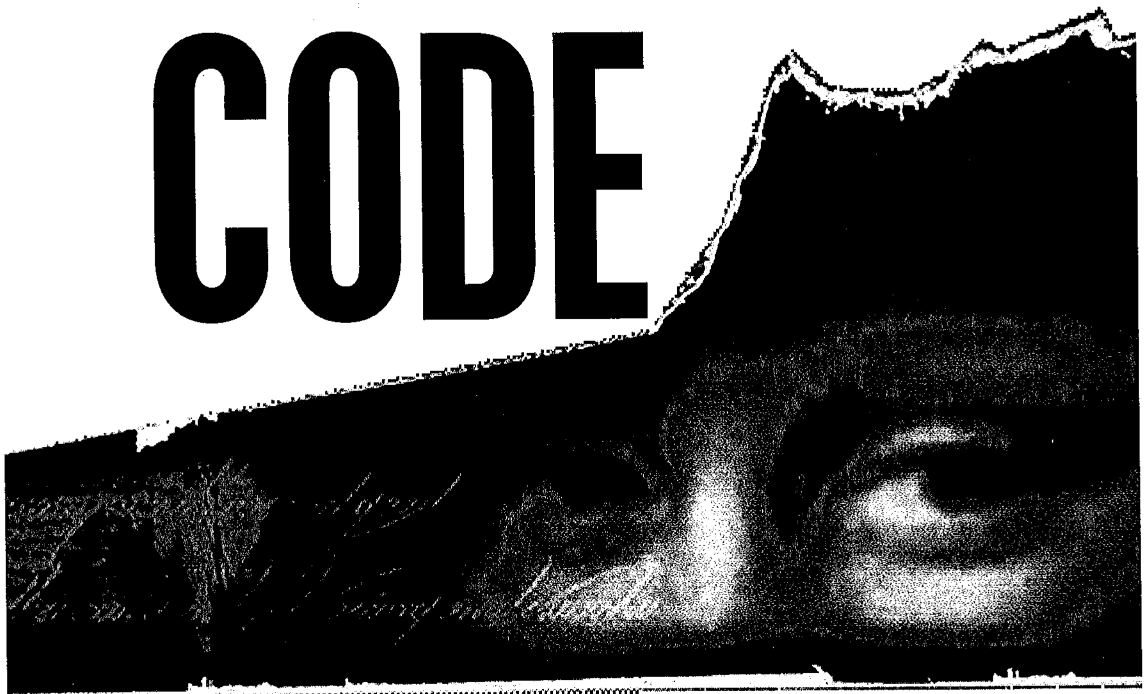
THE CIGA CODE



Unraveling the Dirty Little Secrets of State Insurance Guaranty Associations, California and Beyond

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THE CIGA CODE: UNRAVELING THE *DIRTY* LITTLE SECRETS OF STATE GUARANTY ASSOCIATIONS, CALIFORNIA AND BEYOND

I. Introduction

With the recent popularity of books like "The Da Vinci Code," people have become enthused about exploring previously unexamined and unchallenged paradigms passed down from generation to generation. Parallels can be seen between the renewed interest in reassessing the impacts of history and religion on our lives and the current movement in the legal profession to re-examine strongly held views about what the law "says" and how it applies to current circumstances.

As a younger attorney, I remember being told by an elder mediator that because the insurer of "So and so" Construction was insolvent, my client had to shoulder the loss. I recall questioning the conclusion and being rebuked. He stated sternly that "recovery from CIGA was a lost cause" and "you can forget about getting anything from CIGA." And with a sigh, the mediator exhaled, "That's just the way it is."

Well, the fact is that this is not "just the way it is." CIGA and other guaranty associations often discharge their statutory obligations to defend and indemnify insureds of insolvent carriers voluntarily and certainly can be compelled to discharge these duties. You just need to know how to do it.

That is the goal of these materials – to advise insurance and legal professionals on the best ways to obtain maximum recovery from state insurance guaranty associations at the time of carrier insolvency. Along the way, I discuss "tricks of the trade" and expose the 25 different ***dirty little secrets*** of insurance guaranty associations. Also, I provide specific guidance on how to avoid common pitfalls when working with associations.

Because a majority of today's construction defect litigation takes place in California, Nevada, Arizona, and Florida, the materials focus primarily on the laws of these states. California law is examined most often because it leads other states in passing progressive insurance guaranty association legislation. However, the laws of many other states are reviewed periodically to highlight substantial differences or inform on majority and minority views.

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It is important to note that throughout the materials specific state insurance guaranty associations are often referred to generically as "the association" for brevity's sake. But because Arizona's insurance guaranty association is known as the "Arizona Property and Casualty Insurance Guaranty Fund," "the Fund" is used in the text for broader reference.

Hopefully, after review of the materials, you will better understand the complex and divergent rules that apply on insurer insolvency and be better-prepared to position yourself, your company, or your client to recover the highest amounts available for association claims. Additionally, it is my sincerest desire that reading of the materials is somewhat enjoyable and makes you feel kind of like ***Robert Landon*** or ***Sophie Neveu*** as you meander your way through the mazes of ambiguous and contradicting laws on your way to unraveling the mystical secrets of the ***CIGA Code***.

II. Insurer Insolvency

Before we get to the details about how insurance guaranty associations work, what constitutes "covered" and uncovered claims, claim presentation procedure, and litigation involving insurance guaranty associations, it is helpful to understand the basics of insurer insolvency. The following section describes these fundamentals and assists the reader in determining where in the process later guaranty association rules apply.

A. Overview

Consumers and businesses purchase insurance to protect themselves from financial losses arising from fires, accidents, natural disasters, workers' compensation injuries, or personal liability. *See* http://www.ncigf.com (for further discussion on insurer insolvency). However, occasionally, the insurance purchased is not available to the insured. A claim could not be covered by the policy, be excluded, or be denied for some other reason. However, increasingly, the unavailability of insurance is caused by insurer insolvency.

B. Insolvent Insurers

An insured of an insolvent insurer starts the process of obtaining relief with its ***state insurance guaranty association***. *Id.* Each state has a regulatory agency, called the State Department of Insurance, that is responsible for monitoring the financial health of insurance companies authorized to do business in the state. *Id.* When the Department's chief officer, the Insurance Commissioner, determines that an insurance company is in financial trouble, he is empowered to take appropriate steps to protect policyholders and claimants of the insurance company. *Id.* Depending on the severity of the insurance company's problem, the Commissioner may issue any

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of the following orders: (1) Order of Supervision; (2) Order of Suspension; (3) Order of Rehabilitation; or (4) Order of Liquidation. *Id.*

If an Order of Supervision is issued, the Commissioner requires the insurance company to take specific corrective steps or obtain the Commissioner's approval before it undertakes certain transactions. *Id.* Normally, supervision orders do not affect issued policies or payment of claims. With an Order of Suspension, the Commissioner may require the insurance company to terminate all or a portion of its business in the state. *Id.* An Order of Rehabilitation allows the Commissioner to temporarily manage the faltering insurance company until its financial woes are resolved. *Id.* If the Commissioner believes that the insurance company is so financially unstable that it cannot make good on its obligations to insureds or other claimants, he may seek entry of an Order of Liquidation from a state court. *Id.* Once entered, the liquidation order usually appoints the Commissioner as the "liquidator," who in turns appoints a "Receiver" to manage the liquidation process. *Id.*

C. Liquidation Process

Once appointed, the Receiver and her staff take possession of the insurance company's offices, records, equipment, and assets. *Id.* They send to all policyholders and claimants notices, informing them of the company's liquidation and instructions on filing a claim against the insolvent carrier's estate. *Id.* Policyholders and claimants are also given notice that the state insurance guaranty association will be handling future processing of claims and that their insurance policy will be cancelled on a specified date. *Id.*

D. State Insurance Guaranty Associations

Guaranty (or "Guarantee") associations, and in some states "Funds," are non-profit, quasi-public organizations of statewide authority created by statute for the purpose of protecting policyholders and claimants from severe financial losses and delays in claim payment due to carrier insolvency. *Id.* *See* Cal. Ins. Code § 1063; *O'Malley v. Florida Ins. Guaranty Assoc.*, 257 So. 2d 9, 11 (Fla. 1971). Insurance guaranty associations provide a limited form of "insolvency insurance" to their member insurers. *Arizona v. Imperial Ins. Co.*, 140 Ariz. 426, 428 (Ariz. 1984). The function of the guaranty association is to protect policy insureds in the extraordinary event of insurer insolvency. *Id.* Associations are "legislatively declared mechanism[s] to aid and benefit numerous citizens many of whom comply with state requirements in obtaining casualty and other insurance coverage for themselves and have suffered loss of the insurance protection they obtained because of the insolvency of their insurors." *O'Malley,* 257 So. 2d at 11.

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As a part of their duties, guaranty associations assume responsibility for insolvent carrier's unpaid claims. Though many guaranty association obligations resemble insurer responsibilities, under most states' law, a guaranty association acts as a mere coverage "safety net." It does not exactly substitute for insolvent insurer coverage obligations. Guaranty associations have monetary and subject matter limits on coverage. In some states, they even deny recovery to certain wealthy insureds, who presumably do not need the "safety net."

Each state has one or more guaranty associations. *See* http://www.ncigf.com. In some states, like Nevada, one association pays property and casualty claims, and the other pays health and life insurance claims. Insurance companies are required to be members of the guaranty association as a condition of doing business in the state. *Id.* Guaranty associations' budgets are derived from assessments taxed upon the state's insurance companies and any recovery from insolvent carrier estates. *Id.*

Generally, state law on insurance guaranty associations is consistent. This is due in part to the fact that most states' guaranty association law is based on the National Association of Insurance Commissioners' Model Code. *See infra* Section I(C)(a). However, significant differences do exist. Having a clear understanding these differences is the key to obtaining maximum recovery for yourself, your company, or your client. Next, we examine these differences in detail.

E. Purposes of State Insurance Guaranty Associations

1. NAIC Model Act

In most states, insurance guaranty association law is based on the "Post-Assessment Property and Liability Insurance Guaranty Association Model Act" perpetuated by the National Association of Insurance Commissioners. As you review these materials, you will find that state law on insurance guaranty associations is essentially similar. However, as stated above, understanding these differences is crucial to being able to recover from associations.

2. California

CIGA exists "to pay and discharge covered claims of" insolvent members "and in connection therewith to furnish loss adjustment services and defenses of claimants when required by policy provisions." Cal. Ins. Code § 1063.2. The court, in *R.J. Reynolds Co., Inc. v. California Ins. Guar. Ass'n*, 235 Cal. App. 3d 595, 600 (Cal. Ct. App. 6th 1991), explained how CIGA functions:

> "CIGA assesses its members when another member becomes insolvent, thereby establishing a fund from which insureds

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whose insurers become insolvent can obtain financial and legal assistance. Member insurers then recoup assessments paid to CIGA by means of a surcharge on premiums to their policy holders. In this way the insolvency of one insurer does not impact a small segment of insurance consumers, but is spread throughout the insurance consuming public, which in effect subsidizes CIGA's continued operation." (citations omitted).

CIGA is to insurance as the Federal Deposit Insurance Corporation is to banking. It serves to enhance public confidence in the insurance industry. *Collins-Pine Co. v. Tubbs Cordage Co.*, 221 Cal. App. 3d 882, 885 (Cal. Ct. App. 3d 1990). The occurrence of an earthquake or other natural disaster permits CIGA to issue bonds to provide payment for covered claims. Cal. Ins. Code § 1063.50.

3. Nevada

Consistent with the old western adage, "Less is more," Nevada does not describe the purpose of the "Nevada Insurance Guaranty Association Act" in its statutes. *See* N.R.S. § 687A.010. Apparently, the Legislature is of the belief that mere review of the Act discloses its purpose.

4. Arizona

The court in *Wells Fargo Credit Corp. v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 165 Ariz. 567, 572 (Ariz. 1990) had this to say about the purpose of its guaranty "Fund": "The Fund is a statutorily created source of funds intended to alleviate the economic impact to claimants and policyholders covered by insolvent insurers. Member insurers are assessed only amounts necessary to allow the Fund to meet its obligations to pay 'covered claims.'" *See also Bills v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 194 Ariz. 488, 497 (Ariz. 1999) (stating that "[t]he Fund was created 'to assume the liability of the insolvent insurers").

5. Florida

Florida Statute Annotated § 631.51 provides:

The purposes of this part are to:

(1) Provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer;

(2) Assist in the detection and prevention of insurer insolvencies;

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(3) Create a nonprofit corporation to administer and supervise the operation of such association; and

(4) Assess the cost of such protection among insurers.

F. Membership in Insurance Guaranty Associations

1. California

All carriers of fire, marine, plate glass, liability, workers' compensation, common carrier liability, boiler and machinery, burglary, sprinkler, team and vehicle, automobile, aircraft, and miscellaneous insurance who wish to sell policies in California must be members of CIGA. Cal. Ins. Code § 1063(a). *Saylin v. California Ins. Guar. Ass'n*, 179 Cal. App. 3d 256, 261-62 (Cal. Ct. App. 2d 1986).

