

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**

A Bill

HOUSE BILL

4 **By: Representatives Flanagin and Goodwin**

5

6

7

For An Act To Be Entitled

8 "THE ARKANSAS SURPLUS LINES INSURANCE GUARANTY FUND ACT"

9

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

11

12 SECTION 1. This act shall be known and may be cited as "The Arkansas
13 Surplus Lines Insurance Guaranty Fund Act."

14

15 SECTION 2. Purpose and Applicability. The purpose of this act is to
16 provide a mechanism for the payment of covered claims under certain insurance
17 policies issued by eligible surplus lines insurers; to avoid excessive delays
18 in the payment of the covered claims against insolvent, eligible, nonadmitted
19 insurers; and to avoid financial loss to claimants or policyholders because of
20 the insolvency of an eligible, nonadmitted insurer. This act shall apply to
21 all property and casualty lines of direct insurance, except workers'
22 compensation insurance, title insurance, surety bonds, credit insurance,
23 mortgage guaranty insurance, municipal bond coverage, fidelity insurance,
24 investment return assurance, and ocean marine insurance. This act shall also
25 not apply to reinsurance of any kind.

26

27 SECTION 3. Definitions. As used in this act:

28 (1) "Association" means the Arkansas Property and Casualty Insurance
29 Guaranty Association created pursuant to this act.

30 (2) "Covered claim" means an unpaid claim, including a claim for
31 unearned premiums, which arises out of and is within the coverage, and not in
32 excess of the applicable limits of an insurance policy to which this act
33 applies, and which was issued by a surplus lines insurer which was eligible to
34 transact insurance business in this State at the time the policy was issued
35 and which has been determined to be an insolvent insurer on or after July 1,

1 1991, if (A) the claimant or policyholder is a resident of this State at the
2 time of the occurrence of the insured event for which a claim has been made,
3 or (B) the property from which the claim arises is permanently located in this
4 State.

5 "Covered claim" shall not include any amount due any reinsurer,
6 insurance pool, or underwriting association, as subrogation recoveries or
7 otherwise, except that a claim for any such amount, asserted a person insured
8 under a policy issued by a surplus lines insurer which has become an insolvent
9 insurer, which, if it were not a claim by or for the benefit of a reinsurer,
10 insurer, insurance pool, or underwriting association, would be a "covered
11 claim," may be filed directly with the receiver of the insolvent insurer, but
12 in no event may any such claim be asserted in any legal action against the
13 insured of that insolvent insurer. "Covered claim" shall also not include
14 amounts for interest on unliquidated claims, punitive damages unless covered
15 by the policy, counsel fees for prosecuting suits for claims against the fund,
16 and assessments or charges for failure by an insolvent insurer to have
17 expeditiously settled claim.

18 (3) "Fund" means the Arkansas Surplus Lines Insurance Guaranty Fund
19 created pursuant to Section 4 of this act.

20 (4) "Insolvent insurer" means an insurer which was an eligible surplus
21 lines insurer at the time the insurance policy was issued or when the insured
22 event occurred, and which is determined to be insolvent by a court of
23 competent jurisdiction in this State or the state or place in which the
24 surplus lines insurer is domiciled.

25 (5) "Member insurer" means an eligible, nonadmitted, or surplus lines
26 insurer required to be a member of, and that is subject to assessments by, the
27 fund.

28 (6) "Net direct written premiums" means direct gross premiums on
29 insurance policies written by a surplus lines insurer to which this act
30 applies, less return premiums thereon and dividends paid or credited to
31 policyholders on that direct business. If a policy issued by a surplus lines
32 insurer covers risks or exposures only partially in this State, the "net
33 direct written premiums" shall be computed, for assessment purposes, on that
34 portion of the premium subject to the premium receipts tax levied in
35 accordance with Arkansas Code Annotated §§26-57-601 et seq. "Net direct

1 written premiums" do not include premiums on contracts between insurers or
2 reinsurers.

