the claimant.

Martinez v. State Workman's Comp. Ins. Fund, 163 Ariz. 380, 383-84, 788 P.2d 113, 116-17 (Ct. App. 1990) (Workers' compensation insurance companies are not authorized to assert a lien against the Fund from amounts paid to an injured worker, even though Arizona's workers' compensation statutes would have authorized the lien).

State v. Ariz. Prop. & Cas. Ins. Guar. Fund, 192 Ariz. 390, 391-95, 966 P.2d 557, 558-62 (Ct. App. 1998) (State, whose insurer was declared insolvent, was entitled to sue the Fund for a claim paid by the State. The court rejected the argument that the State, in suing the Fund, was suing itself. State was an insured under the statute and thus was entitled to payment on the claim from the Fund).

If you have questions regarding the information in this chapter, please contact the author or any JSH attorney.

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