2. Nevada

Any person who writes any kind of "direct insurance," including the exchange of reciprocal or interinsurance agreements of indemnity, but excluding life, health, disability, mortgage guaranty, surety, credit, warranty, title, marine, or governmental insurance must be members of Nevada's insurance guaranty association. NRS §§ 687A.037, 687A.020, and 687A.040.

3. Arizona

In Arizona, "member insurer" is defined as "any person who writes any kind of insurance, unless such writing is restricted solely to life, title, surety, disability, credit, mortgage guaranty, workers' compensation or ocean-marine insurance, including the exchange of reciprocal or inter-insurance contracts, and is licensed to transact insurance in this state." Ariz. Rev. Stat. § 20-661(6).

4. Florida

"Member insurers" include "any person who writes any kind of insurance . . . including the exchange of reciprocal or interinsurance contracts, and is licensed to transact insurance in this state." Fla. Stat. Ann. § 631.54(6).

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III. Availability of Association Funds

A. “Covered Claim”

Dirty Little Secret #1: “Covered Claim” is the ammunition with which insurance guaranty associations shoot down unsuspecting claimants. Use of the terminology “covered claim” leads the unwary to believe that, to be “covered,” a claim need only come within the coverage of the insolvent insurer’s policy. This is not the complete truth. Policy terms and insurance guaranty association law in addition to state case law furnish the definition of “covered claim.” DO NOT submit a claim to an association until you have comprehensively examined all applicable sources of authority supporting coverage of your claim. Failure to develop a detailed coverage game plan will result in summary denial.

1. What Is a “Covered Claim”?

a) California

“’Covered claims’ means the obligations of an insolvent insurer, including the obligation for unearned premiums,: (1) imposed by law and within the coverage of the insolvent insurer’s insurance policy; (2) that were unpaid by the insolvent insurer; (3) presented to the liquidator of an insolvent insurer within the time permitted to file such claims; (4) that were incurred prior to termination of coverage and prior to or within 30 days after a liquidator was appointed; (5) that its assets are insufficient to discharge the obligations in full; (6) to provide workers’ compensation insurance under California law; and (7) in the case of other classes of insurance if the claimant or insured is a California resident at the time of the insured occurrence, or the property from which the claim arises is permanently located in this state. Cal. Ins. Code §§ 1063.1(c)(1) and 1063.1(c)(2). Obligations of carriers assuming the assets of an insolvent insurer are also “covered claims.” *Id.*

California law excludes from the definition of a “covered claim” default and stipulated judgments. Judgments constitute “covered claims” only if they were obtained in an adversary proceeding. Cal. Ins. Code § 1063.1(c)(1); *Aloha Pacific, Inc. v. California Ins. Guar. Ass’n*, 79 Cal. App. 4th 297, 309 (Cal. Ct. App. 2d 2000). An exception to this rule exists if CIGA, having had the opportunity to do so, simply refuses to defend the insured of an insolvent insurer. *Garamendi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 716 (Cal. Ct. App. 1st 2004).

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> **Dirty Little Secret #2:** Oftentimes in construction litigation, we come across a party whose carrier has wrongly-denied coverage. Typically, the party has no money, and so the only source of recoverable funds stems from the party's relationship with the insurer. What do we do? We settle with the party by obtaining his rights against his insurer in exchange for our promise not to execute a stipulated or default judgment against the party. In California, we can't do this when the party's carrier is insolvent and coverage is sought from CIGA. Stipulated and default judgments are not "covered claims." Someone must defend the party to obtain CIGA coverage. Note that no such requirement is present in Nevada, Arizona, and Florida law.

b) Nevada

"'Covered claim' means an unpaid claim or judgment, including a claim for unearned premiums, which arises out of and is within the coverage of an insurance policy . . . issued by an insurer which becomes an insolvent insurer, if one of the following conditions exist: (a) The claimant or insured, if a natural person, is a resident of this state at the time of the insured event . . . (b) The claimant or insured, if other than a natural person, maintains its principal place of business in this state at the time of the insured event . . . (c) The property from which the first party property damage claim arises is permanently located in this state . . . (d) The claim is not a covered claim pursuant to the laws of any other state and the premium tax imposed on the insurance policy is payable in this state pursuant to NRS 680B.027." NRS § 687A.033.

c) Arizona

The Arizona Legislature defined "covered claim" as "an unpaid claim, including one for unearned premium, which arises out of and is within the coverage of an insurance policy to which this article applies issued by an insurer, if such insurer becomes an insolvent insurer . . . and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state." Ariz. Rev. Stat. § 20-661(3). The statute further reads: "Covered claim does not include any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise nor shall it include any obligations of the insolvent insurer arising out of any reinsurance contracts nor shall it include attorney's fees or adjustment expenses incurred prior to the determination of insolvency." *Id.*

Liability of an insolvent insurer to claimants determines the extent of liability of the Fund to claimants. Ariz. Rev. Stat. § 20-661(3); *Treffenger v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 22 Ariz. 153, 154 (Ariz. 1974).

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(1) Do Payments an Insolvent Insurer Owes to Vendors Constitute "Covered Claims"?

The Court, in *Cooper Claims Service, Inc. v. Arizona Ins. Guaranty Assoc.*, 22 Ariz. App. 156, 157 (Ariz. 1974), faced this question. The case involved independent adjusters' claims that the association, on behalf of insolvent insurers, owed them substantial sums for adjustment of claims before the insurers entered liquidation proceedings. The trial court granted the association's motion for summary judgment. The appellate court affirmed, holding adjusting expenses did not fall within the definition of a "covered claim." *Compare with Arizona Ins. Guaranty Assoc. v. Humphrey*, 109 Ariz. 284, 286 (Ariz. 1973) (holding that association did not have a right to recover a pro rata share of unearned commissions from insolvent insurer's agents).

(2) Limitations on When "Covered Claim" Arose

Arizona law states: "The fund is obligated solely to the extent of the covered claims existing during any of the following periods: (1) Prior to the determination of insolvency and arising within thirty days after the determination of insolvency. (2) Before the policy expiration date if less than thirty days after the determination of insolvency. (3) Before the insured replaces the policy or on request effects cancellation, if the insured does so within thirty days of the determination of insolvency." Ariz. Rev. Stat. § 20-667(A).

> **Dirty Little Secret #3:** As you can see in Ariz. Rev. Stat. § 20-667(A), guaranty association law encourages procurement of replacement coverage. Insureds of insolvent insurers cannot wait long periods to replace their policies once they receive notice of liquidation proceedings. Your guaranty association claim will be denied if you wait until your insolvent insurer's policy expires to obtain replacement coverage. YOU, and not the guaranty association, will be responsible for a loss arising during the insolvent insurer's periods of coverage.

d) Florida

Under Florida law, a "covered claim" is "an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not excess of, the applicable limits of an insurance policy . . . issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time the insured event or the property from which the claim arises is permanently located in this state." Fla. Stat. Ann. § 631.54(3).

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Compare California's rule that stipulated judgments are not "covered claims" with *Florida Ins. Guaranty Assoc., Inc. v. Giordano*, 485 So. 2d 453, 456 (Fla. Ct. App. 3d 1986). There, the Court saw nothing wrong with binding FIGA to a $150,000 settlement, which it did not negotiate.

2. Exclusions

a) California

Claims not covered by the insolvent insurer's policy cannot be enforced against CIGA. Cal. Ins. Code § 1063.1(c)(1)(i). CIGA does not cover claims of life, annuity, health, disability, mortgage, title, or credit insureds. It does not guaranty fidelity or surety bonds, reinsurance contracts, or an insolvent insurer's obligations to other insurers, insurance pools, or underwriting associations. Cal. Ins. Code §§ 1063.1(c)(3), 1063.1(c)(4), and 1063.1(c)(5). CIGA also will not pay punitive damage awards. Cal. Ins. Code §§ 1063.1(c)(8). Further, CIGA does not cover "any claim by any person other than the original claimant under the insurance policy in his or her own name[.]" Cal. Ins. Code §§ 1063.1(c)(9)(ii). "Original claimant" means the original named insured, not successor entities. *Baxter Healthcare Corp. v. California Ins. Guar. Ass'n*, 85 Cal. App. 4th 306, 313 (Cal. Ct. App. 2d 2000).

Dirty Little Secret #4: CIGA's "been there and done that." Just when you thought of some creative ways to get around the no stipulated or default judgment rule, CIGA slaps you in the face with the express and unambiguous dictate that, once an otherwise "covered claim" is assigned, no CIGA coverage exists.

b) Nevada

Nevada excludes from the definition of a "covered claim": "[a]n amount that is directly or indirectly due a reinsurer, insurer, insurance pool or underwriting association, as recovered by subrogation, indemnity or contribution, or otherwise" and "[t]hat part of a loss which would not be payable because of a provision for a deductible or self-insured retention specified in the policy." NRS § 687A.033.

Further, claims for attorney fees and "expenses," court costs, interest, and bond premiums are not "covered." NRS § 687A.033(e). Untimely claims are excluded. NRS § 687A.033(d). Additionally, claims brought by an insured who has an aggregate net worth of more than $25,000,000.00 are not "covered." NRS § 687A.033(f).

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c) Arizona

"Covered claim does not include any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise nor shall it include any obligations of the insolvent insurer arising out of any reinsurance contracts nor shall it include attorney's fees or adjustment expenses incurred prior to the determination of insolvency." Ariz. Rev. Stat. § 20-661(3).

d) Florida

In Florida, a "covered claim" does not include: "(a) Any amount due any reinsurer, insurer, insurance pool, or underwriting association, sought directly or indirectly through a third party, as subrogation, contribution, indemnification, or otherwise; or (b) Any claim that would otherwise be a covered claim . . . that has been rejected by any other state guaranty fund on the grounds that an insured's net worth is greater than that allowed under the state's guaranty law. Member insurers shall have no right of subrogation, contribution, indemnification, or otherwise, sought directly or indirectly through a third party, against the insured of any insolvent member." Fla. Stat. Ann. § 631.54(3). *See also infra* Section V(D)(2).

> **Dirty Little Secret #5:** Beware of California, Nevada, and Florida state law concerning suing the association for amounts an insolvent carrier owes. The laws of these states make clear that an insurer suing the association directly or an insurer suing the association through its insured may not recover from the association on equitable indemnity and subrogation claims. The law of Arizona, however, need not be feared quite as much. It does not *expressly* preclude coverage of an indemnity or subrogation claim brought by an insurer suing in the name of its insureds, as most policies allow.

(1) Does a Self-Insured's Claim Against an Insolvent Excess Carrier Constitute a "Covered Claim"?

This was the issue before the Court in *Zinke-Smith, Inc. v. Florida Ins. Guaranty Assoc., Inc.*, 304 So. 2d 507 (Fla. Ct. App. 4th 1974). Zinke-Smith was self-insured under Florida law for workers' compensation coverage. To back-up its retention, however, Zinke-Smith procured excess coverage from Home Owners Insurance Company. One particular claim amounted to more than Zinke-Smith's retention. A claim was made with Home Owners, who later became insolvent and unable to pay the claim. FIGA denied the claim. Zinke-Smith brought suit against FIGA for breach of statutory obligations. The trial dismissed the complaint because it decided the policy that existed between Zinke-Smith and Home Owners was not "direct," but "reinsurance," and claims submitted were not "covered claims."

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Like the law of most other states, Florida law provides: "'Covered claim' . . . shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, sought directly or indirectly through a third party, as subrogation, contribution, indemnification, or otherwise." Fla. Stat. Ann. § 631.54(3)(a) (West 2005).

On review, the Court of Appeal acknowledged that a contract of reinsurance exists between an insurer and a reinsurer. For the policy at issue to qualify as reinsurance, Zinke-Smith must have qualified as an insurer. It reviewed Florida law on the definition of an insurer and found that Zinke-Smith, as a self-insurer, was not an "insurer" for purposes of the insurance code. The Court held, therefore, that Zinke-Smith's claim could not have been made pursuant to a reinsurance contract, and the claim was covered. In dicta, the Court likened the relationship of a self-insurer and an excess insurer to that of a high-deductible insured and a primary insurer. It commented that no one would suggest in the latter relationship that the high-deductible insured was in actuality an insurer under the insurance code.

e) Minnesota Law Update

In *Maxwell Communications v. Webb Publishing Co.*, 518 N.W.2d 830, 833 (Minn. 1994), the court held that an insurer's equitable contribution claims against MIGA were not "covered claims" because MIGA was "not a fund for the protection of other insurance companies from the insolvencies of fellow members."

B. Residency

1. California

CIGA's payment obligations are limited to claims in which the claimant or insured was a California resident at the time of the occurrence or arise from property permanently located in California. Cal. Ins. Code § 1063.1(c)(1). Thus, a California resident may recover from CIGA the obligations of a nonresident's insolvent insurer. *Ohrbach's Inc. v. California Ins. Guar. Ass'n*, 204 Cal. App. 3d 1089, 1092-93 (Cal. Ct. App. 2d 1988).

