

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>May 3, 2004</p>	<p>No. I04-001 (R03-020)</p> <p>Re: Joint Underwriting Association</p>
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TO: Christina Urias, Director
Department of Insurance

Questions Presented

Your predecessor asked the following questions regarding the Joint Underwriting Association:

1. Does Article 1, Chapter 12, of Title 20 of Arizona Revised Statutes ("A.R.S.") which provides for the establishment and operation of a JUA, violate the prohibition in Article XIV, Section 2 of the Arizona Constitution, against creating corporations by special legislation?
2. Is a JUA subject to all public process laws applicable to the Arizona Department of Insurance, including state procurement, public records, open meeting, personnel code, fiscal controls, and governmental immunity provisions?
3. May the Director of the Department of Insurance assess monies against only those insurers writing liability insurance to fund the JUA or may the Director also assess all insurers writing casualty insurance?
4. If the JUA is unable to fulfill its financial obligations, does the JUA's debt constitute an obligation of the State?

5. If the JUA becomes insolvent and unable to fulfill its ultimate financial obligations after all legally permissible premiums and policyholder surcharges have been imposed, what course of action is available or required of the JUA?

Summary Answer

1. The JUA is not a corporation created by special legislation. Rather, it is a public entity created within the Department of Insurance.
2. As a public body created by statute, the JUA is subject to all of the public process laws applicable to the Department of Insurance, including state procurement, public records, open meeting, personnel code, fiscal controls and governmental immunity provisions.
3. To fund the JUA, the Director may impose assessments only against insurers writing liability insurance. The provisions authorizing assessments do not apply to all insurers writing casualty insurance.
4. Because A.R.S. § 20-2220 provides that the State or any of its political subdivisions are not “otherwise responsible for losses sustained by the [JUA],” the State is not responsible for any debts the JUA may incur.
5. The JUA statutes require the JUA to take numerous actions to prevent financial insolvency; the JUA statutes, however, do not specify the course of action the JUA must take if it is unable to fulfill its ultimate financial obligations.

Background

The purpose of the Joint Underwriting Association is to provide liability insurance coverages that are otherwise unavailable in Arizona. A.R.S. § 20-2201(A). The JUA may operate only if the Director of the Department of Insurance ("Director") finds after a public hearing that “liability insurance is substantially unavailable through private insurers for a particular line.” A.R.S. § 20-2202(B).

The JUA, which is within the Department of Insurance, consists of private insurers authorized to write and engaged in writing liability insurance, including the liability portion of

multi-peril insurance, in Arizona. A.R.S. § 20-2202(A). These insurers are members of the JUA and remain members as a condition of the authority to transact insurance in this State. *Id.*

The JUA is governed by a board of eleven directors appointed by the Director. A.R.S. § 20-2204(A). The JUA receives funding from assessments on the insurers that are association members. The Director may assess the members up to five hundred dollars for the JUA's initial operating expenses. A.R.S. § 20-2213(A) The Director may also annually assess each member up to two hundred dollars for the costs of administering the plan. A.R.S. § 20-2201(D).

Subject to the Director's approval, the JUA is authorized to: (1) issue liability insurance policies; (2) underwrite the insurance; (3) assume reinsurance from its members; (4) cede reinsurance; (5) receive, invest, and disburse monies; (6) open bank accounts and delegate authority for deposit, withdrawal, and disbursement of monies; (7) borrow monies for the association's necessary administrative expenses; (8) provide for such fidelity and surety bonds as are deemed necessary to transact the business of the association; (9) review, consider, and act on any matters deemed by it to be necessary and proper for the administration of the association; (10) develop, promulgate, and effectuate loss prevention programs; (11) sue and be sued; and (12) employ attorneys and other persons necessary to perform the functions of the association. A.R.S. § 20-2203(1) – (12).

Certain statutory procedures apply if the JUA anticipates financial difficulties. If the JUA determines that it will be unable to pay its outstanding lawful obligations within the next 180 days, the JUA must submit to the Director a schedule of policyholder surcharges and a plan of assessments that "in combination are sufficient to assure the continued sound financial operation of the association." A.R.S. § 20-2212(B). The surcharge, however, is capped at ten percent of the total

premium paid for a policy or policies obtained through the JUA, and the member assessments are capped at one percent of each member's net direct premium in Arizona that is attributable to the line of insurance. *Id.*

After the Legislature passed the original JUA legislation in 1986, the Director requested an Attorney General's Opinion concerning the constitutionality of the JUA statutes. The Attorney General concluded that the statutes creating the JUA probably violated the prohibition in Article XIV, § 2 of the Arizona Constitution against creating corporations by special laws. Ariz. Att'y Gen. Op. 187-037. The Legislature subsequently amended the JUA statutes in an effort to address the constitutional issue raised in the Attorney General's Opinion. *See* 1987 Ariz. Sess. Laws ch. 261.

