MARYLAND ATTORNEY GENERAL
MISCELLANEOUS INFORMATION
CONCERNING BILLS REGARDING
MIGA

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THE ATTORNEY GENERAL

104 LEGISLATIVE SERVICES BUILDING
90 STATE CIRCLE
ANNAPOLIS, MARYLAND 21401-1991
AREA CODE 301
BALTIMORE & LOCAL CALLING AREA 841-3889
WASHINGTON METROPOLITAN AREA 858-3889
TTY FOR DEAF - ANNAPOLIS 841-3814 - D.C. METRO 858-3814

April 22, 1986

The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hughes:

As requested, we have examined the following bills and hereby approve them for constitutionality and legal sufficiency:

House Bills		Senate Bills
156	1168****	24
188	1221*****	50
323*	1486#	377*
543**	1506	813###
678	1564##	851
1004	1622	
1047***	1629	
1097	1637	

Very truly yours,

Stephen H. Sachs
Attorney General

SHS:RAZ:ss
cc: Ben Bialek
F. Carvel Payne
The Honorable Lorraine Sheehan

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* Senate Bill 377 is identical to House Bill 323. These bills amend many of the same provisions altered by Senate Bill 813. There appear to be some stylistic conflicts between the bills, however, the substantive changes of each may be given effect. Attached is a letter of advice on the bill.

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February 17, 1986

The Honorable Melvin A. Steinberg
President of the Senate
State House
Annapolis, Maryland 21401

The Honorable Dennis F. Rasmussen, Chairman
Senate Finance Committee
President's Wing
Senate Office Building
Annapolis, Maryland 21401

Dear Senate President Steinberg and Chairman Rasmussen:

You have requested advice on the appropriate legislative language necessary to clearly indicate that the Maryland Insurance Guaranty Association (MIGA) is not a State agency or instrumentality.

As you know, the Court of Appeals in A. S. Abell Pub. Co. v. Mezzanote, 297 Md. 26 (1983), concluded that MIGA was an "agency or instrumentality of the State" subject to the requirements of the Public Information Law, State Government Article, §10-611 - 10-623. In so doing, the Court noted that "there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose." 297 Md. at 35. Thus, it is quite possible that a particular entity may be a State agency for one purpose, such as application of the Public Information Law, and not another. And in the past, the courts and opinions of the Attorney General have characterized such varied units as housing authorities, liquor boards and boards of education as either State or local, depending upon a partieular context. See e.g., Valentine v. Board of License Commissioners, 291 Md. 523 (1981); 65 Opinions of the Attorney General 385 (1980).

If your primary concern is whether the State may in some way be liable for claims against MIGA because it bears some of the characteristics of a State agency, I do not believe that such liability is possible under the statutory scheme. Under Article 48A, §508(a)(3), claims and expenses incurred by MIGA are paid solely from assessments made against member insurers and, as to any other liability, under Article 48A, §517, the association and its agents are the beneficiaries of a form of governmental immunity. If MIGA is a State agency and is a beneficiary of such immunity, I don't see how the State itself would be precluded from sharing in that immunity. However, to reemphasize the State's nonliability for MIGA claims and acts, the following statutory changes might be made:

(1) A declaration that the Association "is not a department, agency, or instrumentality of the State." Such language is found in the statute creating the Maryland Legal Services Corporation, Article 10, §45D(d).

(2) Elimination of the word "Maryland" from MIGA's name.

(3) A positive statement of the State's nonliability such as the following:

> "All debts, claims, obligations and liabilities incurred by MIGA shall be the debts, claims, obligations and liabilities of the association only and not of the State, its agencies, instrumentalities, officers or employees. MIGA monies shall not be deemed part of the Treasury of the State. The State shall not budget for or provide general fund appropriations to MIGA; and the debts, claims, obligations and liabilities of MIGA shall not be deemed in any manner to be a debt of the State or a pledge of its credit."
>
> Similar language is contained in the MAIF statute, see Art. 48A, §243A(d).

If your concerns are broader and you seek to eliminate any hint that MIGA is a State agency for any purpose, I would suggest revision of the following (in addition to those changes already recommended):

(1) Establish MIGA as a nonprofit, non-stock corporation with "perpetual existence" and powers, privileges and immunities derived from the Maryland General Corporation Law. See 61 Opinions of the Attorney General 567, 573 (1976).

(2) Eliminate the Insurance Commissioner's responsiblity for appointment of MIGA members and provide for members to fill vacancies. 1/

(3) Abolish MIGA's governmental immunity, see 61 Opinions of the Attorney General 567, 572 (1976), and substitute a system of corporate indemnification. See Corporations Article, §2-418.

(4) Eliminate the Insurance Commissioner's broad control over MIGA's operation. See A. S. Abell Pub. Co. v. Mezzanote, supra, 297 Md. at 33-34.

Many of these changes may not be desirable from the point of view of accountability and oversight of MIGA, but they would remove the major indicia that the Court of Appeals relied upon in Mezzanote to conclude that MIGA was a State agency. What I have not eliminated is MIGA's creation by statute, its service of a public purpose and its ability to raise funds by way of assessments. Sometimes little more than that is needed for a Court to find an entity to be a State agency for some purpose or another, see Moberly v. Herboldshcimer, 276 Md. 211 (1977). But I think such changes would certainly establish legislative intent that MIGA not be deemed a State agency for most purposes.