CIGA is obligated to provide workers' compensation benefits under California law no matter where the claimant resides. *In re Eldorado Ins. Co.*, 189 Cal. App. 3d 1149, 1157 (Cal. Ct. App. 2d 1987).

2. Nevada

Like California, Nevada defines "covered claims" as those made by Nevada residents at the time of the insured event. NRS § 687A.033.

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3. Arizona

Arizona follows Nevada's residency requirements. A claim is "covered" only if "the claimant or insured is a resident of [Arizona] at the time of the insured event or the property from which the claim arises is permanently located in [Arizona]." Ariz. Rev. Stat. § 20-661(3).

4. Florida

FIGA claimants must be residents of Florida at the time the insured event takes place. FIGA-"covered" claims can also arise out of property permanently located in Florida. Fla. Stat. Ann. § 631.54(3).

Dirty Little Secret #6: Generally, insurance guaranty association recovery is for state residents. What associations will not tell you, however, is that no law prohibits presenting the same claim to multiple associations if the insured or claimant is a resident of multiple states. To maximize recovery, claimants must make a claim with all applicable insurance guaranty associations.

C. Definition of "Insolvent Insurer"

1. California

California defines "insolvent insurer" as a member insurer against which an order of liquidation or receivership with a finding of insolvency has been entered by a court of competent jurisdiction. Cal. Ins. Code § 1063.1(b).

2. Nevada

In Nevada, "insolvent insurer" is defined as "an insurer which has been issued a certificate of authority by the commissioner to transact insurance in [Nevada], either at the time the policy was issued or when the insured event occurred: . . . (1) Against which a final order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction in the insurer's state of domicile or in Nevada; or . . . (2) [w]hich is involved in judicial proceedings in its state of domicile or in Nevada related to the determination of its solvency, rehabilitation or liquidation, if the court conducting those proceedings has issued an order prohibiting the insurer from paying claims for more than 30 days." NRS § 687A.035.

3. Arizona

Arizona defines "insolvent insurer" as "an insurer authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred and who has been determined to be insolvent by a court of competent jurisdiction." Ariz. Rev. Stat. § 20-661(5).

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4. Florida

Pursuant to Florida Statute Annotated § 631.54(5), "insolvent insurer" "means a member insurer authorized to transact insurance in this state, either at the time the policy was issued or when the insured event occurred, and against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction if such order has become final by the exhaustion of appellate review."

D. "Net Worth" Limitation

1. State Law Comparison

In Arkansas, Washington, D.C., Hawaii, Indiana, Maryland, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Virginia an insured's net worth must not exceed $50 million for a claim to be covered. States, such as Nevada, Delaware, Illinois, Kentucky, Minnesota, and Missouri, have adopted more restrictive net worth limits of $25 million. Georgia went so far as to enact a $3 million net worth exclusion. Michigan's "net worth" law attempts to tie an insured's annual income with member insurers' premium collection. In this state, an insured who makes more than a tenth of one percent of the members' aggregate written premiums is not entitled to payment of a claim with the insurance guaranty association.

2. California and Arizona

Neither California nor Arizona have "net worth" limitations.

3. Florida

Florida has no "net worth" limitation independent of other states' law. However, should a claim be submitted to another state insurance guaranty association, Florida adopts the other state's "net worth" limitations. Florida Statutes Annotated § 631.54(3) clarifies that a "covered claim" is not "[a]ny claim that would otherwise be a covered claim . . . that has been rejected by any other state guaranty fund on the grounds that an insured's net worth is greater than that allowed under the state's guaranty law."

Dirty Little Secret #7: Insurance guaranty associations will not hesitate to deny payment of claims to large businesses or wealthy individuals. Evidently, the successful are not entitled to association payments because of their success. That's why before *ever* submitting a claim to an association, have an accurate understanding of the claimant's value and be prepared to prove it! Failure to have this information available at the time of claim submission will result in delayed acceptance at best and outright denial at worst.

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E. Per-Claim Limits

1. Per Claim Caps

a) California

The maximum claim payable by CIGA is $500,000, except for worker's compensation claims, which have no cap limitations placed upon them. Cal. Ins. Code § 1063.1(c)(7).

b) Nevada

Nevada's monetary limitation on a payable claim is "[t]he limit specified in a policy or $300,000, whichever is less, for each occurrence for any covered claim[.]" NRS § 687A.060(1)(a)(3). Unearned premium claims are limited to "[n]ot more than $300,000 for each policy. NRS § 687A.060(1)(a)(2). No limits are placed on workers' compensation claims. NRS § 687A.060(1)(a)(1).

c) Arizona

As stated above, Arizona's per claim limit is $100,000. Ariz. Rev. Stat. § 20-667(B). The applicability of this limitation was clarified in the *Knipp v. Arizona Prop. & Cas. Ins. Guaranty Fund*, 156 Ariz. 137 (Ariz. 1987) case. There, wrongful death plaintiffs' father was killed in an airplane crash. Three insurance policies provided potential coverage. One, issued to the owner of the airplane, had $2 million per occurrence limits. However, shortly after the litigation began, the insurer became insolvent, and the Fund assumed the insurer's obligations. The question on appeal was whether Arizona's claim limit furnished each of the plaintiffs $100,000 in possible recovery or whether the $100,000 limit was a cap on total recovery for the one wrongful death cause of action. The Court decided that because Arizona law defined a wrongful death claim as one cause of action, plaintiffs were limited to total possible recovery of $100,000, as the insolvent insurer's portion of the claim.

d) Florida

FIGA has an obligation to pay a "covered claim" in an amount "which is in excess of $100 and is less than $300,000, except with respect to policies covering condominium associations or homeowners' associations, which associations have a responsibility to provide insurance coverage on residential units within the association, the obligation shall include that amount of each covered property insurance claim which is less than $100,000 multiplied by the number of condominium units or other residential units; however, as to homeowners' associations, this subparagraph applies only to claims for damage or loss to residential units and structures attached to the residential units." Fla. Stat. Ann. § 631.57(1)(a).

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Dirty Little Secret #8: Florida loves owners of common interest development housing! While most insureds of insolvent carriers are limited to $300,000 in FIGA coverage, those who live in condominiums or housing developments are entitled to property damage coverage in the amount of $100,000 multiplied times the total number of units in the development.

(1) *Florida Focus*: Per Accident or Per Plaintiff?

The Court in *Florida Ins. Guaranty Assoc., Inc. v. Cole*, 573 So. 2d 868, (Fla. Ct. App. 2d 1990) came to the same conclusion on this question as the Court in *Knipp*, but employed different reasoning. In *Cole*, the decedent died in a vehicle accident involving a City of Tampa garbage truck. The decedent's estate and three survivors filed suit against the city. City was insured with a $3,000,000 policy issued by Integrity Insurance. Integrity became insolvent during the litigation. Plaintiffs filed an action against FIGA in which they sought a declaration that the decedent's death gave rise to a "covered claim" of $300,000 per plaintiff in the action. The trial court entered summary judgment in favor of plaintiffs. On review, the appellate court was faced with the issue of whether FIGA's payment limitation applied per plaintiff or per accident.

FIGA argued that since Integrity's policy was occurrence-based, the limit should apply per accident as opposed to per claimant. The Court, however, rejected this argument as "overly narrow." Nonetheless, it decided "the $300,000 statutory limitation for a covered claim in this case applied to the claim of any one person who is injured or killed." The basis for its conclusion was that the insurance industry typically handled personal injury claims on a per person basis – subject to a per accident or per occurrence limitation of liability.

e) Other States

Claim limits for other states are the following: New York ($1,000,000), Alaska ($500,000), Alabama ($150,000), Louisiana ($150,000), Oklahoma ($150,000), Wyoming ($150,000), Arizona ($100,000), Colorado ($100,000), Georgia ($100,000), Indiana ($100,000), New Mexico ($100,000), and Tennessee ($100,000).

2. Per Claims vs. Aggregate Claims

a) State Law Comparison

California, Nevada, Arizona, and Florida do not have explicit limits on the total amount of money guaranty associations will pay out for all claims. However, claims in these states are impliedly limited by the policy's aggregate limit because the state guaranty association has the same rights as the insolvent insurer. *See* NRS § 687A.060(1)(b), Ariz. Rev. Stat. § 20-667(C).

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Indiana, Louisiana, and New Mexico have $300,000 aggregate limits on total claims paid by each state's guaranty association.

3. Aggregate, Per-Insured Limits

a) State Law Comparison

The following states have adopted a $10 million aggregate, per-insured limit on recovery: Colorado, Delaware, Kentucky, Maryland, North Dakota, South Dakota, and Tennessee.

No such limits exist in California, Nevada, Arizona, and Florida.

Dirty Little Secret #9: Insurance guaranty associations will deny coverage when the aggregate limits of an insolvent carrier's policy are exhausted or close to exhaustion. Therefore, to adequately evaluate the availability of association funds you must know the claim history of the insolvent insurer's policy.

4. *H.K. Porter Co., Inc. v. Pennsylvania Ins. Guarantee Ass'n*

The court in *H.K. Porter Co., Inc.v. Penn. Guarantee Ass'n*, Civil No. 93-0212 (3d Cir. 1996) rejected the reasoning contained in the *Knipp* and *Cole* decisions. It concluded that insurance guaranty association limits functioned on a per claimant basis as opposed to a per accident or occurrence basis. The facts of the case were straightforward. Defendant H.K. Porter had manufactured asbestos-containing products since 1958. In 1984, the company had become inundated with thousands of lawsuits alleging its products caused bodily injury. H.K. Porter disposed of many claims by paying close to $50 million. Soon, however, the company had no more money and turned to insurance coverage.

Three $5 million policies issued by Integrity Insurance were applicable. H.K. Porter Co. tendered the lawsuits and claims to Integrity Insurance. Before it received a response, however, Integrity Insurance was declared insolvent. H.K. Porter Co. then submitted the claims to the Pennsylvania Insurance Guaranty Association ("PIGA"). PIGA denied the claims outright. H.K. Porter Co. sued PIGA for a declaration that the association was required to pay up to $15 million for indemnity payments on the claims and defense fees and costs for the pending lawsuits.

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The parties filed summary judgment motions. The district court ruled that H.K. Porter Co. was only entitled to a total of $300,000 per policy for the thousands of claims. Based on the words of the Pennsylvania insurance guaranty statutes, the district court held that PIGA claimants could only be insureds. Since the personal injury claimants were not insureds of Integrity Insurance, the district court stated that their claims did not constitute "covered claims."

The Third Circuit reversed the decision of the district court on four grounds. First, it held that the statute's reference to "a claimant under" a policy in the definition of "covered claim" clearly demonstrated the Legislature's intent to include insureds and third parties within realm of potential PIGA claimants. Second, the Court stated that the Legislature, in passing the insurance guaranty statutes, clearly intended valid third party claims be paid upon insurer insolvency. Third, it held that logic supported the ability of non-insureds to obtain relief from PIGA. The Court said that, typically, insurance policies cover payment of multiple claimants for injuries suffered even if their individual claims are submitted as a group by the insured. Finally, the Third Circuit stated that if the district court's opinion were to stand, a large volume of third party claims would go uncompensated. It believed this result was inconsistent with the purposes of the insurance guaranty statutes.

The *H.K. Porter Co., Inc.* opinion is significant because the Court displayed cogent reasoning in allowing insurance guaranty association limits to apply per claimant as opposed to per accident. However, notwithstanding such reasoning, the *H.K. Porter Co., Inc.* decision remains the minority view on interpretation of insurance guaranty association claim limitations.

F. "Other Insurance" – Exhaustion of Other Coverage Before Association Pays

1. California

California statutes substantially restrict CIGA payment when "other insurance" is applicable to cover a loss. The existence of this "other insurance" reduces CIGA liability in the amount of that allegedly due by the "other" insurer(s).

California Insurance Code § 1063.1(c)(9) provides in relevant part: "'Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article ***available to the claimant or insured***[.]" (emphasis added). The italicized portion of the above statute is quite ambiguous. Does a secondary insurer, who arguably has a duty to "drop down," provide insurance "available to the claimant?" Does an additional insured endorsement carrier who denies coverage furnish insurance

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unavailable to the claimant? Unfortunately, the burdens of litigating these questions are placed squarely on the backs of the insureds and claimants of insolvent carriers. Section 1063.1(c)(9) is overly restrictive and should be amended to clarify its obvious ambiguity.