3 (7) "Surplus lines insurer" means a nonadmitted insurer approved as an
4 eligible, nonadmitted, or unauthorized insurer at the time the policies were
5 issued against which a covered claim may be filed in accordance with this act.
6

7 SECTION 4. Establishment. There is created a private, nonprofit,
8 unincorporated legal entity to be known as the Arkansas Surplus Lines
9 Insurance Guaranty Fund. All surplus lines insurers shall be and remain
10 member insurers of the fund as a condition of their continued eligibility
11 pursuant to Arkansas Code Annotated §23-65-308. The fund shall be managed and
12 administered by the Arkansas Insurance Commissioner. The Commissioner shall
13 exercise all of the powers vested in the fund under this act, and such other
14 powers as may be necessary or appropriate to the fulfilling of its
15 responsibilities under this act. The Commissioner shall administer the
16 affairs of the fund in accordance with the "Arkansas Property and Casualty
17 Insurance Guaranty Act" (Arkansas Code Annotated §§23-90-101 et seq.) and its
18 plan of operation, insofar as the provisions of that act and that plan are not
19 thereof inconsistent with the provisions of this act, and subject to any
20 amendments to the plan as may be necessary or appropriate to effectuate the
21 purposes of this act.

22 In order to assist the Commissioner in implementing the provisions of
23 this act, there is created an advisory body to be comprised of two (2) members
24 representing eligible surplus lines insurers and two (2) members representing
25 surplus lines agents to be appointed by, and to serve at the pleasure of, the
26 Commissioner. The association shall consult the Commissioner on any matter
27 relating to the provisions of this act.

28

29 SECTION 5. Powers and Duties.

30 (a) The fund shall:

31 (1) Be obligated to the extent of the covered claims against an
32 insolvent insurer incurred prior to or thirty (30) days after the
33 determination of insolvency, or before the policy expiration date, if less
34 than thirty (30) days after that determination, or before the policyholder
35 replaces the policy or causes its cancellation, if he does so within thirty

1 (30) days of the determination. The fund's obligation for covered claims
2 shall not be greater than three hundred thousand dollars (\$300,000) per
3 occurrence, subject to any applicable deductible contained in the policy. The
4 Commissioner may adjust the fund's obligations for covered claims based on the
5 monies available in the fund. In no event shall the fund be obligated to a
6 policyholder or claimant in excess of the limits of liability of the insolvent
7 insurer stated in the policy from which the claim arises;

8 (2) Be deemed the insurer to the extent of its obligation on the
9 covered claims and to such extent shall have all the rights, duties, and
10 obligations of the insolvent insurer as if the insurer had not become
11 insolvent;

12 (3) Assess member insurers in accordance with Section 6 of this
13 act in amounts necessary to pay:

14 (A) Obligations of the fund under paragraph (1) of this
15 subsection,

16 (B) Expenses of handling covered claims,

17 (C) Any other expenses incurred in the implementation of the
18 provisions of this act;

19 (4) Investigate claims brought against the fund; and adjust,
20 compromise, settle, and pay covered claims to the extent of the fund's
21 obligation; and deny all other claims, and may review settlements, releases,
22 and judgments to which the insolvent insurer or its policyholders were parties
23 to determine the extent to which the settlements, releases, and judgments may
24 be properly contested;

25 (5) Notify those persons as the Commissioner directs under Section
26 8 of this act;

27 (6) Handle claims through the association's employees or
28 representatives, or through one or more insurers or other persons designated
29 as servicing facilities; and

30 (7) Pay the other expenses of the association in administering the
31 provisions of this act.

32 (b) The fund may:

33 (1) Sue or be sued;

34 (2) Negotiate and become a party to those contracts which are
35 necessary to carry out the purpose of this act;

1 (3) Perform those other acts which are necessary or appropriate to
2 effectuate the purpose of this act; and

3 (4) Refund to the member insurers in proportion to the
4 contribution of each member insurer that amount which the Commissioner
5 determines to be in excess of the needs of the fund.