Sincerely,

Robert A. Zarnoch

Robert A. Zarnoch
Assistant Attorney General

RAZ:mar

cc: Alan Rifkin
Kathleen Sweeney
Lauric Burton-Graham

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1 A private corporation may still remain private despite gubernatorial appointment of some or perhaps all of its members, 63 Opinions of the Attorney General 106, 110 (1978). However, the Court in Mezzanote did note this factor, among others, in concluding that MIGA was a State agency. 297 Md. at 33.

HOUSE BILL 323--MIGA BILL(EMERGENCY)

PREAMBLE--EXPRESSLY PROVIDES FOR THE RETROACTIVE EFFECT OF LEGISLATION IN ORDER TO CORRECT PROBLEM WITH EASTERN INDEMNITY, AN INSOLVENT MARYLAND DOMESTIC SURETY INSURER.

504-- AMENDS PURPOSES SO AS TO MAKE ACT APPLICABLE TO INSOLVENT INSURERS AS OF 1/1/85, I.E. EASTERN

505-- PROVIDES DEFINITIONS, INCLUDING THAT FOR "COVERED CLAIM," "SURETY, ETC.," AND RESIDENT.

-MIGA PAYS ONLY CLAIMS OF MARYLAND RESIDENTS AGAINST INSOLVENT INSURERS LICENSED IN MARYLAND (NO CHANGE)

-MIGA DOES NOT GUARANTEE INSURANCE OFFERING PROTECTION AGAINST INVESTMENT RISKS.

*506-- AMENDS LAW TO CHANGE CURRENT SIX ACCOUNTS INTO FOUR FOR PURPOSES OF ASSESSMENT

CURRENT	PROPOSED
1. TITLE	1. TITLE
2. SURETY	2. MOTOR VEHICLE
3. WET MARINE & TRANSPORTATION	3. WORKMEN'S COMPENSATION
4. MOTOR VEHICLE	4. ALL OTHER
5. WORKMEN'S COMPENSATION	
6. ALL OTHER	

508--PROVIDES FOR NEW MAXIMUM LIMITS ON MIGA'S OBLIGATION

1. FOR ALL INSURANCE, EXCEPT SURETY, FOR EACH COVERED CLAIM:

CURRENT	PROPOSED
$50 TO UNLIMITED	$100 TO $300,000 AND UNLIMITED AS TO WORKMEN'S COMPENSA.

2. FOR SURETY FOR EACH COVERED CLAIM:

CURRENT	PROPOSED
$50 TO UNLIMITED	$100 TO $300,000 PER CLAIMANT WITH $1,000,000 MAX PER BOND, WITH PRO RATA DISTRIBUTION IF NECESSARY.

510--PROVIDES TECHNICAL CHANGE FOR CONSISTENCY

512--SAME AS ABOVE

516--SAME AS ABOVE

Insurance - Maryland Insurance Guaranty Association Act

Explanation:

This Bill would amend the Maryland Insurance Guaranty Association law to enable the Fund to operate in a fashion which is more amenable to the administration of an insolvent insurer engaged in the business of writing surety bonds. The Bill places a limit on certain liability of the Fund and reduces the existing Fund "accounts" from six to three, so that surety, title and ocean marine insurance would be included in the "all other liability" account.

Justification:

Insurance which guarantees the performance of contracts, by guaranteeing and executing bonds, undertakings and contracts of suretyship is different from any other type of property and casualty insurance. Unfortunately, the present MIGA law fails to account for the unique nature of surety bonds so that the Guaranty Association is finding it particularly difficult to fulfill its statutory function for claimants of the Eastern Indemnity Company of Maryland (EICOM), an insolvent Maryland domestic which primarily engaged in the surety bond business.

The MIGA law, in sum, presently provides that monies to pay covered claimants of insolvent insurers be segregated into six separate accounts. Surety insurance, by itself, makes up one such account. All insurers writing surety insurance in Maryland are, if needed, assessed annually to make contributions to this fund, based upon a certain formula which measures relative premium volume in Maryland. A maximum annual assessment of 2% of Maryland premiums is provided. These monies are then used to pay covered claims of insolvent surety insurers on a current and continuing basis. Because the MIGA law provides for no limitation of MIGA liability, the amount of money to be paid to claimants, and the amount of money needed to be assessed from insurers, may be very great. This is particularly true with surety bond claims because damages resulting from a defaulted construction contract are often extreme. However, because of a combination of the 2% maximum and the relatively low premium account for surety insurance written in Maryland, it may take years for MIGA to assess sufficient funds to pay surety claimants. Payment on a current basis becomes impossible.

The current circumstance involving MIGA and the insolvent EICOM illustrates the critical need for emergency legislation to rectify this situation. MIGA estimates that its ultimate exposure for EICOM surety bonds may exceed over 10 million dollars. However, given the current law, MIGA legally may assess surety

insurers based only upon surety business written in Maryland. In 1985, MIGA has assessed the maximum permitted by law which approximates only $500,000. Unless the law is amended it will take approximately twenty years to make whole covered claimants who were bonded by EICOM claimants. This excessive delay was neither anticipated nor intended by the MIGA law, and is not in the public interest.

The Bill corrects this problem in two primary ways.

First, it provides $300,000 as the maximum amount payable on each covered claim. Also as regards surety bonds only, the Bill provides a limit on MIGA's aggregate liability of $1,000,000 under any one bond. This provision serves to limit the ultimate exposure of the Association, at a level which will satisfy the need of the overwhelming number of consumers. Those persons who may carry larger limits of insurance most often are commercial businesses who are best able to consider the financial stability of insurers with whom they do business.

