

6244

1. INSURANCE COMPANY, LIFE—ORGANIZED UNDER AUTHORITY, TITLE IX, DIVISION III, SUBDIVISION I, G. C.—DISPOSING OR ATTEMPTING TO DISPOSE OF STOCK—SUBJECT TO SUPERVISION, SUPERINTENDENT OF INSURANCE—ISSUANCE OF STOCK REGULATED—STOCK EXEMPT FROM REGISTRATION PROVISIONS OF OHIO SECURITIES ACT—SECTIONS 8624-3, PARAGRAPH 7, 8624-37 G. C.
2. AUTHORITY, SUPERINTENDENT OF INSURANCE TO LICENSE DEALERS AND SALESMEN TO DISPOSE OF STOCK ISSUED BY LIFE INSURANCE COMPANY.
3. LIFE INSURANCE COMPANY CANNOT BE LICENSED AS DEALER IN SECURITIES UNDER OHIO SECURITIES ACT TO SELL ITS OWN STOCK PRIOR TO TIME SUBSCRIPTIONS FOR CAPITAL STOCK HAVE BEEN RECEIVED—AMOUNT AT LEAST EQUAL TO THAT ARTICLES STATE IT SHALL HAVE TO COMMENCE BUSINESS.

SYLLABUS:

1. A life insurance company organized under authority of Subdivision I, Division III, Title IX, General Code, disposing or attempting to dispose of its stock, becomes subject thereby to the supervision of the Superintendent of Insurance by reason of the provisions of Section 8624-37, General Code, and since said section also regulates the issuance of such stock by such a life insurance company, such stock, by reason of the provisions of paragraph 7 of Section 8624-3, General Code, is exempt from the registration provisions of the Ohio Securities Act.

2. The Superintendent of Insurance has authority to license dealers and salesmen to dispose of stock where the issuer thereof is a life insurance company organized under Subdivision I, Division III, Title IX, General Code.

3. A life insurance company cannot be licensed as a dealer in securities under the Ohio Securities Act to sell its own stock prior to the time subscriptions for its capital stock have been received in an amount at least equal to that with which the articles state it shall commence business.

Columbus, Ohio, July 31, 1943.

Hon. J. Roth Crabbe, Superintendent of Insurance,
Columbus, Ohio.

Dear Sir:

Your request for my opinion reads:

"A domestic legal reserve stock life insurance company has been incorporated under the provisions of Sections 9340, et seq., General Code, and has completed the publications required by Section 9342, General Code. In conformity with Section 9343, General Code, the articles of incorporation specify that the corporation will begin business with \$100,000.00.

The incorporators propose to offer the 10,000 shares of authorized common stock to the public at \$16.50 per share. \$10.00 of which goes to capital, \$5.00 to surplus and \$1.50 to cover commissions and organization expenses. It is contemplated that a considerable period of time will elapse before the entire issue can be disposed of and the company becomes eligible for a certificate authorizing it to engage in the business of life insurance. It is, therefore, proposed to escrow all proceeds from the sale of stock, the entire amount to be returned to the subscriber in the event that the required capital shall not be raised.

Several questions arise in connection with the proposed disposition of this stock upon which I desire your advice.

Section 8624-3, paragraph 7, General Code, exempts from the registration provisions of the Securities Act:

'Any security issued or guaranteed by an insurance company (except as provided in section 8624-37 of this act) provided that such company is under the supervision of, and the issuance or guaranty of such security is regulated by, a state.'

In view of the provision of Section 8624-37, General Code, is such newly formed corporation 'under the supervision of, and the issuance * * * of such security * * * regulated by, a state,' and therefore exempt from the registration requirements of the Securities Act?

If your answer to this question is in the negative, may the incorporators make application to register the stock?

It is my understanding that this question does not arise in the case of an ordinary private corporation which may com-

plete its organization and commence business when its minimum stated capital has been paid in and which may issue its initial voting shares without prior registration under Section 8624-4, paragraph 13, General Code. The minimum stated capital may be as low as \$500.00 and the initial voting shares are usually closely held, so that the board of directors can be elected, regulation 8624-37, (General Code) providing that 'the superintendent of insurance of Ohio shall, for all the purposes of this act, be substituted for the division of securities,' I desire your advice as to whether I have any power or duty to issue dealers' and salesmen's licenses with respect to insurance securities.

It is proposed that the corporation or some of the incorporators shall handle the sale of the stock to the public. Having in mind that portion of Section 37 of the Securities Act (Section 8624-37, General Code) providing that 'the superintendent of insurance of Ohio shall, for all the purposes of this act, be substituted for the division of securities,' I desire your advice as to whether I have any power or duty to issue dealers' and salesmen's licenses with respect to insurance securities.

If it is your opinion that I have the power and duty to issue such licenses, I wish to know whether the corporation in question would be eligible for a dealer's license, bearing in mind its present status outlined above."

