

95-011

STATUTES CITED IN

ARS 20-201 (FN2)
ARS 20-203 (FN2)
ARS 20-204 (FN2)
ARS 20-632
ARS 20-611 to -648
ARS 20-613 (FN1)
ARS 20-614 (FN1)
ARS 20-624 to -632 (FN1)
ARS 29-624
ARS 20-624(A)
ARS 20-624(D) (E)
ARS 29-625

SESSION LAWS

Laws 1954, ch. 64, Art. 24, sec. 22 (FN3)



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GRANT WOODS
ATTORNEY GENERAL

September 20, 1995

Mr. Chris Herstam, Director
Arizona Department of Insurance
2910 North 44th Street, Suite 210
Phoenix, Arizona 85018

Re: I95-11 (R95-23)

Dear Director Herstam:

You asked whether the Insurance Director, as a receiver under Arizona Revised Statutes Annotated ("A.R.S.") § 20-632, may deposit receivership monies in a national bank or trust company as a trust fund, and invest the monies as approved by the receivership court. We conclude that A.R.S. § 20-632 permits the Director to deposit receivership monies in trust with a national bank or trust company as a trust fund, and, subject to court approval, to invest trust funds in suitable investments.

Under the Uniform Insurers Liquidation Act ("UILA") and related statutes governing receivership proceedings, the Insurance Director is the statutory receiver for impaired and insolvent insurance companies doing business in Arizona.¹ A.R.S. §§ 20-611 to -648. Several statutes, including A.R.S. § 20-632, establish the authority for conducting a receivership. These statutes provide that the superior court shall appoint the Insurance Director as receiver and order the Director to take possession of the insolvent company's assets and administer them under orders of the court. A.R.S. §§ 20-624 and -625.²

¹The Arizona insolvency statutes consist of the Uniform Insurance Liquidation Act and other statutes peculiar to this state. The purpose of the UILA is to centralize insurance rehabilitation and liquidation proceedings in one state court, in order to protect all policyholders and creditors equally wherever they may reside. See *American Star Ins. Co. v. Grice*, 865 P.2d 507 (Wash. 1994). The UILA includes A.R.S. §§ 20-611, -613, -614, and -624 to -630. A.R.S. § 20-631. Section 20-632, A.R.S., however, is not derived from the UILA.

² The UILA distinguishes among receiverships involving domestic, alien, and foreign insurance companies. Domestic insurers are companies formed in Arizona and over which the Insurance Director has the primary regulatory authority; alien insurers are formed outside the United States; and foreign insurers are formed under the laws of another

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Section 20-632 addresses how the receiver shall hold monies that come within his possession:

The monies collected by the director in a proceeding under this article shall be from time to time deposited in one or more state or national banks, savings banks or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depository which is an institution organized and supervised under the laws of this state, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking laws of this state. The director may in his discretion deposit such monies or any part thereof in a national bank or trust company as a trust fund.

Accordingly, A.R.S. § 20-632 allows a receiver to deposit funds in a financial institution without obtaining court approval; accords a priority status to the deposit; and gives the receiver the option of depositing the funds with a national bank or trust company as a trust fund.³ In allowing the Director to deposit funds in trust accounts with national banks and trust companies without court approval, A.R.S. § 20-632 insulates receivership funds from general creditor claims if the national bank or the trust company becomes insolvent.

If the Director deposits funds in a bank account under A.R.S. § 20-632, the Director is not required to obtain approval from the court on how the deposited funds may be invested because there are no additional investment decisions. The deposit of monies in a trust account, however, offers various investment options, and the statute does not address how

state of the United States. A.R.S. §§ 20-201, -203 and -204. The UILA delegates different powers to the Director, depending on whether the insolvent company is a domestic, alien, or foreign insurer. See A.R.S. §§ 20-624 and -625.