Second, the Bill reduces the number of accounts from six to three, thus enlarging the aggregate premium base against which assessments may be made. This seemingly technical change will permit larger assessments against insurers so that covered claims incident to the EICOM insolvency may be paid in a timely fashion.

Provisions in the Bill also would permit surety bonds issued by insurers who become insolvent to be continued in effect for certain periods of time. This serves the interest of bond holders by often times permitting construction jobs to continue uninterrupted to completion, while at the same time limiting the ultimate potential liability of MIGA.

History:

No prior legislation of this nature has been introduced.

BILL ORDER

HB 323

(1b) AN ACT concerning

Insurance - The Maryland Insurance Guaranty Association Act

FOR the purpose of providing that the Maryland Insurance Guaranty Association act contain certain provisions regarding insolvent insurers engaged in the business of writing surety bonds, placing a certain limit on the liability of the Maryland Insurance Guaranty Association, reducing the number of Fund accounts from six to three, and relating generally to the payment of covered claims of persons under surety bonds issued by insolvent insurers.

CIRCLE ONLY ONE:

(rr) By repealing and re-enacting, with amendments,
or
(an) By adding to
or
(r) By repealing

Article 48A, The Insurance Code

Section s 504, 505, 506, 508, 510, 512, 516

Annotated Code of Maryland
(1979 Replacement Volume and 1984 Supplement)

Circle as appropriate

(ed) - July 1 effective date

(eed) - emergency effective date

(sev) - severability clause

(sii) - salary increase not to affect incumbent

(aed) - abnormal effective date:_____

Office_____

Preamble

WHEREAS, the General Assembly of Maryland has determined that the general welfare of the People of Maryland in the vital area of insurance, particularly those who are claimants or policyholders of any member of the Maryland Insurance Guaranty Association which becomes insolvent, requires the retroactive application of this Act,

Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, that sections of the Annotated Code of Maryland read as follows:

Article 48A - Insurance Code

504.

(a) The purposes of this Act are to provide a mechanism for the prompt payment of covered claims under certain insurance policies, and to avoid financial loss to RESIDENTS OF MARYLAND WHO ARE claimants or policyholders [because of the insolvency] of any insurer INCLUDING SURETY WHICH HAS BECOME INSOLVENT; to assist in the detection and prevention of insurer insolvencies; and to provide for the assessment of the cost of such payments and

protection among insurers. ALL PROVISIONS OF THIS SUBTITLE SHALL APPLY TO ANY INSURER INSOLVENCY, INCLUDING SURETY, EXISTING AS OF JANUARY 1, 1985.

505.

As used in this subtitle:

(a) "Account" means any one of the THREE [five] accounts created by Section 506.

(b) "Association" means the Maryland Insurance Guaranty Association created under Section 506.

(c) "Covered Claims" means obligations, including unearned premiums, of an insolvent insurer which (1) arise out of the insurance policy contracts of the insolvent insurer issued to residents of this State or which are payable to residents of this State on behalf of insureds of the insolvent insurer, OR ARISE OUT OF SURETY BONDS ISSUED BY THE INSOLVENT INSURER FOR THE PROTECTION OF THIRD PARTIES, WHO ARE RESIDENTS OF THIS STATE, (2) were unpaid by the insolvent insurer, (3) are presented as a claim to the receiver in this State or the Association on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings, (4) EXCEPT FOR SURETY BOND CLAIMS, were incurred or existed prior to, on, or within 30 days after [the date the

receiver is appointed] THE DETERMINATION OF INSOLVENCY, [and] (5) FOR SURETY BOND CLAIMS ARISING UNDER SURETY BONDS WERE INCURRED OR EXISTED PRIOR TO, ON, OR WITHIN 18 MONTHS AFTER THE DETERMINATION OF INSOLVENCY, WHETHER OR NOT THE SURETY BONDS ARE ISSUED FOR NO STATED PERIOD OR FOR A STATED PERIOD [5] (6) arise out of policy contracts OR SURETY BONDS of the insolvent insurer issued for the kinds of insurance to which this subtitle applies.

"Covered claim" does not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise. No insurer shall assert a claim of subrogation against any insured of an insolvent INSURANCE company but may assert any claim it may have against the receiver of the insolvent [insurer] INSURANCE COMPANY.

(d) "Insolvent insurer" means [1] an insurer (1) authorized to transact insurance OR AUTHORIZED TO ISSUE SURETY BONDS in this State either at the time the policy OR SURETY BOND was issued or when [the insured event occurred] THE EVENT GIVING RISE TO THE CLAIM OCCURRED, and (2) against whom 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 OF THE INSURER.

(e) "Member insurer" means any insurer which: (1) writes any kind of insurance to which this subtitle applies under §504

including the exchange of reciprocal or interinsurance contracts and (2) is licensed to transact insurance in this State. The term includes the Maryland Automobile Insurance Fund.

(f) "Net direct written premium" means direct gross premiums written in this State on insurance policies OR SURETY BONDS to which this Act applies, less return premiums thereon and dividends paid or credited to policyholders, OR PRINCIPALS OR OBLIGEES OF SURETY BONDS on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers, or premiums received by insurers under the Maryland Property Insurance Availability Act.

(G) THE TERMS "SURETY BOND, SURETY, AND SURETYSHIP" AS EACH IS USED IN THIS SUBTITLE MEANS THAT KIND OF INSURANCE DEFINED IN §69(2) OF THIS ARTICLE.