Section 8624-3, General Code, referred to in your letter, provides, in so far as pertinent to your question:

"The following securities shall be exempt from the provisions of sections 8, 9, 10, 13, 14 and 41 hereof, and the requirements therein set forth need not be complied with. * * *

(7) Any security issued or guaranteed by an insurance company (except as provided in section 8624-37 of this act, provided that such company is under the supervision of, and the issuance or guaranty of such security is regulated by, a state."

Sections 8, 9, 10, 13, 14 and 41 referred to in the above quoted portion of Section 8624-3, General Code, are respectively Sections 8624-8, 8624-9, 8624-10, 8624-13, 8624-14 and 8624-41, General Code. It is unnecessary to review the provisions of these sections in detail, but suffice it to say that they provide for registration either by description or qualification of securities with the Division of Securities, for the payment of certain filing fees, and for the filing with the application for regis-

tration of an irrevocable consent to the commencement of actions and the service of process on the Secretary of State.

Section 8624-37, General Code, to which you also refer in your letter, provides:

“If the issuer of such securities be incorporated, organized or formed to make any insurance named in Subdivisions I and II, Division III, Title IX of the General Code, the superintendent of insurance of Ohio shall, for all the purposes of this act, be substituted for the division of securities. In addition to the powers given to, and the duties prescribed to be performed by him under this act, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state.

No person shall, for the purpose of organizing or promoting any insurance company, or of assisting in the sale of its securities after organization, dispose or offer to dispose, within this state, of any such securities, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

‘No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess ofper cent of the amount actually paid upon separate subscriptions, (or, in lieu thereof there may be inserted, \$...... per share from every full paid subscription) and the remainder of such payment shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority.’

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid.

The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent (15%) of the amount actually received upon the subscription.”

Paragraph 7 of Section 8624-3, General Code, *supra*, exempts from the registration provisions of the Securities Act any security issued or guaranteed by an insurance company "except as provided in section 8624-37 of the General Code," provided that such company is under the supervision of, and the issuance of such security is regulated by, a state. An analysis of Section 8624-37, General Code, discloses that it contains no provisions with respect to the registration of securities either by description or qualification, and the exception contained in paragraph 7 of Section 8624-3, General Code, is therefore meaningless and without effect. If an insurance company is under the supervision of a state and the issuance of its securities is regulated by a state, such securities are exempt from the registration provisions of the Ohio Securities Act.

Section 8624-37, General Code, as you will have noted, provides that "the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state." The Superintendent of Insurance, of course, has supervision over insurance companies licensed to do business in this state. *State, ex rel., v. Conn*, 115 O. S., 607, 620, 621, 622. When an insurance company organized for the purpose of transacting the business of life insurance, which is an insurance named in Subdivision I, Division III, Title IX, General Code, disposes or attempts to dispose of any of its securities within this state, it thereby immediately becomes subject to supervision by the Superintendent of Insurance who is an officer of this state, and such company is therefore "under the supervision of a state," within the meaning of Section 8624-3, General Code.

The next question to be determined is whether the issuance of securities by such company is "regulated by a state." It will be noted that Section 8624-37, General Code, provides that the amount of commission, promotion and organization expense shall in no case exceed fifteen per cent of the amount actually received upon the subscription, and that the contract of subscription must be in writing and contain a provision substantially in the language used in said section. The section further requires that the amount paid upon the subscription after the payment of commission, promotion and organization expense, must be deposited with a bank or trust company of this state or invested as provided in Sections 9518 and 9519, General Code, until the company is licensed.

The terms "regulate" and "regulation" are each of protean meaning.

See 53 C. J., 1172, et seq. However, it seems to me that these requirements of Section 8624-37, General Code, constitute a regulation by a state of the issuance of the security. The form of the subscription contract, the temporary disposition of the proceeds arising from the subscription and the limit of the amount which may be paid as commission and organization expense are all prescribed by law. These are important elements in the regulation of the issuance of securities. It is true that Section 8624-37, General Code, might provide a more comprehensive and detailed scheme of regulation, but regulation is nevertheless provided.

I am therefore of the opinion that the securities in question are not subject to the registration requirements of the Ohio Securities Act.

I come now to a consideration of your next question, that is, whether you have the power as Superintendent of Insurance to issue dealers' and salesmen's licenses with respect to the securities in question. Sections 8624-18 and 8624-19, General Code, respectively provide for the application for and issuance of dealers' licenses and salesmen's licenses. Each of these sections provides that application for such licenses shall be made to the Division of Securities and such division is empowered thereby to issue such licenses. However, as you have stated in your letter, Section 8624-37, General Code, supra, provides that where the issuer of the securities is incorporated to make any insurance named in Subdivisions I and II, Division III, Title IX, General Code, the Superintendent of Insurance shall, for all the purposes of the Securities Act, be substituted for the Division of Securities. Since the issuer of the stock in question is an insurance company of one of the classes mentioned in Section 8624-37, General Code, and since that section provides that the Superintendent of Insurance, for all purposes of the Securities Act, shall be substituted for the Division of Securities, it follows that the Superintendent of Insurance has authority to license dealers and salesmen to sell stock issued by such life insurance company.