6

7 SECTION 6. Assessment and Loans.

8 (a) In order to provide the monies necessary to meet the fund's
9 obligations and expenses under this act:

10 (1) Each member insurer, including a surplus lines insurer made
11 eligible on or after the effective date of this act, shall make an initial
12 one-time payment of twenty-five thousand dollars (\$25,000), to be made to the
13 fund within sixty (60) days of the effective date of this act; and

14 (2) A surcharge on the policy premium, as determined by the
15 Commissioner, shall be levied and collected on any surplus lines coverage
16 issued or renewed on or after the effective date of this act. The surcharge
17 shall be collected by the surplus lines agent at the time of delivery of the
18 cover note, certificate of insurance, policy, or other initial confirmation of
19 insurance. No premium receipts tax, commissions, or assessments shall be
20 levied or collected on the surcharge. The surplus lines agent shall forward
21 to the fund the amount of the surcharge on a quarterly payment basis. Each
22 member insurer and surplus lines agent shall be notified of the policy
23 surcharge not later than ten (10) days before it is due. The amount of the
24 assessment surcharge may be, from time to time, adjusted, terminated, or
25 reinstated by the Commissioner, as he may deem necessary to meet the current
26 and projected obligations and expenses of the fund, except that in no case
27 shall the surcharge in any year exceed four percent (4%) of the policy
28 premium.

29 (b) No policy surcharge shall be levied or collected upon a
30 determination by the Commissioner that the fund's unencumbered assets exceed
31 the fund's outstanding and anticipated obligations and other liabilities,
32 including expenses chargeable to the fund, by ten million dollars
33 (\$10,000,000) or more.

34

35 SECTION 7. Nonpayment of Assessments. The Commissioner may, after

1 notice, suspend the eligibility of a member insurer or the license of a
2 surplus lines agent that fails to pay an assessment or policy surcharge under
3 Section 6 of this act when due, or any interest accruing thereon, or fails to
4 comply with the applicable provisions of the plan of operations. The
5 Commissioner may, after notice and hearing in accordance with the
6 "Administrative Procedure Act" (Arkansas Code Annotated §§25-15-201 et seq.),
7 withdraw the eligibility of that insurer or suspend or revoke the surplus
8 lines agent's license.

9 Interest shall be charged on the amount of the unpaid assessment or
10 surcharge subject to the provisions of this section. The interest charge
11 shall be at the current market rate of interest, using an index or indexes to
12 be selected by the Commissioner, and shall be payable at the time the unpaid
13 assessment or policy surcharge is paid to the fund.

14 Eligibility of a surplus lines insurer or the license of an agent shall
15 not be restored or reissued until all monies owing under this section have
16 been paid to the fund.

17

18 SECTION 8. Commissioner's Powers.

19 (a) An insolvent insurer shall forward to the Commissioner and to the
20 association a copy of the declaration of insolvency within three (3) business
21 days of the date of the determination of the insolvency. A surplus lines
22 insurer shall forward to the fund and Commissioner a copy of any complaint
23 seeking an order of liquidation with a finding of insolvency against the
24 insurer at the same time that such complaint is filed with a court of
25 competent jurisdiction.

26 (b) The Commissioner shall:

27 (1) Order the termination of all in-force policies of an insolvent
28 insurer within thirty (30) days of the date of determination of the
29 insolvency;

30 (2) Upon request, provide the fund with a statement of the net
31 direct written premiums of each member insurer; and

32 (3) Order surplus lines agents to notify, within five (5) days of
33 the date of the order, the policyholders of the insolvent insurer and any
34 other interested parties of the determination of insolvency and of their
35 rights under this act. Notification shall be by mail at their last known

1 address, where available, but if sufficient information for notification by
2 mail is not available, notice by publication in a newspaper of general
3 circulation shall be sufficient.