(H) THE TERM "RESIDENT" MEANS AN INDIVIDUAL DOMICILED IN THIS STATE. THE TERM "RESIDENT" WITH REGARD TO CORPORATIONS AND OTHER ENTITIES WHICH ARE NOT NATURAL PERSONS, MEANS THOSE CORPORATIONS OR ENTITIES WHOSE PRINCIPAL PLACE OF BUSINESS IS IN THIS STATE.

506.

(a) There is created a nonprofit unincorporated legal entity to be known as the Maryland Insurance Guaranty Association. All

insurer defined as member insurers in Section 505(e) shall be and remain members of the Association as a condition of their authority to transact insurance in this State. The Association shall perform its functions under a plan of operation established and approved under Section 509 and shall exercise its powers through a board of directors established under Section 507. For purposes of administration and assessment, the Association shall be divided into [six] THREE separate accounts: (1) [the title insurance account; (2) the surety insurance account; (3) wet marine and transportation insurance account: (4)] THE motor vehicle insurance account; [(5)] (2) the Workmen's Compensation account and [(6)] (3) the account for all other insurance to which this subtitle applies.

(b) ANY AMOUNTS IN THE TITLE INSURANCE ACCOUNTS, THE SURETY INSURANCE ACCOUNT AND THE WET MARINE AND TRANSPORTATION ACCOUNT ON THE EFFECTIVE DATE OF THIS ACT SHALL BE TRANSFERRED TO THE ACCOUNT CREATED UNDER SUBSECTION (A) FOR ALL OTHER INSURANCE.

508.

(a) The Association shall:

(1)(I) EXCEPT AS TO SURETY BONDS, be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of

insolvency or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but such obligation shall include only that amount of each covered [accident] claim which is in excess of [$50.00] $100 AND LESS THAN $300,000. HOWEVER, THE ASSOCIATION SHALL PAY THE FULL AMOUNT OF ANY COVERED CLAIM ARISING OUT OF A WORKERS' COMPENSATION POLICY. In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

(II) WITH RESPECT TO SURETY BONDS, BE OBLIGATED TO THE EXTENT OF THE COVERED CLAIMS EXISTING PRIOR TO THE DETERMINATION OF INSOLVENCY, AND ARISING WITHIN 18 MONTHS AFTER THE DETERMINATION OF INSOLVENCY WHETHER OR NOT THE SURETY BONDS ARE ISSUED WITH NO STATED PERIOD OR FOR A STATED PERIOD. SUCH OBLIGATION SHALL INCLUDE ONLY THAT AMOUNT OF EACH COVERED CLAIM PAYABLE TO EACH CLAIMANT WHICH IS IN EXCESS OF $100.00 AND LESS THAN $300,000.00. IN NO EVENT SHALL THE ASSOCIATION BE LIABLE FOR AN AGGREGATE AMOUNT IN EXCESS OF $1,000,000.00 UNDER ANY ONE BOND. IN THE EVENT COVERED CLAIMS ARE IN EXCESS OF $1,000,000.00 UNDER ANY ONE BOND, THE ASSOCIATION SHALL MAKE A PRORATED PAYMENT ON ACCOUNT OF EACH COVERED CLAIM IN THE RATIO THAT THE COVERED CLAIM BEARS TO THE TOTAL AMOUNT OF ALL COVERED CLAIMS UNDER THE BOND. IN NO EVENT SHALL THE ASSOCIATION BE OBLIGATED TO ANY CLAIMANTS IN AN

AMOUNT IN EXCESS OF THE OBLIGATION OF THE INSOLVENT INSURER UNDER THE SURETY BOND FROM WHICH THE CLAIM ARISES.

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent have all rights, duties, and obligations of the insolvent insurer as if the insurer or surety company had not become insolvent.

(3) Allocate claims paid and expenses incurred among the [six] THREE accounts separately, and assess member insurers separately from each account in amounts necessary to pay the obligation of the Association under paragraph (1) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under Section 513 and other expenses authorized by this subtitle. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurers for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account. Each member insurer shall be notified of the assessment not later than 30 days before it is due. No member insurer may be assessed in any year on any account in an amount greater than 2 percent of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the

Association in any account, does not provide in amy one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.

510.

(b) The Commissioner may:

(1) Require that the Association notify the insured, OR THE PRINCIPAL AND SPECIFIC OBLIGEES NAMED IN SURETY BONDS, of the insolvent insurer and any other KNOWN interested parties of the determination of insolvency and of their rights under this subtitle. Such notification may be by mail at their last known address where available, but if sufficient information for

notification by mail is not available, notice by publication in a newspaper or general circulation shall be sufficient.

512.

(a) Any person having a COVERED claim against an insurer, INCLUDING SURETY, under any provision in any insurance policy OR SURETY BOND, other than a policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under such policy OR BOND. Any amount payable on a covered claim under this Act shall be reduced by the amount of any recovery under such insurance policy OR SURETY BOND.

(b) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first: (i) EXCEPT WITH RESPECT TO A SURETY BOND, 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, he shall seek recovery first from the Association of the location of the property; (ii) WITH RESPECT TO A SURETY BOND, FROM THE ASSOCIATION OF THE PLACE OF PERFORMANCE OF THE OBLIGATION DESCRIBED IN THE BOND. Any recovery under this Act shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

516.

The rates and premiums charged for insurance policies AND SURETY BONDS to which the Act applies shall include amount sufficient to recoup over a reasonable length of time which shall not be less than three years, a sum equal to the amounts paid to the Association by the member insurers less any amount returned to the member insurer by the Association and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.