Sections 9343, 9346 and 9349, General Code, respectively provide:

Section 9343:

"No joint stock company shall be organized under this chapter with less than one hundred thousand dollars capital. Before proceeding to business, the whole capital shall be paid in and invested in treasury notes, in stocks or bonds of the United States, or of the state of Ohio, or of any municipality or county thereof, or in mortgages on unincumbered real estate within this state worth double the amount loaned thereon, or in farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act approved July 17, 1916, and amendments thereto."

Section 9346:

"Any such company may invest its capital in such stocks, bonds, or mortgages, and change and invest it or any part thereof in like manner, at pleasure. But no company shall commence business until it has deposited with the superintendent of insurance at least one hundred thousand dollars, in such stocks, bonds, and mortgages, or one or more of them, duly made or assigned to the superintendent in trust for the purposes mentioned in this chapter. When a mortgage of real estate is assigned to the superintendent, the assignment shall be immediately entered in the records of the county in which the real estate is situated, the fee for the recording of which shall be paid by the company."

Section 9349:

"When the company is fully organized and has deposited the requisite amount of securities, it shall file with the superintendent of insurance a duly certified copy of its articles of incorporation and approval of the attorney general, and a copy of its by-laws or constitution. If the superintendent finds that the company is duly organized and that its capital stock has been subscribed, paid in and invested as required by law, unless he finds the name assumed by the company so nearly similar to the name of another company doing business in this state as to lead to confusion or uncertainty on the part of the public he shall furnish the company with his certificate of such deposit, and with a license duly reciting that the company has complied with the law and is entitled to transact the business defined in section ninety-three hundred and eighty-five, which license shall be its authority to commence business and issue policies."

It will be noted that Section 9343, General Code, contains the language "before proceeding to business," and Section 9346, General Code, contains the expression "but no company shall commence business." It is necessary to determine whether the term "business" as used in these sections is limited to the insurance business to be carried on or whether such term embraces business generally. The question is a close one and there appear to be no court decisions which are of assistance.

Sections 9343, 9346 and 9349, General Code, supra, were in their original form Sections 7, 8 and 10 of Chapter II of an act entitled "An Act To regulate Insurance Companies doing business in the State of Ohio" found in 69 O. L., 140, the particular sections in question being found at page 152. Section 18 of said Chapter II of this act provided in part:

"It shall not be lawful for any life insurance company, organized by act of congress, or by or under the laws of any other state of the United States, to transact any *business of insurance*

in this state, without first procuring from the superintendent of insurance a certificate of authority so to do; nor shall it be lawful for any person or corporation, directly or indirectly, to act as agent in this state for any such company, either in procuring applications for insurance, taking risks, or in any manner transacting the *business of insurance*, without first procuring from the superintendent of insurance a license so to do, in which said superintendent shall state that said company has complied with all the requisitions of this act applicable to such company, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent shall be established; nor shall it be lawful for any such insurance company to take risks, or transact any *business of insurance* in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this act; * * *” (Emphasis added.)

In Section 18 the words “business of insurance” were used, whereas, in Sections 7, 8 and 10, which were the prototypes for Sections 9343, 9346 and 9349, General Code, the word “business” alone was used. This indicates that the General Assembly chose its language with discrimination and care, and that it intended to distinguish between the business of insurance and business done generally by a life insurance company.

Further, Section 9349, General Code, ends with the clause “which license shall be its authority to commence business and issue policies.” The legislature, by using the terms “business” and “policies,” again distinguished between the insurance business of such a corporation and its business generally, and it would seem therefore that a proper interpretation of the language of these three sections prohibits a life insurance corporation from engaging in any business until the entire capital stock is paid in, invested and deposited as required by law.

However, even if the term “business” as used in Sections 9343, 9346 and 9349, General Code, were construed to embrace only the business of insurance, it would still be impossible for a life insurance company to be licensed as a dealer in securities prior to the time subscriptions for at least \$100,000.00 of the capital stock have been received. By reason of the provisions of Section 8623-55, General Code, all the capacity and authority of a corporation is vested in its board of directors. The first board of directors is selected at the first shareholders’ meeting after subscriptions have been received in an amount at least equal to the capital stated in the articles as that with which the corporation will begin business. See Section 8623-11, General Code. The amount stated in the articles of incorporation of a life insurance company with which it will begin business must be at least \$100,000.00 on account of the provisions of Section 9343, General Code. Section 8624-17, General

Code, prohibits the corporation in question from obtaining subscriptions to its stock under the circumstances related in your letter other than through a licensed dealer.

In other words, in order for the corporation to be licensed as a dealer, it must have (1) received subscriptions to at least \$100,000.00 of its capital stock; (2) held a first meeting of the shareholders and elected directors thereat; and (3) made application on the authority of its board of directors for a dealer's license. Since it could receive the subscriptions only through a licensed dealer, it follows that it could not comply with the first requirement enumerated and could therefore not obtain a dealer's license at the present time.

Respectfully,

THOMAS J. HERBERT,
Attorney General.