Analysis

1. **The Statutes Creating the JUA Do Not Violate the Prohibition Against Creating Corporations by Special Laws.**

Your first question is whether the existing JUA statutes violate Article XIV, Section 2 of the Arizona Constitution which provides: "Corporations may be formed under general laws, but shall not be created by special Acts." The courts presume all statutes to be constitutional and resolve any doubts in favor of constitutionality. *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981).

Article XIV, Section 2 prohibits creating both public and private corporations through special acts. *Fireman's Fund*, 112 Ariz. 7, 536 P.2d 695 (1975). The Arizona Constitution defines "corporation" to include "all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships." Ariz. Const. art. XIV, § 1.

In *Fireman's Fund*, the Arizona Supreme Court declared that the Arizona Insurance Guaranty Association, which was created to assume the liabilities of insolvent insurers, violated the

prohibition against creating a corporation by special legislation. 112 Ariz. at 9, 536 P.2d at 697. In reaching its conclusion, the court examined the powers of the guaranty association, its organizational structure, and the Director's authority over the association. *Id.* at 8, 536 P.2d at 696. The Court concluded that the Director had only limited oversight over the matters of the association and, therefore, the legislation establishing the association violated the Arizona Constitution by creating a corporation by special legislation. *Id.* at 8-9, 536 P.2d at 696-97.¹

Although *Fireman's Fund* recognized the Legislature's authority to create a variety of governmental agencies to achieve its public purposes, the court observed that the unifying feature of governmental agencies is that each is "governed and controlled by public officials." *Id.* at 9, 536 P.2d at 697. If state institutions are governed and controlled by public officials, they "are not associations or joint stock companies" and are therefore not corporations. *Sullivan*, 45 Ariz. at 255, 42 P.2d at 623. The fact that the Legislature has "conferr[ed] upon the [entity] certain corporate powers and privileges impinges no constitutional rule." *Id.*

After this Office concluded that the original JUA statutes violated *Fireman's Fund*, the Legislature amended the relevant statutes to increase the Director's control over the JUA. A.R.S. § 20-2203 (as amended by 1987 Ariz. Sess. Laws, ch. 261, §2). As amended, the statutes require the JUA to obtain the Director's approval before exercising any of its enumerated powers. *Id.* After these changes, the Director either approves all of the JUA's actions or acts on its behalf.

Because of the Director's control over the JUA, the JUA is not a corporation that has been created by special legislation. The JUA statutes, therefore, do not violate article XIV, § 2 of the Arizona Constitution.

¹In 1987 the Arizona Legislature amended the statutes to address the court's concern. See A.R.S. § 20-2203 (as amended by 1987 Ariz. Sess. Laws, ch. 261, § 2).

2. The JUA Is Subject to All the Public Process Laws Applicable to the Arizona Department of Insurance.

You have also asked whether the JUA must comply with various public process laws applicable to the Department of Insurance. Each law and its applicability to the JUA will be discussed separately.

A. The State Personnel Code.

The Director of the Department of Administration has general responsibility for the direction and control of personnel administration for all offices and positions in state service.² A.R.S. § 41-761. The JUA has been created within the Department of Insurance, and all of its actions are subject to the control of the Director of the Department. A.R.S. §§ 20-2202(A); -2203. Nothing in statute exempts the JUA from the state personnel system. Consequently, the JUA is subject to the State personnel system directed by the Department of Administration.

B. The Open Meeting Law.

Arizona's Open Meeting Law applies to any public body, which is defined as:

the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.

A.R.S. § 38-431(6). The JUA's board is subject to the Open Meeting Law because it is a multimember governing body of a state agency, created by statute. A.R.S. § 20-2204(A). *Cf. Prescott Newspapers Inc. v. Yavapai Cmty. Hosp. Ass'n*, 163 Ariz. 33, 39, 785 P.2d 1221, 1227 (App. 1989) (concluding that the Yavapai Community Hospital Association is not "of the state or

² "State service" is defined as "all offices and positions of employment in state government except those offices and positions that are exempted [from the personnel administration statutes]." A.R.S. § 41-762(2).