DLR # 15

The relevant constitutional provisions, Federal and State, and court decisions, have been examined and, in my opinion, the bill, if enacted, will be valid according to its provisions.

Kathleen M Sweeney

Assistant Attorney General

8/22/85

(date)

SENATE FINANCE COMMITTEE MINUTES

BILL NO. SB 813

Title: Maryland Insurance Guaranty Association

Sponsor: Rasmussen

Hearing: 2/25/86

Tom Barbera - this bill address the concerns regarding MIGA and the image of whether that association is perceived as a state entity. This bill clarifies that MIGA is not an instrumentality of the state and changes the name to the Property and Casualty Insurance Guaranty Association.

It also provides that an insurance company in the sale of a product cannot use the Fund to induce that sale -- that is in present law.

Muhl - it could be construed as a Md. instrumentality.

The Court of Apeals often disagrees with the AGs opinion.

The AG (Zarnoch) doesn't believe MIGA is a state agency. If MIGA is sued now it would be defended by its own counsel. If this bill passes, nothing would change in that respect.

Denis - referred to a letter by the AG.

Barbera - the MIGA board would not change.

Rasmussen - there may be a question as to any potential liability to the State. This bill is to be used as a vehicle to say that there is no potential financial liability.

GREEN - THE INSURANCE COMMISSIONER OR AG SHOULD ADDRESS CHANGING THE NAME IN AN OPINION.

O'Reilly - concerns with language on page 2, lines 29-33. Rasmussen says that there are AMENDMENTS to address those concerns.

TO: Marty Roach

DATE: March 5, 1986

FROM: Pat Trask Pat

SUBJECT: MIGA Legislation

Having reviewed the materials you gave me earlier and having spoken with Bob Zarnoch, it is my opinion based upon preliminary legal research that MIGA could fairly easily be found to be an agency or instrumentality of the State under the precedent of the case Bob cited in his opinion to Messrs. Steinberg and Rasmussen dated February 17, 1986. Even more on point is the State's brief in Chevy Chase Savings and Loan vs. State of Maryland , where the State contended that MDIF has sovereign immunity because it expressly is an agency/instrumentality of the State. Each one of the State's arguments is applicable to MIGA to prove that it is a State entity.

Since it is very likely that MIGA could be found to be an instrumentality of the State, the next question is whether there is sovereign immunity. Under Article 48A, Sec. 517, immunity is granted as follows:

> 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, or the Commissioner or his representatives for any action taken by them in the performance of their powers and duties under this subtitle.

It is critical to note that this immunity was granted by the Acts of 1971, ch. 703, Sec. 1. In the Acts of 1976, ch. 450, the General Assembly abolished sovereign immunity in contract actions against the State, as follows:

> Unless otherwise specifically provided by the laws of Maryland, the State of Maryland, and every officer, department, agency, board, commission, or other unit of State government may not raise the defense of sovereign immunity in the courts of this State in an action in contract based upon a written contract executed on behalf of the State, or its department, agency, board, commission, or unit by an official or employee acting within the scope of his authority.

It is Bob Zarnoch's opinion that the 1976 Act did not revoke any specific grant of sovereign immunity existing prior to that time, i.e., MIGA's immunity. I must defer to his opinion since I have only read the Act and its preamble, but not done any case law research.

Assuming that the bill revisions specifically separated MIGA from the State, it is my opinion that claims that arose prior to the effective date of the legislation could still be brought against MIGA as an instrumentality of the State, whereupon the State would raise the defense of sovereign immunity, assuming the Court found that MIGA was a State instrumentality.

I've talked to Bob Zarnoch and Al Rifkin regarding the private corporation issue. Neither Al nor I is sure what the problems are; it is my understanding from Bob that the legislature may create a private corporation serving a public purpose, and to make it a private corporation, it should have all the attributes of a private corporation under Maryland law. Alan isn't sure, and neither am I, about the concept of a corporation's "perpetual existence" as necessary to its being truly a private corporation. We're attempting to get a clarification on that.

In the meantime, as per Bob's February 17th opinion letter and the attached Court of Appeals opinion, everything that might create a State involvement with MIGA, and the Court was quite specific, should be taken out of existing legislation. Do you want me to go through the statute very carefully to do this?

BY adding to

Article 25A - Chartered Counties of Maryland
Section 1A
Annotated Code of Maryland
(1973 Replacement Volume and 1975 Supplement)

BY adding to

Article 25B - Home Rule for Code Counties
Section 13A
Annotated Code of Maryland
(1973 Replacement Volume and 1975 Supplement)

WHEREAS, The Court of Appeals of Maryland has held that, as a result of the common law doctrine of sovereign immunity, a suit cannot be maintained against the State or its political subdivisions, unless authorized by the Legislature, and funds are available to satisfy any judgment rendered; and

WHEREAS, The Court of Appeals further has stated that any change in the doctrine of sovereign immunity must be made by the Legislature; and

WHEREAS, Maryland is one of the few States which has not yet abolished or modified the effect of this common law doctrine; and

WHEREAS, The Governor's Commission to Study Sovereign Immunity has thoroughly studied the issues presented by an abrogation or modification of the doctrine in actions in contract and has thoroughly considered the effects of retaining this defense; and

WHEREAS, The Governor's Commission to Study Sovereign Immunity believes that there exists a moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a contract; and

WHEREAS, The Governor's Commission to Study Sovereign Immunity has concluded that the doctrine is no longer appropriate to actions on certain contracts, and that the effects of this doctrine should be limited by legislative action; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That new Section 10A be and it is hereby added to Article 41 - Governor - Executive and Administrative Departments, of the Annotated Code of Maryland (1971 Replacement Volume and 1975 Supplement) to read as follows:

Article 41 - Governor - Executive and Administrative Departments

10A.