Even more harsh, however, is the rule that CIGA claims cannot be assigned to third parties. *See Baxter Healthcare Corp. v. California Ins. Guarantee Assn.*, 85 Cal. App. 4th 306, 313 (Cal. Ct. App. 2d 2000) (stating "[t]he Guarantee Act limits CIGA's liability to claims asserted by an 'original claimant under the insurance policy in his or her own name'"). The exact wording of the applicable provision of the Act is as follows:

> "Covered claims" does not include . . . (ii) any claim by any person other than the original claimant under the insurance policy in his or her own name, his or her assignee as the person entitled thereto under a premium finance agreement as defined in Section 673 and entered into prior to insolvency, his or her executor, administrator, guardian or other personal representative or trustee in bankruptcy *and does not include any claim asserted by an assignee or one claiming by right of subrogation*, except as otherwise provided in this chapter.

Cal. Ins. Code § 1063.1(c)(9) (emphasis added).

The inability to obtain CIGA claim assignments is a real hindrance to resolution of claims against a joint tortfeasor, who is insured by an insolvent carrier. As described below, insurers of third parties, and even third parties themselves, are barred from suing an insured of an insolvent carrier for statutory claim limits or less. Cal. Ins. Code § 1063.1(5). In the absence of § 1063.1(c)(9), a third party seeking indemnity from an insolvent carrier's insured could skirt this rule by settling with the insured and receiving an assignment of the claim against CIGA in exchange for a covenant not execute a judgment against the insured. This would take the burden of litigating the claim off the insolvent carrier's insured and place it on the third party claimant seeking indemnity. However, under California law this action cannot be taken. Otherwise "covered claims" maintained by non-original insureds or claimants are removed from the definition of "covered claims."

Dirty Little Secret #10: In California, due to the express prohibition of third party assignment of CIGA claims and exclusion of non-litigated claims from the definition of "covered claims," a stipulated judgment against the insured of an insolvent carrier with a covenant not to execute is not worth the paper on which it is written.

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a) *Open Question*: Defense Costs Claim Assigned to 3d Party Constitute "Covered Claim"?

No case has addressed the full scope of § 1063.1(9)'s limitation on assignee claimants to present "covered claims" to CIGA. One could conceive of a situation in which a third party sued the insured of an insolvent carrier. The insured presented the claim to CIGA, which subsequently denied it. The insured incurred $50,000 in defense costs in defending the claim. The insured entered into settlement negotiations with the third party. A settlement was reached in which the insured assigned any and all rights to be reimbursed by CIGA for defense costs to the third party. In this situation, the claim to CIGA is not indemnity-related as the definition of "covered claims" contemplates. Maybe someday a challenge will brought to CIGA's denial of an assignee's claim for reimbursement of defense costs.

b) Secondary Coverage May Count as "Other Insurance"

California Insurance Code § 1063.1(c)(9) provides that a "covered claim" does not include: "any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured[.]" The "other insurance" ***may be secondary coverage*** if the policy provides coverage when the primary carrier becomes insolvent. *Mercury Ins. Co. v. Enterprise Rent-A-Car Co. of Los Angeles*, 80 Cal. App. 4th 41, 50 (Cal. Ct. App. 2d 2000). To determine whether a secondary carrier's obligations "kick-in" before CIGA's obligations, you must perform "Drop-down Analysis." In *Ross v. Canadian Indemnity Ins. Co.*, 142 Cal. App. 3d 396 (Cal. Ct. App. 2d 1983), the court held that a claimant should look to all available secondary insurance before seeking indemnification from CIGA.

Dirty Little Secret #11: California law requires CIGA to be "a party in interest in all proceedings involving a covered claim." Cal. Ins. Code § 1063.2(b). Parties to litigation have subpoena power. Cal. Civ. Proc. Code 1985(c). Therefore, before making a claim to CIGA, be sure you have fully investigated every avenue of possible secondary coverage. If you do not, and CIGA finds even potentially applicable secondary insurance during discovery, you are sure to see immediate denial of the claim and presentation of a CIGA cost bill.

(1) "Drop-down" Analysis

An excess insurer "drops down" when it assumes defense and indemnity obligations of the underlying insurer(s). *See* Dennis Wall, *Litigation & Prevention of Insurer Bad Faith*, 2d Ed. § 6:3 (July 2003) (discussing "drop down" duty). Determining whether a "drop down" duty is owed requires analysis of the language of the secondary carrier's policy.

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Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 812 (Cal. 1982) is the watershed California case on "drop-down" language interpretation. In this case, the Supreme Court held that the duty to "drop down" is non-existent if a secondary carrier's policy language clearly and unambiguously excludes any duty to "drop down" in the absence of underlying coverage. If the policy language is ambiguous, however, the duty to "drop down" is implied and owed. *Pisciotta*, 30 Cal. 3d at 814-15.

This rule differs from those in other states. *See Continental Marble & Granite Co. v. Canal Ins. Co.*, 785 F. 2d 1258, 1259 (5th Cir. 1986); *Maricopa County v. Federal Ins. Co.*, 757 P. 2d 112, 114 (Ariz Ct. App. 2d 1988). Several courts outside of California share the belief that implying the "drop down" duty on secondary carriers, who do not expressly exclude it from their policies, creates an unworkable financial burden.

(a) Determining Whether Excess Policy Language Is "Clear and Unambiguous"

Despite the Supreme Court's unequivocal pronouncement in *Pisciotta* that only clear and unambiguous policy language excluding any duty to "drop down" dispossesses the secondary carrier of the "drop down" obligation, much litigation centers on the issue of whether the carrier clearly and unambiguously excluded any duty to "drop down." As a result, California courts have given guideposts for determining whether a "drop down" obligation is owed.

(i) Specific Language Disclaiming "Drop Down" Duty

The area of the secondary carrier's policy that courts usually examine to find "drop down" language is the "limits of liability" section. Note, however, that specific language designed to avoid a "drop down" duty may also be found in an excess policy's endorsement. Prudent excess insurers include in the "limits of liability" section language stating that liability of the excess insurer "only attaches after the underlying insurers have paid or have been held liable to pay the full amount of their respective liability."

(ii) Unclear and Ambiguous "Drop Down" Duty Language

(a) "Amount Recoverable"

The Supreme Court in *Pisciotta*, 30 Cal. 3d at 815, found that the "amount recoverable" language of a CNA policy was capable of being understood to mean that the insurer was liable either for amounts over the dollar limits of the underlying insurance or for amounts which the insured was not able to actually recover from the underlying insurer because of its insolvency. The court in *Coca Cola Bottling Co. v. Columbia Cas. Ins. Co.*, 11 Cal. App. 4th 1176, 1187 (Cal. Ct. App. 4th 1992) seized upon the *Pisciotta* decision and confirmed that the "amount recoverable" language is per se ambiguous.

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Out-of-state courts are split about whether "amount recoverable" language automatically gives rise to a "drop down duty." *See Zurich Ins. Co. Heil Co.*, 815 F. 2d 1122, 1125 (7th Cir. 1987) (examining "limits of liability" language in conjunction with "maintenance clause" language and finding no "drop down" duty); *Donald B. MacNeal, Inc. v. Interstate Fire & Cas. Co.*, 477 N.E. 2d 1322, 1325 (Ill. Ct. App. 1st 1985) (adopting the reasoning of Pisciotta and holding that "amount recoverable" language was ambiguous). *See also Radiator Specialty Co. v. First State Ins. Co.*, 651 F. Supp. 439, 441-42 (W.D. N.C. 1987) (considering meaning of "amount recoverable" as it was presented in the excess policy's declaration page and finding no duty to "drop down").

(b) "Exhaustion of Underlying Insurance"

The "limits of liability" section of many secondary policies contains the requirement of "exhaustion of underlying insurance." It has been argued that the definition of "exhaustion" does not include primary insurer insolvency. But this argument has not been accepted by any California or out-of-state court. *See Wells Fargo Bank, N.A. v. California Ins. Guar. Ass'n.*, 38 Cal. App. 4th 936, 945-46 (Cal. Ct. App. 1st 1995); Zurich *Ins. Co. Heil Co.*, 815 F. 2d 1122, 1125 (7th Cir. 1987); *Radiator Specialty Co. v. First State Ins. Co.*, 651 F. Supp. 439, 441-42 (W.D. N.C. 1987).

(c) "Covered"

The insurance involved in *Housing Group v. California Ins. Guar. Ass'n,* 47 Cal. App. 4th 528, 533 (Cal. Ct. App. 4th 1996) was an umbrella policy that had a "broad as primary" endorsement. The endorsement provided coverage for a loss "covered" under the policies of underlying insurance. The court found that "covered" could mean falling with the scope of the underlying policy or actually paid by the underlying policy. *Id.* at 532-33. Therefore, the "covered" language was ambiguous – nothing in the excess policy expressly stated coverage of the umbrella was only triggered when a loss was actually paid. The court decided the umbrella carrier was obligated to "drop down."

c) Self-Insured Retention May Not Be "Other Insurance"

No California case expressly holds that a self-insured retention ("SIR") does not constitute "other insurance." However, in *Black Diamond Asphalt, Inc. v. Sup. Ct.,* 114 Cal. App. 4th 109, 118 (Cal. Ct. App. 3d 2003), the court held that a party with a $1 million SIR was not an insurer and "its retention limit [was] not insurance available to it." Therefore, the party was entitled to maintain an equitable indemnity claim against another party with an insolvent carrier. Because SIR funds are often not as readily available to parties as indemnity payments are to insurance companies, courts in the future may use the reasoning of *Black Diamond* to hold that SIRs do not constitute "other insurance" for purposes of determining when CIGA's obligations are triggered. *Compare Zinke-Smith, Inc. v. Florida Ins. Guaranty Assoc., Inc.*, 304 So. 2d 507

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(Fla. Ct. App. 4th 1974) (holding self-insured retention did not render claimant an "insurer" for purposes of determining whether "covered claim" existed).

2. Nevada

California law on "exhaustion" of "other insurance" is much more explicit than Nevada law. When the insured has a secondary policy and the Nevada guaranty association is trying to avoid coverage, it has three main arguments under Nevada law. First, it can argue the insured's claim is not covered. *See* NRS § 687A.033(1)(d) (providing that a "covered claim" is "not a covered claim pursuant to the laws of any other state"). The association could use another state's law to show that the claim falls outside of its coverage.

Second, the association could assert the insured's claim is not yet payable because she failed to "exhaust" her rights under another policy. Nevada Revised Statutes § 687A.100(1) provides:

> Any person having a claim against his insurer, including, but not limited to, a claim for damages caused by an uninsured motorist, under any provision in his insurance policy, which is also a covered claim shall first exhaust his right under the policy. Any amount payable on a covered claim under this chapter must be reduced by the amount of the applicable limit under the claimant's insurance policy, regardless of whether the claimant recovers the full amount payable under that policy or exhausts only a lesser amount.

Employing "drop down" analysis, the association could argue that applicable state law compels a secondary insurer to assume the obligations of the insolvent primary insurer. The insured is in a "pickle" because of the ambiguity of § 687A.100(1)'s wording. How does an insured "exhaust his right under the policy?"[1] Is mere submission of the claim enough? Is denial of the claim "exhaustion?" Does the insured actually have to obtain relief for "exhaustion" to occur? Litigating these questions and the insured's claim against the secondary insurer can prove costly.

A third argument available to the association is that a claim is not yet payable because the insured had not completed claim presentation to the insurance guaranty association in the state of her residence. Nevada Revised Statutes § 687A.100(2) provides:

> Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall

[1] *Compare* Ariz. Rev. Stat. § 20-673(G) (providing "'exhaustion of all rights under any other policy of insurance' means the payment of the applicable policy limits or an adjudication by a court of record that no benefits are owed").

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seek recovery first from the association of the place of residence of the insured. However, if the claim is a first party claim for damage to property with a permanent location, recovery must first be sought from the association of the location of the property. If the claim is a workman's compensation claim, recovery must first be sought from the association of the residence of the claimant. Any recovery under this chapter must be reduced by the amount of the recovery from any other insurance guaranty association or its equivalent.

It is evident that a significant conflict exists between the foregoing section and Nevada's "covered claim" law. Under NRS § 687A.033(1)(d), if a claim is covered by "the laws of any other state," then it is not a "covered claim" for purposes of Nevada insurance guaranty law. Therefore, § 687A.100(2) could be considered meaningless when determining whether a given claim is covered. However, assuming a Nevada "covered claim" included claims "which may be recovered under more than one insurance guaranty association or its equivalent," it is probable the association would argue that before a nonresident claim is payable, the insured must "seek recovery" from the association of his residence first.[2] Of course, this position forces the insured to pay substantial expenses to litigate coverage in another state before resolving his claim in Nevada.[3]

Dirty Little Secret #12: Be mindful of the insurance guaranty association's little tricks. Assume your Nevada-based subcontractor client performs work at a housing development in California. Later, the subcontractor is sued for defective work causing damage to the work of other contractors who performed work at the development. Following suit, the subcontractor's primary carrier becomes insolvent. You assist the subcontractor in submitting the claim to CIGA because the development is located in California. Since the subcontractor is a resident of Nevada, you also present the claim to the Nevada association. California denies the claim pursuant to law requiring claimants to first seek relief in the state of their residence. (Continued on next page).