[a] political subdivision” because it is created by a group of private individuals acting together as authorized by Arizona statutes and because its powers and duties are dictated by its Articles of Incorporation) (internal quotations and citation omitted).

C. The Procurement Code.

The procurement code applies to every expenditure of public monies by any state governmental unit under any contract for the procurement of materials, services, construction or the disposal of materials. A.R.S. § 41-2501. A state governmental unit includes “any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.” A.R.S. § 41-2503(35). Public monies includes “money belonging to, received or held by, state . . . officers in their official capacity.” A.R.S. § 35-302. The JUA is a state governmental unit, and none of the exemptions in the procurement code apply to it. *See Fund Manager, Pub. Safety Personnel Ret. Sys. v. Superior Court*, 152 Ariz. 255, 259-260, 731 P.2d 620, 624-625 (App. 1986)..

The JUA’s monies are also public monies. The JUA is supported by assessments that the Director imposes on the JUA members. A.R.S. §§ 20-2201(D), -2213(A). The assessments are deposited in a fund created by statute. A.R.S. § 20-2201(E). The Director administers the fund monies as a continuing appropriation for the purposes specified in the JUA statutes. A.R.S. § 20-2201(E). Because the JUA is a state governmental unit, it must comply with the state procurement code when expending its public monies.

D. The Public Records Law.

Public officers and public bodies are required to maintain all records “reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their

activities which are supported by monies from the state or any political subdivision of the state.”

A.R.S. § 39-121.01(B).

A public body, for the purposes of Arizona’s Public Records Law, is

the state, . . . any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state.

A.R.S. § 39-121.01(2). An officer is “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(1).

The JUA is a public body that the Legislature created within the Department of Insurance. A.R.S. §20-2202(A). Thus, the JUA is a public body as defined by the public records laws and the members of the JUA Board of Directors are officers within the meaning of A.R.S. § 39-121.01(2). Therefore, the JUA’s records are public records subject to the requirements of A.R.S. §§ 39-121 through –126.

E. Application of State Budgetary or Fiscal Controls to the JUA.

State budgetary or fiscal controls apply to the JUA because the JUA is funded by state monies and is part of a budget unit of the state. A “budget unit” of the state is “any department, commission, board, institution or other agency of the state organization receiving, expending or disbursing state funds or incurring obligations against the state.” A.R.S. § 35-101(7). “State monies” means all monies that are in the State's treasury or that come lawfully into the state treasurer's possession or custody. A.R.S. § 35-321(10). This includes monies in the general fund as well as other special funds designated by law. A.R.S. § 35-142 (A)(8).

Monies from the Director's annual assessment are deposited into an assessment fund for voluntary plans, and the Director administers the funds as a continuing appropriation. A.R.S. § 20-2201(E). This fund is expressly exempt from the provision in A.R.S. § 35-190, that provides that appropriations generally lapse at the end of a fiscal year. *Id.* Because the JUA is part of a budget unit it must comply with state budgetary and fiscal controls governing the receipt, expenditure and accountability of public monies. *See generally* A.R.S. §§ 35-101 through -215.

F. The Governmental Immunity Provisions Applicable to the JUA.

The JUA statutes specifically provide that the JUA may "sue and be sued", but that "no judgment against the JUA shall create any liability in the individual member companies" of the JUA. A.R.S. § 20-2203(11). In addition, A.R.S. § 20-2219 provides an immunity for "acts or omission, made in good faith."

There is no liability on the part of nor does any cause of action accrue against the association or its members, the director or his authorized representatives or any other person or organization for any acts or omissions made in good faith by them during any proceeding or concerning any matters within the scope of this chapter.

The more general statutes, A.R.S. §§ 12-820.01 and -820.02, provide immunity to public entities and public employees under certain circumstances, and those would apply to the JUA, its employees and board members when appropriate. *See* A.R.S. § 12-820 (1),(5),(6),(7) (defining public entity and public employee).

3. Scope of Assessments that the Director May Impose.

Your third question is whether the Director may impose an assessment on only those insurers writing liability insurance or whether the Director may impose assessments on all insurers writing casualty insurance.