(A) UNLESS OTHERWISE SPECIFICALLY PROVIDED BY THE LAWS OF MARYLAND, THE STATE OF MARYLAND, AND EVERY OFFICER, DEPARTMENT, AGENCY, BOARD, COMMISSION, OR OTHER UNIT OF STATE GOVERNMENT MAY NOT RAISE THE DEFENSE OF SOVEREIGN IMMUNITY IN THE COURTS OF THIS STATE IN AN ACTION IN CONTRACT BASED UPON A WRITTEN CONTRACT EXECUTED ON BEHALF OF THE STATE, OR ITS DEPARTMENT, AGENCY, BOARD, COMMISSION, OR UNIT BY AN OFFICIAL OR EMPLOYEE ACTING WITHIN THE SCOPE OF HIS AUTHORITY.

(B) IN ANY SUCH ACTION, THE STATE, OR ITS OFFICER, DEPARTMENT, AGENCY, BOARD, COMMISSION, OR OTHER UNIT OF GOVERNMENT IS NOT LIABLE FOR PUNITIVE DAMAGES.

(C) A CLAIM IS BARRED UNLESS THE CLAIMANT FILES SUIT WITHIN ONE YEAR FROM THE DATE ON WHICH THE CLAIM AROSE OR WITHIN ONE YEAR AFTER COMPLETION OF THE CONTRACT GIVING RISE TO THE CLAIM, WHICHEVER IS LATER.

(D) IN ORDER TO PROVIDE FOR THE IMPLEMENTATION OF THIS SECTION, THE GOVERNOR ANNUALLY SHALL PROVIDE IN THE STATE BUDGET ADEQUATE FUNDS FOR THE SATISPACTION OF ANY FINAL JUDGMENT, AFTER THE EXHAUSTION OF ANY RIGHT OF APPEAL, WHICH HAS BEEN RENDERED AGAINST THE STATE, OR ANY OFFICER, DEPARTMENT, AGENCY, BOARD, COMMISSION, OR OTHER UNIT OF GOVERNMENT IN AN ACTION IN CONTRACT AS PROVIDED IN THIS SECTION.

SECTION 2. AND BE IT FURTHER ENACTED, That new Section 1A be and it is hereby added to Article 23A – Corporations – Municipal, of the Annotated Code of Maryland (1973 Replacement Volume and 1975 Supplement) to read as follows:

Article 23A – Corporations – Municipal

1A.

(A) UNLESS OTHERWISE SPECIFICALLY PROVIDED BY THE LAWS OF MARYLAND, A MUNICIPAL CORPORATION, AND EVERY OFFICER, DEPARTMENT, AGENCY, BOARD, COMMISSION, OR OTHER UNIT OF MUNICIPAL GOVERNMENT MAY NOT RAISE THE DEFENSE OF SOVEREIGN IMMUNITY IN THE COURTS OF THIS STATE IN AN ACTION IN CONTRACT BASED UPON A WRITTEN CONTRACT EXECUTED ON BEHALF OF THE MUNICIPAL CORPORATION, OR ITS DEPARTMENT, AGENCY, BOARD, COMMISSION, OR UNIT BY AN OFFICIAL OR EMPLOYEE ACTING WITHIN THE SCOPE OF HIS AUTHORITY.

(B) IN ANY SUCH ACTION, THE MUNICIPAL CORPORATION, OR ITS OFFICER, DEPARTMENT, AGENCY, BOARD, COMMISSION, OR OTHER UNIT OF GOVERNMENT IS NOT LIABLE FOR PUNITIVE DAMAGES.

(C) A CLAIM IS BARRED UNLESS THE CLAIMANT FILES

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March 3, 1986

The Honorable Howard A. Denis
410 James Senate Office Building
Annapolis, Maryland 21401

SB 813

Dear Senator Denis:

You have requested our opinion on three issues pertaining to the Maryland Insurance Guaranty Association ("MIGA"):

1. whether the State of Maryland is financially liable for claims against MIGA;

2. whether MIGA is a State agency or entity; and

3. whether appointment of the MIGA board of directors by the State Insurance Commissioner is an important factor in the above two determinations.

For the reasons given below, we conclude that:

OPINION OF THE ATTORNEY GENERAL

Cite as: Opinion No. 86-012 (March 3, 1986) (unpublished)

1. The State has no financial liability for claims raised against MIGA.

2. MIGA is properly considered a State agency for some purposes but not for others.

3. The appointment of MIGA's board of directors by the Insurance Commissioner may well be a factor in determining MIGA's status as a State agency but has no bearing whatsoever on the issue of State liability.[1]

I

Background

The Maryland Insurance Guaranty Association was established by Chapter 703, Laws of Maryland 1971. The law governing MIGA is codified in Article 48A, §§504 through 519 of the Maryland Code.