4

5 SECTION 9. Settlement of Claims.

6 (a) Any person recovering under this act shall be deemed to have
7 assigned his rights under the policy from which the claim arose to the fund to
8 the extent of his recovery from the fund. Every policyholder or claimant
9 seeking the protection of this act shall cooperate with the fund to the same
10 extent as that person would have been required to cooperate with the insolvent
11 insurer. The fund shall have no cause of action against the policyholder of
12 the insolvent insurer for any sums it has paid out, except for those causes of
13 action as the insolvent insurer would have had if the sums had been paid by
14 the insolvent insurer. In the case of an insolvent insurer operating on a
15 plan with an assessment liability, payments of claims by the fund shall not
16 operate to reduce the liability of policyholders to the receiver, liquidator,
17 or statutory successor for unpaid assessments.

18 (b) The receiver, liquidator, or statutory successor of an insolvent
19 insurer shall be bound by settlements of covered claims by the fund or its
20 representatives. The court having jurisdiction shall grant the covered claims
21 paid by the fund priority, against the assets of the insolvent insurer, over
22 any claims against the assets of the insolvent insurer by claimants having
23 received any payment from the fund for the covered claims, to the extent of
24 the amount of the payments made by the fund. The expenses of the fund in
25 handling claims shall be accorded the same priority as the liquidator's
26 expenses.

27 (c) The fund shall periodically file with the receiver or liquidator of
28 the insolvent insurer statements of the covered claims paid by the fund and
29 estimates of anticipated claims on the fund, which shall preserve the rights
30 of the fund against the assets of the insolvent insurer.

31 (d) The liquidator, receiver, or statutory successor of an insolvent
32 insurer covered by this act shall permit access by the fund or its
33 representative to all of the insolvent insurer's records which would assist
34 the fund in carrying out its functions under this act with regard to covered
35 claims. In addition, the liquidator, receiver, or statutory successor shall

1 provide the fund or its representatives with copies, or permit copies to be
2 made of the insolvent insurer's records upon request, and at the expense of
3 the fund.

4

5 SECTION 10. Priority of Claims. Any person having a covered claim that
6 may be recovered from more than one insurance guaranty association, or its
7 equivalent, shall seek recovery first from the association of the place of
8 residence of the policyholder at the time of the insured event, except that if
9 it is a first party claim for damage to property with a permanent location, he
10 shall seek recovery first from the association of the jurisdiction in which
11 the property is located. Any recovery under this act shall be reduced by the
12 amount of recovery from any other insurance guaranty association; except that,
13 if recovery is denied or deferred by that association, a person may proceed to
14 recover from any other insurance guaranty association from which recovery may
15 be legally sought.

16

17 SECTION 11. Examination. In the event the Commissioner has sufficient
18 basis to believe that the financial condition of a member insurer is hazardous
19 to the policyholders or the public, the Commissioner shall request the
20 appropriate regulatory authority of the domiciliary jurisdiction of that
21 member insurer to examine and report back to the Commissioner on the financial
22 condition of the member insurer.

23

24 SECTION 12. Disclosure of Insolvency Protection. A member insurer
25 shall include on the application and on the face of the policy or certificate
26 for insurance subject to this act a notice stating that the insurer is not an
27 admitted company in Arkansas, but that the policy coverage has the protection,
28 in whole or in part, of the Arkansas Surplus Lines Insurance Guaranty Fund, if
29 the eligible surplus lines insurer becomes bankrupt or insolvent. A member
30 insurer or an agent or broker may advertise that policy coverages offered by a
31 member insurer and subject to the provisions of this act are protected by the
32 Arkansas Surplus Lines Insurance Guaranty Fund, should the surplus lines
33 insurer become bankrupt or insolvent. The Commissioner shall determine the
34 contents and form of the notice.

35

1 SECTION 13. All provisions of this act of a general and permanent
2 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
3 Code Revision Commission shall incorporate the same in the Code.

4

5 SECTION 14. If any provision of this act or the application thereof to
6 any person or circumstance is held invalid, such invalidity shall not affect
7 other provisions or applications of the act which can be given effect without
8 the invalid provision or application, and to this end the provisions of this
9 act are declared to be severable.

10

11 SECTION 15. All laws and parts of laws in conflict with this act are
12 hereby repealed.

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8