[2] Interestingly, Nevada legislators used the phrase "seek recovery" in subsection (2) as opposed to "exhausting of rights" in subsection (1). This could indicate legislative intent to force a claimant to obtain recovery from "other insurance" before payment by the Nevada association is required.

[3] Another conflict evident in § 687A.100(2) crops up when attempting to apply the first sentence. "Place of residence" does not equal domicile. Many insureds have multiple places of residence. For example, under this law an insured who lives in California, Nevada, and Alaska and whose claim is arguably "covered" by insurance guaranty association law in California and Nevada may have to submit a claim to the Alaska insurance guaranty association before obtaining recovery in the other states. This does not make sense.

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Dirty Little Secret #12: (Cont.) Nevada denies the claim because it alleges application of California law requires the subcontractor's secondary carrier to "drop down." Regardless of whether the insurance guaranty associations are correct or in error, the subcontractor is stuck litigating with four parties, viz. plaintiffs, secondary carrier, CIGA, and the Nevada association. Three solutions exist depending upon the resources of the subcontractor – go bankrupt, sue CIGA and the Nevada association for breach of statutory obligations, or sue only CIGA and settle with the Nevada Association for an assignment of the subcontractor's rights against the secondary carrier.

3. Arizona

The heart of Arizona law on "other insurance" affecting the guaranty fund's obligation to defend and indemnify appears in § 20-673. This section provides in pertinent part:

> A. Any person having a claim against an insurer under any provision in an insurance policy that is also a covered claim shall be required to exhaust first all rights under such policy. Any amount payable on a covered claim pursuant to this article shall be reduced by the amount of such recovery under the claimant's insurance policy. A member insurer or other insurer, which pays such insurer's own policy, shall have no right of subrogation or recovery against the insured of an insolvent insurer.
>
> B. Any person having a claim that may be recovered under more than one insurance guaranty fund or its equivalent or who is insured under more than one policy shall first exhaust coverage from the fund of the place of residence of the insured or, if it is a first-party claim for damage to property with a permanent location, shall first exhaust coverage from the fund of the location of the property, or shall first exhaust coverage under such other policy. Any recovery pursuant to this article shall be reduced by the amount of the recovery from any other insurance guaranty fund or its equivalent or under the policy. Covered claims by subscribers of an insolvent reciprocal insurer shall not be paid until all subscribers have been assessed pursuant to § 20-791.
>
> C. Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages. Any recovery pursuant to this

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> article shall be reduced by the amount of the recovery under the claimant's insurance policy. Any amount payable on a covered claim shall be reduced by the amount of such recovery under other applicable insurance.

The case of *Maricopa County v. Federal Ins. Co.*, 157 Ariz. 308 (Ariz. 1988) dealt with the issue of whether an available secondary insurance policy automatically "dropped down" when a primary carrier became insolvent. Plaintiff's husband was employed by RJ as a driver transporting dirt to a jobsite controlled by CD and owned by Maricopa County. On one trip, the decedent was electrocuted when his dump truck came into contact with an electrical line. Plaintiff sued RJ, CD, and Maricopa County. RJ had a primary policy with limits of $500,000 and an excess policy with $5 million limits. RJ's primary carrier became insolvent. The action settled before trial for $120,000. Maricopa County, CD, and RJ's excess insurer, Chubb, each paid $40,000 towards the settlement.

In summary judgment proceedings, Maricopa County and CD argued that Chubb should reimburse them for amounts paid because it was required to "drop down" upon the primary carrier's insolvency. The trial court found for Chubb. On appeal, Maricopa County and CD argued that application of § 20-673(C) caused Chubb's policy to become primary. The appellate court rejected this contention, stating "[w]e do not interpret A.R.S. § 20-673(C) to mean that by exhausting 'all rights under other applicable coverage' the insured may transform the character of the other coverage into something other than that expressed in the policy in unambiguous terms."

What can be taken from the *Maricopa County* decision is that Arizona's insurance guaranty statutes do not operate to transform contractual relationships between the insured and its carriers absent some express wording in the given policies.

4. Florida

Florida insurance guaranty law on "other insurance" is much less restrictive than the above states. Florida Statutes Annotated § 631.61 provides:

> Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall not be required to exhaust first her or his rights under such a policy. Any amount payable on a covered claim under this part shall be reduced by the amount of any recovery under such insurance.
>
> Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall

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> seek recovery first from the association of the place of residence of the insured, except that if it is a first-party claim for damage to property with a permanent location, the person shall seek recovery first from the association of the location of the property, and if it is a workers' compensation plan, the person shall seek recovery first from the association of the residence of the claimant. Any recovery under this part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

These provisions seem to indicate, somewhat ambiguously, that no exhaustion of "other insurance" requirement exists to maintain a claim with FIGA. However, it seems *equally clear* that any amount payable on a "covered claim" is reduced by: (a) the amount of any recovery under the insurance policy(ies), and (b) the amount of recovery from any other insurance guaranty association or its equivalent. Fla. Stat. Ann. § 631.61; Leonard I. Reiser, *Florida Jurisprudence*, § 439 (2d Edition).

a) The Date of Primary Carrier Insolvency Determines Whether Secondary Coverage "Drops Down"

In *Golden Isles Hosp., Inc. v. Continental Cas. Co.*, 327 So. 2d 789 (Fla. Ct. App. 3d 1976), the Court held that an excess carrier was not "the guarantor of the solvency of the primary insurer chosen by the policy holder." Golden Isles tendered a $60,000 claim to its primary insurer. The insurer did not pay the claim because it became insolvent. Golden Isles then submitted the claim to its excess insurer with whom it had a $1,000,000 policy. It argued the claim was covered in view of the excess policy's trigger clause, which stated "CNA insured the HOSPITAL for losses (up to $1,000,000) in excess of the 'amount recoverable' from primary insurance." Golden Isles claimed that because the primary carrier was insolvent, the amount then recoverable was zero, and the clause triggered coverage. In affirming the trial court's rejection of this argument, the appellate court did not explicitly state that in all cases secondary coverage did not "drop down" upon primary carrier insolvency. Instead, it anchored its reasoning on the *time* of the primary carrier's insolvency. It stated "the collectibility of primary insurance is to be determined as of the date of the occurrence fixing liability." In this case, on the date the claim arose, the primary carrier was solvent. Primary coverage was collectible at that point, and therefore, secondary coverage was inapplicable. The fact that the primary carrier went insolvent after the claim arose but before any payment to the insured, was of no consequence in determining whether excess coverage was triggered.

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Dirty Little Secret #13: Guaranty associations are adept at convincing insureds that excess coverage must be exhausted before their coverage attaches. Do not necessarily be swayed by these arguments. In fact, most current secondary coverage policies expressly exclude any "drop down" duty. Thus, your claim is likely covered if all other statutory requirements are satisfied.

G. Guaranty Association "Set-offs"

1. California

CIGA is entitled to a set-off against covered claims in the amount recoverable by the injured motorist under her own underinsured motorist coverage. Cal. Ins. Code § 1063.2(c)(1). The same is true of recovery from "other insurance" or other insurance guaranty associations. *See* Cal. Ins. Code §§ 1063.1(c)(9) and 1063.2(c)(1).

2. Nevada

Nevada law states "[a]ny amount payable on a covered claim . . . must be reduced by the amount of the applicable limit under the claimant's insurance policy, regardless of whether the claimant recovers the full amount payable under that policy or exhausts only a lesser amount." NRS § 687A.100(1).

3. Arizona

Arizona's set-off law is broader. Arizona Revised Statute § 20-673(C) provides:

> Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages. Any recovery pursuant to this article shall be reduced by the amount of the recovery under the claimant's insurance policy. *Any amount payable on a covered claim shall be reduced by the amount of such recovery under other applicable insurance.*

(emphasis added).

A case showing the harsh results of this law's application is *Arizona Prop. and Cas. Ins. Guaranty Fund v. Ueki*, 150 Ariz. 451 (Ariz. 1986). In *Ueki*, Judy Ueki was sitting in the front passenger seat of a vehicle driven by Henry Ueki and owned by Pudlas. An accident occurred, and Judy Ueki's injuries amounted to over $15,000. Henry Ueki was insured by Rockwood with policy

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limits of $15,000 per person. Pudlas was insured by Ambassador with policy limits of $15,000 per person. After the accident, Ambassador became insolvent, and the association took over its obligations. Rockwood paid Judy Ueki $15,000 in partial settlement of her claim. Thereafter, the association commenced a declaratory relief action, asking the trial court to determine as a matter of law it had no obligation to pay any more pursuant to § 20-673(C). The trial court found in favor of the association.

Judy Ueki argued on appeal that § 20-673(C) contradicted the underlying intent of the insurance guaranty statutes, which was to "avoid financial loss to claimants and policyholders because of the insolvency of an insurer." The Appeals Court responded by stating that the insurance guaranty law had been amended so many times since this express purpose was included "the clause no longer retains any viability." Because of the first sentence of § 20-673(C), plaintiff averred the association's payment obligation is deemed "excess coverage" that would be triggered by Rockwood's payment. The Court completely avoided responding to this point, instead feeling content to rely on the "concise and unambiguous" wording of the last sentence of § 20-673(C). It concluded that the association's obligation was limited to "covered claims" reduced by the amount other insurance paid. Therefore, Rockwood's $15,000 payment extinguished Judy Ueki's right to receive any more from the association. By Ambassador becoming insolvent, Pudlas not only lost all his paid premiums, but also any liability protection. Judy Ueki ***merely*** lost compensation for her injuries.

The unsavory result of *Ueki* caused the Arizona Supreme Court to overrule the case and hold that the last sentence of § 20-673(C) required only that the amount of the claimant's total damage claim be reduced by the amount paid under other insurance policies, but that the other payments would not be offset against the association's obligation. *Jangula v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 207 Ariz. 468, 470 (Ariz. 2004); *Arizona Prop. and Cas. Ins. Guaranty Fund v. Herder*, 156 Ariz. 203, 208 (Ariz. 1988). Under the *Ueki* holding, given an injured claimant with UM coverage of $15,000, a negligent driver insured by an insolvent insurer with policy limits of $100,000, and a damage claim of $150,000, the association would be liable for only $100,000 minus the $15,000 paid by the UM carrier. *Jangula*, 207 Ariz. at 470. Under the *Herder* holding, the same facts would result in reduction of the claimant's $150,000 damage claim by $15,000 or $135,000, and the association would be required to pay $100,000, the full extent of its statutory obligation. *Id.*

Then in 1998, the Arizona Legislature amended § 20-673(C) and added that "[a]ny recovery pursuant to this article shall be reduced by the amount of the recovery under the claimant's insurance policy." 1998 Ariz. Sess. Laws, ch. 94, § 5; *Jangula*, 207 Ariz. at 470. Obviously, its intent was to return the state of the law back to the holding in *Ueki*. So, it is important to remember that, at

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least with regard to Arizona (and Florida) law, payments by other carriers offset amounts due by the association, even if damages exceed policy limits.

4. Florida

As stated above, Florida law provides that any amount payable on a "covered claim" is reduced by (a) the amount of any recovery under the insurance policy(ies), and (b) the amount of recovery from any other insurance guaranty association or its equivalent. Fla. Stat. Ann. § 631.61; Leonard I. Reiser, *Florida Jurisprudence*, § 439 (2d Edition).

5. Massachusetts Law Update

Massachusetts General Laws, Chapter 175D, § 9 provides: "Any person having a claim against his insurer under any insolvency provision in his insurance policy which is also a covered claim shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of such recovery . . . ."

Dirty Little Secret #14: The *Ueki* decision brings to the fore the differences in states' application of insurance guaranty association set-offs. "Other insurance" reduces either the association's obligation or the claim amount, which association's funds go to pay. Arizona law provides that "other insurance" reduces its Fund's obligation. Thus, in a situation in which a $2 million claim is made against a subcontractor with one available $1 million policy and one $1 million policy of an insolvent insurer, the Fund owes nothing. Why? The highest amount the Fund is ever liable for is $300,000. Once one carrier pays $1 million, the Fund's obligation is reduce to zero. If the same hypothetical was analyzed under California law, CIGA's obligation would be $500,000. That is because the $1 million payment reduced the ***claim***, as opposed to the association's ***obligation***, by $1 million. CIGA must pay its limits, viz. $500,000, because of the remaining $1 million claim.

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IV. Presentation of Claim To Insurance Guaranty Associations

A. Claim Presentation

Generally, there are three ways a "covered claim" comes to the attention of an insurance guaranty association: (1) notice to the insured/claimant by the association; (2) insured/claimant submission of a claim to the association; and (3) litigation against the insured of an insolvent insurer.

1. Notice from Association

When an insurer is declared insolvent and the court orders the company to be placed in liquidation, a "Liquidator" is appointed. The Liquidator takes control of the insolvent carrier's assets and liabilities and all unpaid claims. After inventorying the claims, the state insurance guaranty association sends notices to all insureds, claimants, and any other parties having an interest in the insolvent carrier's estate. Responses to the notices constitute claim presentation.