³The Legislature enacted A.R.S. § 20-632 when it revised the insurance code in 1954. 1954 Ariz. Sess. Laws, Ch. 64, Art. 24, § 22. The Legislature's express authorization to the Director to deposit monies in a financial institution without court approval may have been a response to the different opinions of the courts as to whether court approval was necessary. That issue had plagued receivers in other states where courts had reached inconsistent conclusions about a receiver's liability for depositing monies in banks without court approval. Compare *Miller v. Fidelity & Deposit Co. of Maryland*, 40 P.2d 951 (Cal. App. 1935) and *Armstrong v. Walton*, 95 S.E. 714 (Ga. 1918) (holding receivers liable for depositing monies in bank accounts without court approval where the banks subsequently become insolvent), with *Johnsen v. Pheasant Pickling Co.*, 24 P.2d 628 (Wash. 1933) and *Neff v. Harmon*, 291 P. 518 (Okla. 1930) (holding receivers not liable for depositing monies in banks which subsequently become insolvent). The Arizona statute also clarified the priority status of an insurance receiver's bank deposits which courts in other jurisdictions had questioned. See *Bridge v. First National Bank-Detroit*, 5 F.Supp. 442 (E.D. Mich. 1933) (holding that although a receiver holds monies in trust for the receivership estate, a receiver's bank deposits do not have a priority status in a bank liquidation).

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such monies may be invested. In our opinion, under the general statutory scheme of the insurance receivership statutes and the common law of receiverships, the Director must obtain court approval in choosing investment options for monies in trust accounts.

The UILA generally authorizes an insurance receiver and the receivership court to exercise control over impaired or insolvent insurers. For example, A.R.S. § 20-624(A) provides that when the Director is appointed receiver of a domestic or alien company, "the court shall order the director forthwith to take possession of the assets of the insurer and to administer them under the orders of the court." The statute further provides that the Director as domiciliary receiver is "responsible for the proper administration of all assets coming into his possession or control" and upon obtaining possession of an insurer's assets, the Director, "subject to the direction of the court," shall conduct the insurer's business or liquidate and rehabilitate the insurer and conserve its assets. A.R.S. §§ 20-624(D) and (E). Thus, although the insurance receivership statutes prescribe many of the Director's duties as receiver, they generally delegate to the court the authority to approve how receivership monies may be invested. A.R.S. § 20-624(A).

Where a receivership statute creates a general framework for conducting a proceeding, the Arizona Supreme Court has held that the receiver may nonetheless be governed by the same principles that apply to a common law receiver. For example, the supreme court concluded that the Superintendent of Banks, as receiver of insolvent financial institutions, is a ministerial officer of the courts and must seek court approval before he may act as receiver. *Stowell v. Arizona Savings and Loan Ass'n*, 93 Ariz. 310, 380 P.2d 606 (1963) (*en banc*); *Sawyer v. Ellis*, 37 Ariz. 443, 295 P. 322 (1931). Under common law principles, a receiver may not invest receivership funds without court approval. Because the purpose of the receivership is to preserve the company's assets for the benefit of creditors, the receiver has a duty to seek the court's approval to make proper investments:

Any order by the court to invest the funds should indicate very definitely the securities or type of securities to be bought and only the most conservative investments suitable for trust funds should be designated. Since the preservation of the fund is the main purpose of the receivership, the law must guard those funds with great jealousy. The court is the real guardian of the fund and has power over it.

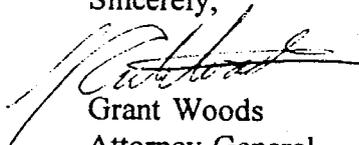
Ralph E. Clark, 2 *The Law and Practice of Receivers*, 3d ed., § 381, 639-640 (citation omitted). See also 75 C.J.S. *Receivers* § 173. Nonetheless, the receiver may have a duty to seek leave of the court to invest receivership funds that will be held in trust for a substantial period of time. *Schwartz v. Keystone Oil Co.*, 25 A. 1018 (Pa. 1893). A receiver may also have an affirmative duty to deposit funds in interest rather than non-interest bearing bank

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accounts. *See Strober v. Warren Property Co.*, 444 N.Y.S.2d 475, 477 (App. 1981).

Thus, we conclude that A.R.S. § 20-632 allows the Director to deposit monies in certain financial institutions without court approval, but does not relieve the Director from seeking court approval to make investments of monies collected during the receivership proceedings.

Sincerely,



Grant Woods
Attorney General