As you have noted, the purpose of MIGA is to protect the public by (i) providing a mechanism to avoid financial loss to policyholders and claimants resulting from the insolvency of insurers and (ii) assisting in the detection and prevention of insurer insolvencies. Article 48A, §504(a). To that end, all insurers providing insurance (other than life and health insurance and annuities) must be members of MIGA as a condition of their authorization to transact business in Maryland. Article 48A, §§504(b) and 506.[2]

MIGA is designated as a "non-profit unincorporated legal entity." Article 48A, §506. Members of its board of directors are appointed by the Insurance Commissioner. Article 48A, §507.

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[1] In a letter of advice to Senate President Melvin A. Steinberg and Senate Finance Committee Chairman Dennis F. Rasmussen (February 17, 1986), Assistant Attorney General Robert A. Zarnoch reached essentially the same conclusions as are set forth here. That letter also set out various possible changes to MIGA's statute to further clarify MIGA's relationship to the State.

[2] For purposes of administration and assessment against member insurers, MIGA is divided into six separate accounts: title insurance, surety insurance, wet marine and transportation insurance, motor vehicle insurance, workmen's compensation, and all other insurance to which the statute applies. Article 48A, §506.

MIGA uses no public funds. On the contrary, the Association is statutorily required to "[a]llocate claims paid and expenses incurred among the six accounts separately, and assess member insurers separately for each account in amounts necessary to pay the obligation of the Association ... subsequent to an insolvency, the cost of examinations ... and other expenses authorized by this subtitle." Article 48A, §508(a)(3). Even if MIGA's own funds prove insufficient in any given year, no provision is made for resort to State funds. Rather, the statute specifically requires that if the maximum assessment against members, taken together with other MIGA assets, does not comprise a sufficient amount in any account to make all necessary payments from that account, "the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available." Article 48A, §508(a)(3).

II

State Liability for Claims Against MIGA

In general terms, any assumption of financial liability by the State must be expressly stated. This may occur by authorization in the Constitution, by statute, or by express contract with the State. See, e.g., §§13-120 and 13-152(a)(1) of the Financial Institutions Article. In the absence of such express authorization, the State cannot be held liable, as all rights "asserted against the State must be clearly defined, and cannot be raised by inference or presumption." Rogan v. B & O R.R. Co., 188 Md. 44, 55 (1946). See also 81A C.J.S. States §194 (1977); 72 Am.Jur.2d. States, Territories, and Dependencies §88 (1974).

Even where express statutory or other authorization does exist, an enactment does not amount to a pledge of the faith and credit of the State unless it provides for wholly unconditional governmental liability for the payment of a debt. Thus, in Maryland Industrial Development Financing Auth. v. Meadow-Croft, 243 Md. 515, 523 (1966), the Court of Appeals held that a statute purporting to pledge the State's faith and credit was "of no legal force or effect" because limitations on the pledge prevented it from being binding in and of itself.

Finally, any financial obligation of the State must accord with Article III, §34 of the Constitution. This section provides in pertinent part that "[t]he credit of the State shall not in any manner be given, or loaned to, or in aid of any individual

association or corporation."[3] The Court of Appeals has interpreted this prohibition as "directed against the guaranty by a state of the debt of another and is not a limitation on the creation of an indebtedness for which a state is primarily liable." Development Credit Corp. v. McKean, 248 Md. 572, 576-77 (1968). Thus, the State may make grants or loans to private entities from the proceeds of the State's own borrowing, if the purpose of such grant or loan is public or semipublic; it may not, however, directly pledge its own faith and credit to guaranty the debt of another entity. Johns Hopkins University v. Williams, 199 Md. 382, 401 (1952); Maryland Industrial Development Financing Auth. v. Helfrich, 250 Md. 602, 614-15 (1968); McKean, 248 Md. at 576.

Applying these general principles to your question about MIGA, we conclude that the State has absolutely no financial liability for claims against MIGA. Article 48A makes no provision for financial liability of the State to MIGA. The statute neither appropriates State funds nor pledges the credit of the State for that or any other purpose. Instead, as discussed in Part I above, the statute specifically allocates MIGA claims and expenses among the separate MIGA accounts, all of which are funded by assessments on member insurers. Article 48A, §508(a)(3). Furthermore, in the event that MIGA funds do not meet its obligations in any given year, the statute provides for a procedure of prorating and delayed payment from those same accounts. Article 48A, §508(a)(3).[4]

In short, the State has never expressly assumed liability for claims against MIGA. On the contrary, the pertinent provisions of Article 48A makes clear that the obligation rests solely on the member insurers from whose assessments MIGA is

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[3] A comma after the word "individual" was omitted, apparently without substantive intent, in the 1867 Constitution. The language of Article III, §34 has been construed to bar gifts or loans of the State's credit to individuals as well as to associations and corporations. See 70 Opinions of the Attorney General ___ (1985) [Opinion No. 85-023 (October 16, 1985)], at 20 n. 18.