2. Submission of a Claim

Much like submitting a claim to your insurance broker, an insured or claimant may notify the state insurance guaranty association by mailing all vital information about the claim to the insurance guaranty association's claims address.

3. Litigation Against the Insured of an Insolvent Carrier

Often state insurance guaranty associations become aware of "covered claims" when an insured/claimant provides them with a civil complaint and accompanying documentation.

B. Timeliness of Claim

1. California

California law defines "covered claims" as those "which are presented as a claim to the liquidator in this state or to the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings[.]" Cal. Ins. Code § 1063.1(c)(iii). Therefore, CIGA may deny claims submitted after the last day set for filing of claims in the insolvent insurer's liquidation proceedings.

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2. Nevada

Nevada claimants must file a claim with the guaranty association within "18 months after the date of the order of liquidation" or before "the final date set by the court for the filing of claims against the liquidator or receiver or the insolvent insurer[.]" NRS §§ 687A.033(2)(c) and 687A.033(2)(d).

3. Arizona

Arizona's limitation statute is quite restrictive. It provides: "[w]ith respect to the handling of claims, the fund may by resolution bar known claims, whether liquidated or unliquidated, not filed within four months from the date of notice to creditors." Ariz. Rev. Stat. § 20-679.

4. Florida

Florida provides no claim filing time limitations. Under Florida Statutes Annotated § 631.57(1)(a), FIGA is obligated to pay "covered claims" existing:

> a. Prior to the adjudication of insolvency and arising within 30 days after the determination of insolvency; b. Before the policy expiration date if less than 30 days after the determination; or c. Before the insured replaces the policy or causes its cancellation, if she or he does so within 30 days of the determination.

Florida does, however, provide a time limitation for commencing suit on an allegedly "covered claim." Section 631.68 provides: "A covered claim as defined herein with respect to which settlement is not effected and suit is not instituted against the insured of an insolvent insurer or the association within 1 year after the deadline for filing claims, or any extension thereof, with the receiver of the insolvent insurer shall thenceforth be barred as a claim against the association and the insured."

> **Dirty Little Secret #15:** Remember that insurance guaranty associations strictly abide by applicable time limits on "covered claims." Because of the relatively short periods in which claims are recognized, insureds or claimants should immediately present claims upon first notice of insurer insolvency. Failure to do so could result in claim denial without remedy. The "notice / prejudice" rule applicable to insurers is completely inapplicable to insurance guaranty associations.

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V. Litigation Involving Insurance Guaranty Associations

A. "Necessary Party" Status

1. California

Pursuant to California Insurance Code § 1063.2(b), CIGA "shall be a party in interest in all proceedings involving a covered claim, and shall have the same rights as the insolvent insurer would have had if not in liquidation[.]" These rights include the ability to appear in and defend any action and receive notice of, investigate, and settle covered claims.

2. Nevada

Nevada insurance guaranty association law does not require the association to be a "necessary party" to proceedings involving a "covered claim." However, for all intents and purposes, the association "[s]hall be deemed the insurer to the extent of its obligations on the covered claims and to that extent has any rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent." NRS § 687A.060(1)(b). The association has the right to obtain recoverable salvage and sue in subrogation of a "covered claim." *Id.* Additionally, the association is bound to "investigate claims brought against the fund and adjust, compromise, settle and pay covered claims to the extent of the obligation of the Association and deny any other claims." NRS § 687A.060(1)(d).

3. Arizona

The authority for the Arizona Insurance Guaranty Fund to participate in litigation is phrased permissively: "The board may: 1. Appear in, defend and appeal any action on a claim that is brought against the fund . . . 4. Sue and be sued." Ariz. Rev. Stat. § 20-664(B).

4. Florida

Like Arizona, FIGA may sue and be sued, defend, and appeal any action on a claim against it. *See* Fla. Stat. Ann. § 631.57(2)(c).

Dirty Little Secret #16: Do not delay notifying insurance guaranty associations of litigation concerning a "covered claim" to avoid the 60 to 180-day stays to which they are entitled. Even if you can show the claim resulted in a litigated judgment for which the association is liable, you risk outright denial of the claim on insufficient notification grounds.

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B. Actions by the Association

1. Subrogation

a) California

Since CIGA stands "in the shoes" of the insolvent insurer, it retains the right to recoup losses paid out of its own funds from responsible third parties through subrogation actions. Cal. Ins. Code §§ 1063.2(b)(1) and 1063.2(b)(2); *California Ins. Guar. Ass'n v. Sup. Ct.*, 64 Cal. App. 4th 219, 225 (Cal. Ct. App. 4th 1998).

b) Nevada

As stated above, the Nevada Insurance Guaranty Association has the right to obtain recoverable salvage and sue in subrogation of a "covered claim." NRS § 687A.060(1)(b).

c) Arizona

Arizona's statute on the Fund's ability to subrogate losses reads as follows: "Any person recovering pursuant to this article shall be deemed to have assigned his or her rights under the policy to the fund to the extent of his or her recovery from the fund. Every insured or claimant seeking the protection of this article shall cooperate with the fund to the same extent as such person would have been required to cooperate with the insolvent insurer. The fund shall have no cause of action against the insured of the insolvent insurer for any sums it has paid." Ariz. Rev. Stat. § 20-672(A).

d) Florida

Florida's statute leaves FIGA a little room to sue insureds, should the insolvent insurer have a cause of action against the insured. Section 631.60(1) provides:

> Any person recovering under this part shall be deemed to have assigned her or his rights under the policy to the association to the extent of the person's recovery from the association, regardless of whether such recovery is received directly from the association or through payments made from the proceeds of bonds issued under former § 166.111(2). Every insured or claimant seeking the protection of this part shall cooperate with the association to the same extent as such person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out *except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer*. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims

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> of the association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

(emphasis added).

The above italicized portion of §631.60(1) begs the question of when would an insolvent insurer have a cause of action against the insured after payments on the policy had been made. This situation could occur when an insurer makes payment based on its own mistake or the insured's misrepresentations and/or concealment of operative facts. In this case, a declaratory relief, reformation, and/or rescission cause of action would inure to the insurer and then be passed to FIGA on insolvency.

Dirty Little Secret #17: Be mindful that in Florida, as opposed to other states, once FIGA pays a claim, the case is not over! Should FIGA later discover facts giving rise to a cause of action against the claimant, viz. mistake, misrepresentation, or fraud, it will sue the claimant for reimbursement, attorney fees, and costs. Therefore, no claimant in Florida (or to be safe, in any other state) should allow payment of a claim without receiving the association's written waiver of any and all present and future claims against the claimant concerning the payment.

2. Equitable Causes of Action Against Insurers

a) Actions Against Primary Insurers with Overlapping Coverage

Because generally state law provides that insurance guaranty associations stand "in the shoes" of the insolvent insurers and possess the same rights as the insolvent insurer to sue, they may commence equitable contribution actions against other primary level insurers who deny coverage. *See American Continental Ins. Co. v. American Cas. Co.*, 73 Cal. App. 4th 508, 513 (Cal. Ct. App. 2d 1999) (stating "[Equitable contribution] is the right to recover, not from the party primarily liable for the loss, but from a co-obligor who shares such liability with the party seeking contribution").

b) Actions Against Secondary Insurers

Insurance guaranty associations also have the right to sue an insured's secondary carriers for equitable indemnity and subrogation. *See United Services Auto. Ass'n v. Alaska Ins. Co.*, 94 Cal. App. 4th 638, 644-45 (Cal. Ct. App. 4th 2001) (discussing equitable indemnity in the context of multiple insurers); *Fortman v. Safeco Ins. Co.*, 221 Cal. App. 3d 1394, 1401-02 (Cal. Ct. App. 2d 1990) (describing equitable subrogation among insurers).

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Circumstances abound in which either the association is unaware of the presence of applicable secondary coverage or a secondary insurer of an insured whose primary carrier is insolvent erroneously denies coverage. In these situations, insurance guaranty associations have the ability to recover some or all parts of their payments from these secondary insurers by suing in equity.

> **Dirty Little Secret #18:** While, generally, a claimant is prohibited from assigning a claim against the insurance guaranty association, the same claimant can assign ***to the association*** claims she may have against a secondary carrier as a means to encourage payment and settlement of her claim. For example, if upon primary carrier insolvency the secondary insurer denies coverage and, it is at least arguable that the carrier should "drop down," the claimant can request the association pay the claim in exchange for assignment of her breach of contract and "bad faith" causes of action against the secondary carrier.

3. Declaratory Relief

a) Against the Insured for Failure to Discharge Duty of Cooperation

(1) California

The uninsured and underinsured motorist provisions of a California automobile insurance policy require timely suit by the insured, settlement with the insurer, or commencement of arbitration. Cal. Ins. Code § 11580.2. Failure of an insolvent carrier's insured to comply with these requirements entitles CIGA to contest coverage in the same ways the carrier could if it was solvent. *Kortmeyer v. California Ins. Guar. Ass'n*, 9 Cal. App. 4th 1285, 1289 (Cal. Ct. App. 2d 1992).

(2) Nevada

Nevada prohibits its association from suing insureds except in a few situations. Nevada Revised Statutes § 687A.090 provides in relevant part: "Except as otherwise provided in subsection 2, the Association does not have a cause of action against the insured of the insolvent insurer for any sums it has paid out . . . 2. The Association may recover the amount of money paid to or on behalf of an insured of an insolvent insurer: (a) If the aggregate net worth of the insured and any affiliate of the insured . . . is more than $25,000,000 . . . or (b) If the Association paid the money in error."

(3) Arizona

Arizona seems to limit its Fund's ability to recover against insureds of insolvent insurers. The law states unambiguously: "[t]he fund shall have no

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cause of action against the insured of the insolvent insurer for any sums it has paid." Ariz. Rev. Stat. § 20-672(A). It is an open question whether or not this provision bars a declaratory relief action against the insured.

(4) Florida

Like California, FIGA may sue the insureds of insolvent insurers for declaratory relief, reformation, and/or rescission. *See* Fla. Stat. Ann. § 631.60(1) (providing "[t]he association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out *except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer*.").

C. Actions Against the Association

1. By Insured / Third Party Claimant

a) Breach of Statutory Duties

(1) California

An insured may only sue CIGA to compel discharge of its statutory duties, viz. defense and reimbursement for "covered claims." Cal. Ins. Code § 1063.2(a); *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal. 3d 775, 783-84 (Cal. 1988).

California Law Update: In *Garamendi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 748-49 (Cal. Ct. App. 1st 2004), the court decided that an insolvent insurer's failure to reserve coverage defenses waived the defenses for CIGA, also.

Dirty Little Secret #19: State law authorizes insurance guaranty associations to furnish a defense in connection with a "covered claim" and when required by policy provisions. *See e.g.*, Cal. Ins. Code § 1063.2(a). The scope of an association's defense duty, however, is ***narrower*** than an insurer's defense duty. An insurer owes an obligation to defend whenever there is potential coverage of the claim under the policy. By contrast, associations owe a duty to defend only claims "covered" at the time of the insurer's insolvency. Consequently, if facts become available during the defense of a claim that rule out any potential for coverage, the association owes no defense duty. *See Saylin v. California Ins. Guar. Ass'n*, 179 Cal. App. 3d 256, 264 (Cal. Ct. App. 2d 1986).

(2) Nevada

Using broad and declarative language, it appears the Nevada Legislature wrote its liability statute to "scare off" potential insured litigants. It provides:

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"There is no liability, and no cause of action of any nature shall arise against any member insurer, the association, its agents or employees, the board of directors, the commissioner or his representatives, for any reasonable action taken by them in the performance of their duties and powers under this chapter." NRS § 687A.150. However, in actuality, at least a single cause of action does exist against the association – breach of statutory duty. *See Nevada Ins. Guaranty Assoc. v. Sierra Auto Center*, 108 Nev. 1123, 1126 (Nev. 1992) (upholding trial court's determination that association "improperly denied its obligations").

(3) Arizona

Arizona permits insureds to sue the association for breach of statutory duties. *Bills v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 194 Ariz. 488, 497 (Ariz. 1999).

An example of a litigant who successfully pursued this cause of action is described in the "***bad check case***" – *Betancourt v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 170 Ariz. 296 (Ariz. 1992). In this case, Betancourt sued Ogles for negligence in an automobile accident. Ogles was insured by American Excel. During the litigation, Betancourt entered into a settlement agreement with Ogles for the $15,000 policy limits. Fourteen days later, plaintiff attempted to cash the settlement payment, and American Excel's check bounced. Later, plaintiff learned the insurance company had been recently adjudged insolvent. She demanded the Fund pay the $15,000, but it refused. Plaintiff's summary judgment motion was granted shortly thereafter.