The JUA is funded by an initial assessment of up to five hundred dollars that the Director may impose on every participating insurer of the JUA. A.R.S. § 20-2213. The Director is also authorized to annually assess each insurer that is authorized to transact liability insurance in Arizona up to two hundred dollars for the costs of administering the plan. A.R.S. § 20-2201(D).

Only insurers that issue liability insurance are subject to the JUA assessments. A.R.S. §§ 20-2201(D) (authorizing director to assess "each insurer authorized to transact liability insurance in this State"); -2213 (one percent cap based on "net direct premium attributable to the liability insurance the member writes"). Liability insurance is

insurance against legal liability for the death, injury or disability of any human being, or for damage to property, and provision of medical, hospital, surgical or disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured, when issued as an incidental coverage with or supplemental to liability insurance.

A.R.S. § 20-252(1).

Casualty insurance is a broader term that includes liability insurance as well as other types of insurance. A.R.S. § 20-252. The assessments for the JUA do not extend to all types of casualty insurance; they are expressly limited to insurers that issue liability insurance. *See e.g.*, A.R.S. § 20-2201(D).

4. State Liability for Obligations of the JUA.

You have also asked whether debts that the JUA may incur are obligations of the State. Any costs that the Director incurs in implementing the JUA statutes are charged to the association.

The statutes expressly limit the liability for the JUA to the JUA itself and provide that the State is not "otherwise responsible for losses sustained by the [JUA]." A.R.S. § 20-2220.

The Arizona Guaranty Fund is also not available to pay claims against the JUA. The JUA is not a member of the Guaranty Fund and the Guaranty Fund is not “responsible for losses sustained by the [JUA].” A.R.S. § 20-2220.

Under this statutory scheme, the JUA, rather than the State or some other State fund, is responsible for the JUA's financial obligations.

5. Course of Action Available or Required if the JUA Becomes Insolvent and Unable to Continue Operating.

Finally, you ask for direction on what course of action may be available if the JUA becomes insolvent and unable to continue operation. The JUA statutes provide a framework for preventing financial insolvency, but offer no specific guidance as to what course of action to take if the JUA cannot fulfill its financial obligations.

“A board or commission which is a creation of a statute created for a special purpose has only limited powers and it can exercise no powers which are not expressly or impliedly granted.” *Fund Manager, Pub. Safety Pers. Ret. Sys. v. Tucson Police Pub. Safety Pers. Ret. Sys. Bd.*, 137 Ariz. 536, 540, 672 P.2d 201, 205 (App. 1983). The JUA has the general authority to review, consider and act on any matters necessary and proper for the administration of the association. A.R.S. § 20-2203(9).

The JUA statutes also contain numerous provisions “to assure the continued sound financial operation of the association.” A.R.S. § 20-2212(B). They authorize the JUA to “[d]evelop, promulgate and effectuate loss prevention programs.” A.R.S. § 20-2203(10). They also require the JUA to submit to the Director a plan of operation, which includes a “provision for a system or program of reasonable loss control efforts.” A.R.S. § 20-2205. The statutes also provide a mechanism in the event the JUA anticipates that a deficiency will occur. In that situation, the JUA

is required to certify to the Director that “within the next one hundred and eighty days thereafter the association will be unable to pay its outstanding lawful obligations as they mature in the regular course of business.” A.R.S. § 20-2212(A). At the time of certification, the JUA is required to submit a schedule of policyholder surcharges and a plan of member assessments, “which in combination, are sufficient to assure the continued sound financial operation of the association.” A.R.S. § 20-2212(B). The statute, however, caps the amount of the policyholder surcharges at ten percent of the total premium paid and the member assessments at one percent of the net direct premium paid respectively. *Id.*

Finally, the statutes provide that “[d]issolution of the association, including its assets and liabilities, shall be accomplished under the supervision of the director.” A.R.S. § 20-2221. The statutes do not, however, provide guidance on how the JUA’s liabilities should be addressed if the funding surcharge cap has been reached and the JUA’s liabilities exceed its assets.

Conclusion

The JUA is a public entity within the Department of Insurance and subject to the supervision of the Department's Director. It is subject to the Open Meeting Law, Public Records Law, and other laws governing state entities. The JUA is funded by assessments against liability insurers, and the State is not liable for the JUA’s losses.

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