Date Issued: January 12, 1987 (AGO 87-01)

Requested by: Earl R. Pomeroy, Commission of Insurance

- QUESTION PRESENTED -

Whether legal fees and expenses incurred in the defense of an insured for an insurance company prior to a determination that the insurance company is insolvent are "covered claims" within the meaning of N.D.C.C. chapter 26.1-42 which must be paid by the North Dakota Insurance Guaranty Association.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that fees and expenses incurred in the defense of an insured for an insurance company prior to a determination that the insurance company is insolvent are not "covered claims" within the meaning of N.D.C.C. chapter 26.1-42 and therefore must not be paid by the North Dakota Insurance Guaranty Association.

- ANALYSIS -

Your question addresses the obligation of the North Dakota Insurance Guaranty Association to reimburse an attorney for fees and expenses when the attorney has been retained to defend an insured whose policy of insurance covers such costs and is with an insurance company which later is declared to be insolvent.

The North Dakota Insurance Guaranty Association was created pursuant to N.D.C.C. chapter 26.1-42 (the model National Association of Insurance Commissioner's Guaranty Association law). That chapter requires the Association to pay the "covered claims" of certain insolvent insurers. A "covered claim" must be one "within the coverage of an insurance policy." Emphasis supplied. N.D.C.C. section 26.1-42-02(3). N.D.C.C. chapter 26.1-42 does not specifically address whether attorney's fees and expenses incurred in defending insurance company policyholders may be considered a "covered claim." In addition, the North Dakota Supreme Court has not addressed this issue.

Courts in other states have addressed the issue of whether attorney's fees and expenses should be reimbursed by guaranty associations for legal services provided to policyholders prior to a determination that an insurance company is insolvent. Most, if not all, of those jurisdictions have adopted the N.A.I.C. model law for guaranty associations. The general rule is that reimbursement for attorney's fees and other professional services may not be paid by insurance guaranty associations as "covered claims" if those services were rendered to insureds prior to a determination of insolvency of an insurance company. See generally 30 A.L.R. 4th 1110 (1984).

The decision, Ohio Insurance Guaranty Association v. Simpson, 439 N.W.2d. 1257 (Ohio Ct. App. 1981), exemplifies this general rule. In Simpson, the court held that attorney's fees incurred in defending an insurance company's policyholder prior to the company's insolvency did not amount to "covered claims" to be paid by the insurance guaranty association. The court noted that the Ohio Legislature in creating the Ohio Insurance Guaranty Association stated one of its purposes to be to avoid "financial loss to claimants or policyholders because of the insolvency of an insurer." The Court concluded that the association was designed to protect policyholders and persons who had claims against policyholders, not general creditors of insolvent insurance companies. The court further said that its conclusion was "in line with what appears to be

the unanimous position of appellate courts in those sister jurisdictions which have construed nearly identical statutes when confronted with similar circumstances." Simpson, at 1259. See, e.g., Greenfield v. Pennsylvania Insurance Guaranty Association, 389 A. 2d. (Pa. Super. Ct. 1978); Florida Insurance Guaranty Association v. Price, 450 S. 2d. 596 (Fla. Ct. App. 1984); Metry v. Michigan Property & Casualty Guaranty Association, 267 N.W.2d. 695 (Mich. 1978).

A claim for attorney's fees and expenses would not become a "covered claim" within the meaning of N.D.C.C. section 26.1-42-02(3) by virtue of the fact that the insured's policy provides coverages for those costs. In White v. Alaska Insurance Guaranty Association, 592 P. 2d. 367 (Alaska 1979), the Alaska Supreme Court followed the rule stated above and said the Guaranty Association Act "on its face limits 'covered claims' to those asserted by claimants or insured" and the insured is the person who is named on the policy form. The plaintiff attorney was not a named insured on the policy form. The court said the plaintiff attorney also did not constitute a "claimant" under the insurance policy contract because he was not a "third party victim who may be entitled to reimbursement for injury or damage which under the terms of the policy triggers the insurer's obligation to pay benefits." Id. at 369.

The only published decisions found which have awarded a claim for attorney's fees against a guaranty association involved circumstances where either the state guaranty association or the insured's insurance company itself refused to fulfill an obligation to defend an insured who was therefore subsequently forced to hire legal counsel to defend against such claims. See, e.g., Florida Insurance Guaranty Association v. Giorano, 485 S.2d. 453 (Fla. Dis. Ct. App. 1986) and Isaacson v. California Insurance Guaranty Association, 169 Cal. App. 3rd. 1062 (1985).

The cases reviewed above interpreting insurance guaranty association statutes similar to N.D.C.C. chapter 26.1-42 agree that legal services rendered on behalf of an insurance company to its insureds according to the terms of an insurance policy and before the company is determined to be insolvent may not be reimbursed by guaranty associations as "covered claims" under the insurance policy.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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