On appeal, the Fund argued it had no duty to pay the settlement payment because it did not make the agreement – American Excel did. The Fund stated that the law permits it to investigate claims and to even obtain a stay of proceedings to give it sufficient time for claim evaluation. Based on these provisions, the Fund argued, the Legislature expected it to make its own determination about the value of given claims. The association maintained that it should not be compelled to merely pay an amount that some insolvent insurance company determined was appropriate when the company had reason to know it could never pay the settlement. The Court of Appeals rejected this argument, however. It analyzed whether Betancourt's claim was a "covered claim," found that it was, and held that the Fund was obligated to make the settlement payment. The Court rejected the investigation argument as lacking merit because the Fund had never bothered to seek a stay in this particular case. The implied reasoning of the Court was that if the Fund so needed to evaluate Betancourt's claim, it would have requested a stay, at least.

(4) Florida

Currently, the state of Florida law on the issue of whether insureds may recover against FIGA for breach of statutory duties is unclear. To be sure § 631.66 clearly and unambiguously prohibits FIGA's liability for *any* cause of

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action. However, recent appellate court decisions have stopped short of barring plaintiffs from suing FIGA for any and all causes of action.

Analysis of the question begins with *Florida Ins. Guaranty Assoc., Inc. v. Giordano*, 485 So. 2d 453, 456 (Fla. Ct. App. 3d 1986). In *Giordano*, decedent's wife commenced a products liability action against Rego, who had allegedly manufactured a gas valve that caused Giordano's death. Rego had a $300,000 policy with Reserve. It also had $5,000,000 in excess coverage. Reserve undertook the defense of plaintiff's suit for four years. Thereafter, Reserve became insolvent, and coverage was tendered to FIGA. After accepting the defense, FIGA determined Rego was an Illinois company. It then invoked Florida Statute Annotated § 631.61(2), which provides in relevant part "[a]ny person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured[.]" The insured's claim was thereafter tendered to the Illinois Guaranty Fund ("IGF"), who took over the defense.

As the litigation progressed, FIGA became aware that settlement negotiations were taking place between plaintiff, Rego, IGF, and the excess carrier. In court one day, with a FIGA attorney present, plaintiff, Rego, IGF, and the excess carrier announced a settlement. IGF was to pay its limit of $150,000, the excess carrier was to pay $225,000, and FIGA was to pay $150,000. Rego assigned its rights against FIGA to plaintiff in exchange for a covenant not to execute judgment against it. FIGA objected to the settlement and refused to pay plaintiff. Plaintiff sued FIGA pursuant to the assignment and obtained summary judgment against it. On review, the appellate court held that based on Florida Statute Annotated § 631.57(1)(b), which obligated FIGA to "[b]e deemed the insurer to the extent of its obligation on covered claims", no basis existed for FIGA to entirely reject its defense and indemnification duty. The trial court's judgment for plaintiff was affirmed.

Interestingly, the Florida court avoided analysis of many more issues relevant to *Giordano's* facts. It stated no support for its conclusion that FIGA "had a coextensive duty with IGF, as a primary carrier, to defend the insured." It failed to analyze whether FIGA could be obligated by a stipulated judgment it had no part in negotiating. It did not address whether IGF could maintain an equitable cause of action against FIGA for failure to completely discharge its statutory obligation to defend the insured. Finally, the Court recognized that the insured was "harmed by FIGA's failure to defend [the insured]," but did not state why this was relevant to the case in light of clear Florida precedent prohibiting FIGA "bad faith" liability.

Florida Ins. Guaranty Assoc., Inc. v. Jones, 847 So. 2d 1020 (Fla. Ct. App. 1st 2003) may or may not have overruled *Giordano*. *Jones* involved a fatal auto accident. Jones' estate brought a wrongful death action against

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vicariously liable party, Pratt. During the litigation, Pratt's insurance carrier became insolvent. The claim was tendered to FIGA, who conducted an investigation of the claim. FIGA determined plaintiff's claim was not covered. It, therefore, did not furnish a defense to Pratt. The result was that Pratt's default was taken, and a $75,000,000 judgment was entered against Pratt.

Pratt assigned his rights against FIGA to plaintiff. Plaintiff sued FIGA for breach of statutory, contractual, and fiduciary obligations owed to Pratt. It appears the complaint alleged entitlement to only consequential damages, viz. $75,000,000. The trial court granted summary judgment to plaintiff and awarded FIGA statutory limits of $300,000 plus interest from the date of the Pratt default judgment. FIGA appealed. Basing its ruling on the express wording of § 631.66, the appellate court reversed the trial court's ruling and found that plaintiff's "alleged causes of action are not cognizable."

The words chosen for the decision seem to indicate the Court's intent to bar any and all causes of action against FIGA. However, what is significant about the case is that Pratt did not hire its own defense counsel when FIGA denied coverage. Had it done this, plaintiff would have presumably pled expectation damages (i.e., the cost to defend the case and the indemnity obligation, if it existed after defense) and consequential damages. Then, the Court would have been squarely faced with making a decision on both types of damages. As the facts were presented, however, it did not have to. In the future, Florida courts must clarify FIGA's legal obligations to insureds of insolvent insurers.

Dirty Little Secret #20: After claim denial, insurance guaranty associations often direct claimants to state statutes "clearly and unambiguously" disclaiming any liability whatsoever to anyone. If you have a valid claim, be not dissuaded from commencing litigation against an insurance guaranty association. It seems in this area at least, ***the laws were written to be broken***. Currently, most states (except for possibly Florida) permit claimants to maintain breach of statutory duty causes of action against associations who erroneously deny "covered claims." Many states also allow claimants to recover attorney fees and costs incurred in litigating from the association.

b) Breach of Implied Covenant of Good Faith and Fair Dealing ("Bad Faith")

(1) California

California law provides that "bad faith" or other tort claims against an insolvent insurer do not fall within the definition of "covered claims." Cal. Ins. Code § 1063.2(g); *Interstate Fire & Cas. Ins. Co. v. California Ins. Guar. Ass'n*,

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125 Cal. App. 3d 904, 910 (Cal. Ct. App. 2d1981). CIGA may not even be sued for its own "bad faith" handling of an insured's claim. *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal. 3d 775, 783-84 (Cal. 1988).

(2) Nevada

Like in California, in Nevada an insured may not sue the association for "bad faith." *Nevada Ins. Guaranty Assoc. v. Sierra Auto Center*, 108 Nev. 1123, 1127 (Nev. 1992).

The seminal case on this point is *Sierra Auto Center*. This matter involved a company called Sierra whose employee killed a pedestrian while driving a company vehicle. Sierra was insured by Mission. The pedestrian's heir sued Sierra for negligence. Mission accepted the defense of Sierra and actually defended for a short period. Then, Mission became insolvent. The Nevada Insurance Guaranty Association assumed Mission's obligations. During the association's investigation of the claim, it discovered the pedestrian had applicable uninsured motorist coverage. It dropped Sierra's defense based upon Nevada's exhaustion provision and stated it would not resume the defense until the pedestrian's heir had exhausted his rights under this policy. Sierra settled with the heir. Sierra then sued the association, arguing that it had tortiouosly failed to discharge its statutory obligations. The trial court found that the association was liable for "bad faith." On appeal, the Nevada Supreme Court affirmed and reversed in part. It stated that because the UM coverage was not applicable, the association breached its statutory duty to defend and indemnify. However, it reasoned the association could not be liable for a tort related to the breach. The Court explained that "bad faith" arises in the presence of contractual privity. In this case, Sierra and the association had no contract.

The opinion's stated reasoning appears to be a pretext for a policy judgment. Nevada law provides explicitly that the association stands "in the shoes" of the insolvent insurer. NRS § 687A.060(1)(b). It even states the association "[s]hall be deemed the insurer[.]" The association is bestowed with rights and duties of the insured's policy without ever entering into an agreement with him. That the right to sue for "bad faith" is the one obligation that did not make it in the transition does not make logical sense. *See Bills v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 194 Ariz. 488, 492 (Ariz. 1999) (rejecting the lack of privity argument). The Court's conclusion exists in the face of express statutory language providing that no cause of action exists "for any ***reasonable*** action taken by [the association] in the performance of their duties and powers under this chapter." NRS § 687A.150 (emphasis added). The opinion could be more respected if the Court held flatly that no "bad faith" causes of action exist against the association for policy reasons, i.e., the association is a "safety net", not an insurer.

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(3) Arizona

Under Arizona law, the insurance guaranty fund is not subject to liability for "bad faith" and other torts. Ariz. Rev. Stat. § 20-675; *Bills v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 194 Ariz. 488, 497 (Ariz. 1999); *Wells Fargo Credit Corp. v. Arizona Prop. and Cas. Ins. Guaranty Fund*, 165 Ariz. 567, 573 (Ariz. 1990).

The key case on this point is *Bills*. In this action, a motor vehicle accident caused the death of plaintiff's husband. Plaintiff alleged PBC was liable for his death due to negligence in selling him alcoholic drinks. PBC was insured by Prestige. During the course of litigation, PBC became insolvent, and the Fund assumed PBC's defense. Contrary to the recommendations of PBC's defense counsel, the Fund refused to pay any amount to settle the case. After trial, plaintiff obtained a judgment against PBC in the amount of $401,706.34. Plaintiff and PBC entered into an agreement in which PBC assigned any and all rights it had against the Fund to plaintiff. Plaintiff sued the Fund for negligence, breach of contract, and "bad faith." The Fund moved for summary judgment. The trial court granted "partial summary judgment" and dismissed plaintiff's tort causes of action.

On appeal, plaintiff alleged § 20-675 permitted recovery against the Fund for torts it committed when handling PBC's claim. After rejecting various technical arguments advanced by both plaintiff and the Fund, the Court seized upon the core statutory reason why the Fund could not be held liable. It recognized the Fund was empowered to assess amounts from its members only for "covered claims." It reasoned tort damages against the association were not "covered claims." Therefore, the Court held, the Fund should not be liable for tort damages because it lacks the source from which to pay them. *Id.* at 580.

To guard its conclusion, the Court summarily dismissed several statutory and policy arguments given by plaintiff. It said that the fact that the Fund was authorized to borrow money and take all actions to affect the intent of the law did not serve to create a cause of action where none previously existed. It failed to acknowledge, however, that serving the intent of the law was another Fund purpose that existed in addition to payment of "covered claims." It admitted providing immunity to the Fund for any of its unreasonable acts allowed it to be "unchecked by any real consequence[.]" However, the Court advised plaintiff to take this problem up with the Arizona Legislature. Id. at 497. It also said that, notwithstanding her inability to recover for "bad faith" against the Fund, plaintiff could recover breach of contract damages, interest, and attorney fees up to $100,000. Plaintiff was ***probably pleased*** with this sentiment in view of the fact she was awarded over $400,000 by the jury.

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(4) Florida

(a) FIGA Is Neither Directly Nor Vicariously Liable for "Bad Faith"

In *Rivera v. Southern American Fire Ins. Co.*, 361 So. 2d 193 (Fla. Ct. App. 3d 1978), the facts were that plaintiffs obtained a $53,000 judgment from an insured whose insurer became insolvent before payment of the amount. Plaintiffs obtained payment by FIGA for the insurer's $25,000 policy limits. They then sued FIGA for amounts in excess of $25,000 on the theory that the insolvent carrier committed bad faith for which FIGA was vicariously liable. In reviewing the dismissal of plaintiffs' complaint, the appellate court seized upon the language of Florida Statute Annotated § 631.57(a)(3), which provides: "In no event shall the association be obligated to a policy holder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises." It held "FIGA is not liable for any amounts in excess of policy limits and is not vicariously liable for tortious acts of members' insurers."

Fernandez v. Florida Ins. Guaranty Assoc., Inc., 383 So. 2d 974 (Fla. Ct. App. 3d 1980) concerned the question of whether FIGA could be liable for "bad faith" refusal to settle within policy limits. Plaintiff, in this case, was injured in an accident caused by a motorist whose insurer became insolvent during litigation of the claim. FIGA succeeded to the insolvent insurer's status as a party defendant. Plaintiff made a $10,000 policy limits demand, which was refused by FIGA. At trial, plaintiff obtained a $54,000 verdict. She recovered $10,000 from FIGA, and then commenced a separate "bad faith" action against it. The trial court dismissed the complaint under §§ 631.57(a)(3) and 631.66. The appellate court reviewing the decision determined Florida Statute Annotated § 631.66 was apt in resolving the dispute. Section 631.66 provides broadly that:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the board of directors, the Chief Financial Officer, or the department or office or their representatives for any action taken by them in the performance of their powers and duties under this part. Such immunity shall extend to the participation in any organization of one or more other state associations of similar purposes and to any such organization and its agents or employees.

The Court held that this provision "clearly, unambiguously, and directly" applied to the facts of the case, and application of it compelled "the conclusion that no bad faith cause of action lies against FIGA."

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(5) Other States

Other states precluding "bad faith" liability against their insurance guaranty associations include Georgia, Hawaii, Kentucky, Louisiana, Massachusetts, Mississippi, North Carolina, Oklahoma, and Pennsylvania.