[4] The origins of MIGA are described in 57 Opinions of the Attorney General 306 (1972). As this opinion observed, a main purpose of MIGA is to spread the costs resulting from an insurer's insolvency "throughout a large segment of the industry since assessments are made against all insurers in the appropriate category under [Article 48A, §506]." 57 Opinions of the Attorney General at 316. Nothing in the legislative history, as recounted in this opinion, suggests that any part of the costs were to be borne by the State.

funded. See National Grange Mut. Ins. v. Pinkney, 284 Md. 694, 703-04 (1979) (MIGA is not "maintained by the State," but instead allocates claims and expenses among its authorized accounts).[5]

Given the clear language of Article 48A, there is no question that the statute fails to provide for wholly unconditional governmental liability for payment of MIGA's debts. This is not, as in Meadow-Croft, due to limitations in a statutory pledge of faith and credit. In this case, there is no pledge whatsoever - the requirement of unconditional liability obviously has not been met where no liability at all is undertaken.[6]

Finally, even if the State had expressly and unconditionally assumed liability for MIGA's obligations, which it has not, such action would probably violate Article III, §34 of the Constitution. As we have already discussed, the State could make a grant or loan to MIGA from the proceeds of its own borrowing, but it could not explicitly pledge its faith and credit to guaranty claims against MIGA. See generally Opinion No. 85-023, at 20-21. Thus, to hold the State financially liable for claims covered by MIGA would not only extend the meaning of the statute beyond its stated terms, but would construe it in such a way as to make it potentially unconstitutional. Cf. In re James D., 295 Md. 314, 327 (1983) (statutes are to be construed to avoid constitutional questions whenever "reasonably possible").

III

MIGA's Status As A State Agency

As the Court of Appeals observed in A.S. Abell Pub. Co. v. Mezzanotte, 297 Md. 26, 35 (1983), "there is no single test for

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[5] We note that Senate Bill 813, currently before the General Assembly, proposes to amend Article 48A to clarify the relationship between MIGA and the State. Among other changes, the bill would add a provision that payment of covered MIGA claims "is neither guaranteed nor insured by the State of Maryland." Proposed Article 48A, §504(a)(2). It is our opinion that this express denial of any State guaranty only confirms existing law.

[6] Moreover, the State's underlying sovereign immunity has not been "expressly waived" by the MIGA statute or "by a necessary inference from such legislative enactment." Board of Trustees v. John K. Ruff, Inc., 278 Md. 580, 588 (1976). In addition, no State funds have been appropriated for the payment of judgments arising out of claims against MIGA. 278 Md. at 591.

determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose. All aspects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine its status." In examining MIGA's status for the purpose of the State's Public Information Act, the Court of Appeals found in A.S. Abell that MIGA's existence depends upon the General Assembly; it serves a public purpose; its management is selected by the Insurance Commissioner, and is not self-perpetuating; it does not independently manage its affairs or enforce its regulations; its decisions may be reversed by the Insurance Commissioner; and it enjoys a special tax and liability status. The Court of Appeals accordingly held that while the State does not exercise control over all aspects of MIGA's operation, the total relationship between the State and the Association is such as to make MIGA an instrumentality of the State within the scope of the Public Information Act. 297 Md. at 38-39.

Taking full account of the holding in A.S. Abell, this Office subsequently considered MIGA's status as a "unit of the State government" for purposes of the statutory ban against retaining private counsel. 70 Opinions of the Attorney General ___ (1985) [Opinion No. 85-016 (June 14, 1985)]. In making our determination, we noted that: MIGA is a "non-profit unincorporated legal entity" whose primary duties require it to operate much as a private insurance pool; the General Assembly intended it to operate in most respects as a private entity in the day-to-day handling of its claims and cases; its needs for legal counsel are the same as those of any private insurance pool and could best be met by privately-retained attorneys who specialize in insurance practice; and the long-standing practice, accepted by MIGA, the Insurance Commissioner, and the Attorney General, was for MIGA to be represented by privately-retained counsel. Considering all these factors, we found that MIGA was not a unit of State government for the purpose of the statutory ban and could therefore continue to retain private counsel. Opinion No. 85-016 at 4.

There is no discrepancy between the Court of Appeals' holding in A.S. Abell and the determination made in Opinion No. 85-016. It is well-established that an entity may be considered an agency, unit, or instrumentality of government for one purpose, but not for another. Opinion No. 85-016, at 3 (citing examples of the Maryland Legal Services Corporation, county boards of education, and the American Red Cross). The factors to be considered in making this inquiry, as well as its ultimate outcome, are to a great extent determined by the purpose for which the inquiry is made. Thus, some or all of the factors mentioned above, and potentially other factors as well, might be pertinent, depending upon the particular inquiry. It is not

possible to make an across-the-board determination of MIGA's status as a State agency.[7]

IV

Appointment of MIGA's Board of Directors

The State Insurance Commissioner appoints the members of the MIGA board of directors from member insurers. You have asked whether this fact is an important consideration in answering your previous two questions.

The power of appointment by a state official has no bearing whatsoever on the State's financial liability for claims against MIGA. As we have discussed in Part II above, that question depends on the language and construction of MIGA's statute, which clearly puts no obligation on the State to guaranty the association. The manner in which MIGA's board is appointed is wholly irrelevant to the issue.

On the other hand, State control over the board of directors would likely be one pertinent factor in determining MIGA's status as a State agency for some specified purpose. Indeed, as we have noted, appointment by the Commissioner was one of the factors considered by the Court of Appeals in determining that MIGA was a State instrumentality for the purposes of the Public Information Act. A.S. Abell, 297 Md. at 38.

V

Conclusion

In summary, it is our conclusion that the State bears no financial liability for claims against MIGA. MIGA is properly considered a State agency for some purposes but not for others.

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[7] Among the amendments to Article 48A proposed in Senate Bill 813 (see note 5 above) is a provision that expressly denies that MIGA is an instrumentality of the State of Maryland.

While the appointment of its board of directors may have some bearing on MIGA's status in this regard, it is wholly irrelevant to the issue of the State's financial obligation.

Sincerely,

Stephen H. Sachs
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Staff Attorney

Jack Schwartz
Chief Counsel
Opinions and Advice