Dirty Little Secret #21: When insurance guaranty associations tell you they cannot be sued, they lie. When associations tell you they are not liable for "bad faith" or other torts, they speak the truth. At present, no state recognizes a "bad faith" cause of action against its insurance guaranty association. Generally, the rule's rationale is that no contractual privity exists between the insured and association. However, in the future, Legislatures should review laws pertaining to association tort liability. Currently, no law prevents them from abusing insureds.

c) Vicarious Liability for Defense Counsel's Acts

At least one court has grappled with the question of whether counsel appointed by an insurance guaranty association to defend the insured is its agent for purposes of the immunity statute. In *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 515, 518 (Ariz. 1986), the Court held that when an association retains an attorney to represent an insolvent company's insured in a claim against that insured, the attorney is the agent of the insured and not the agent of the association.

2. By Other Insurers For Indemnity, Contribution, or Subrogation

a) California

Under California law, obligations an insolvent insurer owes to other insurers, including claims of indemnity, contribution, and subrogation, are not "covered claims." Cal. Ins. Code § 1063.1(c)(5). Solvent insurers may not sue CIGA for indemnity, contribution, or subrogation. *Mercury Ins. Co. v. Enterprise Rent-A-Car Co. of Los Angeles*, 80 Cal. App. 4th 41, 50 (Cal. Ct. App. 2d 2000). *See Black Diamond Asphalt, Inc. v. Sup. Ct.*, 114 Cal. App. 4th 109, 118 (Cal. Ct. App. 3d 2003); *California Union Ins. v. Central Nat'l Ins. Co. of Omaha*, 117 Cal. App. 3d 729, 734 (Cal. Ct. App. 2d 1981).

b) Nevada

Nevada law excludes from the definition of a "covered claim" "an amount that is directly or indirectly due a reinsurer, insurer, insurance pool or underwriting association, as recovered by subrogation, indemnity or contribution, or otherwise." NRS § 687A.033(2)(a).

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c) Arizona

Arizona law provides that a "[c]overed claim does not include any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise nor shall it include any obligations of the insolvent insurer arising out of any reinsurance contracts nor shall it include attorney's fees or adjustment expenses incurred prior to the determination of the insolvency." Ariz. Rev. Stat. § 20-661(3).

d) Florida

Florida uses the same phrasing as Nevada in disclaiming FIGA liability for "[a]ny amount due any reinsurer, insurer, insurance pool, or underwriting association, sought directly or indirectly through a third party, as subrogation, contribution, indemnification, or otherwise[.]" Fla. Stat. Ann. § 631.54(3)(a).

3. By the State?

In *Arizona v. Arizona Prop. & Cas. Ins. Guaranty Fund*, 192 Ariz. 390 (Ariz. 1998), a unique issue was presented: Can the state sue its insurance guaranty association? The facts of the case are straightforward. The Arizona Department of Transportation entered into a contract with California corporation BB&B for construction of a highway. As a part of the contract's conditions, BB&B was obligated to obtain an insurance policy and name the state as an additional insured. During the course of the project, several workmen were injured in a construction accident. The workmen sued BB&B and the state. BB&B's insurer, Mission, accepted the state's tender and commenced defense of the suit. Shortly thereafter, Mission entered liquidation proceedings. In the interim, the state settled with plaintiffs and filed a claim with CIGA. CIGA rejected the claim due to California law defining "covered claims" to exclude "any obligation of the insolvent insurer arising out of any obligation to any state or federal government." *See* Cal. Ins. Code § 1063.1(c)(3).

The state then filed a claim with Arizona Property & Casualty Insurance Guaranty Fund because Mission was authorized to do business in Arizona. The Fund denied the claim on the ground that the state cannot seek monetary relief from itself. Then, the state sued the Fund for a declaration that the state was entitled to monies paid due to the insolvency of Mission. The trial court ruled for the state. The Court of Appeals first tackled the issue of whether the state was a "person" entitled to make a claim with the fund. It determined that, to be entitled to payment from the Fund, the state did not have to be a "person" – it was sufficient if the state fell within the definition of an "insured" as provided by the insurance code. The Court then responded to the Fund's argument that a state cannot make a claim or sue itself. It dispelled the notion that the state was the Fund by acknowledging that the Fund operated independently of the state through a board of directors and received its operating funds, not through the state treasury, but through

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assessments to its members. The Court also stated that public policy supported the state's ability to receive compensation from the Fund. It recognized that taxpayers should not directly shoulder the burden of an insurer's insolvency.

Dirty Little Secret #22: If you're an insurer, you can ***"forget about"*** suing insurance guaranty associations for equitable indemnity, contribution, or subrogation – especially in California. In other states, such as Nevada, Arizona, and Florida, the only way to recover from the association is to obtain an assignment of any breach of statutory duty cause of action from the insured. Also, in Arizona a small loophole may exist. Arizona Revised Statute § 20-661(3) does not expressly preclude a third party insured from suing the association on behalf of the insurer for the above equitable causes of action. However, such suit may be thrown out due to the Legislature's intent to prohibit insurer recovery from associations

D. Actions Against Third Parties Insured by Insolvent Carriers

1. California

California law is unique in its treatment of suits by third parties against insureds of insolvent insurers. The operative provision provides as follows:

> An insurer, insurance pool, or underwriting association may not maintain, *in its own name or in the name of its insured*, any claim or legal action against the insured of the insolvent insurer for contribution, indemnity or by way of subrogation, except insofar as, and to the extent only, that the claim exceeds the policy limits of the insolvent insurer's policy. In those claims or legal actions, the insured of the insolvent insurer is entitled to a credit or setoff in the amount of the policy limits of the insolvent insurer's policy, or in the amount of the limits remaining, where those limits have been diminished by the payment of other claims.

Cal. Ins. Code § 1063.1(5) (emphasis added).

By virtue of this language, no third party insured may assert contribution, subrogation, or indemnity claims against persons insured by an insolvent insurer except for amounts exceeding the insolvent insurer's policy limits.[4] Cal. Ins. Code § 1063.1(c)(5). *See also E.L. White, Inc. v. City of*

[4] Note, however, that this law does not seem to preclude an uninsured or self-insured third party from maintaining equitable causes of action against an insured of an insolvent carrier. This point

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Huntington Beach, 138 Cal. App. 3d 366, 371 (Cal. Ct. App. 4th 1982); *Collins-Pine Co. v. Tubbs Cordage Co.*, 221 Cal. App. 3d 882, 887-88 (Cal. Ct. App. 3d 1990). *See Black Diamond Asphalt, Inc. v. Sup. Ct.*, 114 Cal. App. 4th 109, 119 (Cal. Ct. App. 3d 2003). Thus, indemnity claims may lie against an insolvent carrier insured for amounts exceeding the policy limits. *Black Diamond Asphalt, Inc.*, 114 Cal. App. 4th at 119. The underlying purpose of this law is to protect insureds of insolvent insurers from not only liability, but litigation caused by reason of a circumstance out of their control – their insurer's insolvency. *Id.*

Dirty Little Secret #23: In a California construction defect action, it is often the case that two or more parties are liable for plaintiffs' defect damages. However, one party's insurer is insolvent. Developer's settlement demand to the insolvent carrier's insured exceeds CIGA limits. If you represent the solvent carrier party, the proper procedure is to notify CIGA of the claim, if the insolvent insurer party has not already done so. Then, your client may cross-complain against the insolvent insurer party to the extent that any payment the client makes on behalf of the insolvent insurer party exceeds the $500,000 per claim limit.

2. Nevada, Arizona, and Florida

None of the other states place limitations on third party insurers or insureds in their ability to maintain causes of action against insureds of insolvent carriers. In these states, less protection exists for the insured of an insolvent insurer. As stated above, California law provides that a third party insurer or its insured cannot sue an insured of an insolvent insurer for indemnity. Therefore, if the indemnity claim is below statutory limits, no money is available. If the claim exceeds $500,000, then the insurer or its insured may maintain an action against the insured of the insolvent carrier to the extent the claim value exceeds the statutory limit. In other states, the same is not true. Suing the insureds of insolvent insurers is perfectly acceptable. Generally, once the suit is tendered, the claim is passed to the state insurance guaranty association. Then, the association determines whether the claim is "covered" or not.

In Florida, law excludes from the definition of "covered claim" "[a]ny amount due any reinsurer, insurer, insurance pool or underwriting association, sought directly or indirectly through a third party, as subrogation, contribution, indemnification, or otherwise[.]" Fla. Stat. Ann. § 631.54(3)(a). Therefore, as distinct from California law, the claim presented to FIGA would not constitute

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is crucial in view of the current trend of contractors relying on self-insured retentions and excess policies to satisfy project insurance requirements.

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a "covered claim." However, Florida does not bar suit against the insured of the insolvent carrier.

Arizona law is not quite as sophisticated as Florida law on this point. Arizona Revised Statutes § 20-661(3) provides: "any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise." This provision appears to allow a third party, insured or not, to obtain recovery through the insolvent carrier insured's claim with the Fund.

Nevada law mirrors Florida law on whether or not the claim by a third party insurer or insured is covered. N.R.S. § 687A.033(2)(a).

Dirty Little Secret #24: One contractor may assert an express indemnity cause of action against another contractor whose insurer is insolvent. However, many times liability of the insolvent carrier's contractor for express indemnity causes of action is excluded under the policy. If such a provision exists in the policy, CIGA will not cover payment of the express indemnity claim.

E. Damages

1. "Benefit of the Bargain" Damages

A party asserting a breach of statutory obligation cause of action against an association may recover "the measure of damages . . . which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Cal. Civ. Code § 3300. "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon." Cal. Civ. Code § 3302.

2. Consequential Damages

The issue about whether consequential damages are recoverable on a breach of statutory obligations cause of action against an insurance guaranty association has not been decided. This measure of recovery can be described as damages which the parties should have foreseen when they contracted as likely to result from the breach. Cal. Civ. Code § 3300; *Glendale Fed. Sav. & Loan Assn. v. Marina View*, 66 Cal.App.3d 101, 125 (Cal. Ct. App. 4th 1977). It seems unlikely that states would allow recovery of this type of damage, however. No privity exists between the insured and the association.

3. Emotional Distress

Emotional distress damages are usually not recoverable as consequential damages for breach of an insurance contract. Therefore, while the issue has never been decided, it appears unlikely that such damages would be

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recoverable on a breach of statutory duties cause of action against an association. *See Sawyer v. Bank of America*, 83 Cal. App. 3d 135, 139 (Cal. Ct. App. 1st 1978) (holding emotional distress damages are not deemed "reasonably contemplated" by parties when the contract was entered into, even if the distress in fact resulted from the breach).

Dirty Little Secret #25: Emotional distress damages are recoverable in an insured's action for breach of insurance contract when the allegation is that the insurer wrongfully failed to defend. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 9 Cal. App. 3d 508, 528 (Cal. Ct. App. 3d 1970). This is because the policy terms "relate to matters which concern directly the comfort, happiness or personal welfare of" the insured. *Id.* at 527. Because, at least arguably, an insurance guaranty association's obligation to defend implicates these same matters, it seems reasonable to conclude insureds of insolvent carriers may recover distress damages from an association if its failure to defend caused such damages.

4. Attorney Fees and Costs

Generally, parties seeking to enforce an insurance guaranty association's obligations must pay their own fees and costs. *See* Cal. Civ. Proc. Code § 1021.

a) Florida

Costs are recoverable against FIGA. *Florida Ins. Guaranty Assoc., Inc. v. Johnson*, 654 So. 2d 239 (Fla. Ct. App. 4th 1995).

5. Punitive Damages

Punitive damages do not constitute "covered claims" for which associations are responsible. *See, e.g.,* Cal. Ins. Code §§ 1063.1(c)(8).

6. Interest

Associations are not liable for pre-judgment interest. *See FIGA v. R.V.M.P. Corp.*, 874 F. 2d 1528, 1533 (7th Cir. 1989).

VI. Conclusion

As is evident from review of the above, rules applicable to various states' insurance guaranty associations can be ambiguous and confusing to apply. However, having read the materials, at least you understand this point now and can use your new-found knowledge to confidently walk the road to obtaining payment of claims by insurance guaranty associations.

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Some key points to remember are to take the utmost care in analyzing whether a given claim is "covered," timely notify the applicable insurance guaranty association(s) about a claim, and commence litigation against insurance guaranty associations as a last resort, in the correct manner, and against the correct parties. These actions can be taken today to assure recognition of your claim.

Apart from applying your new understanding of insurance guaranty associations in your daily work, hopefully, the materials have awakened you to the urgent need for substantial revisions to insurance guaranty association law. Whether it is providing claimants with clear claim-filing deadlines, doing away with the prohibition of claim assignment, or merely increasing associations' statutory claim caps, changes are required to adequately protect insureds and claimants against the detrimental consequences of insurer insolvency. Additionally, with increased effort in modifying current paradigms about insurance guaranty associations will come new laws that de-mystify association rules and illuminate proper association procedures so that no texts, like this one, will be needed to unravel the mysteries of the ***CIGA Code***.

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