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MUTUAL INSURANCE COMPANY—SECTION 9607-12 G. C. PROHIBITS INTEREST PAID ON ADVANCES MADE TO IT FROM ANY SOURCE OTHER THAN SURPLUS EARNINGS OF THE COMPANY—TERM “SURPLUS EARNINGS” HAS REFERENCE TO ENTIRE PERIOD OF COMPANY’S EXISTENCE, NOT TO ANY PARTICULAR YEAR.

SYLLABUS:

Section 9607-12, General Code, prohibits a mutual insurance company from paying interest on advances made to it pursuant to the provisions of such section from any source other than surplus earnings of the company, and the term “surplus earnings” as used in such section has reference to the entire period of the company’s existence and not to any particular year.

Columbus, Ohio, December 10, 1943.

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

Dear Sir:

Your request for my opinion reads:

“A question has arisen with respect to the payment of interest on money advanced under Section 9607-12, General Code, to a domestic mutual insurance company upon which I desire your opinion.

To submit the problem I may state the following hypothetical case. The X Insurance Company had an increase in surplus during the year 1942 of \$12,000.00. No additional contributions to surplus were made during that year, said increase having resulted from earnings. The company had a surplus to policyholders on December 31, 1942 of \$50,000.00. The total contributions under Section 9607-12, General Code, commonly referred to as guaranty capital, amounted to \$100,000.00 on said date leaving a deficit in earned surplus since the organization of the company of \$50,000.00.

Early in 1943 the company paid interest on the notes or certificates evidencing the contributions of \$3,000.00. On the assumption that there was no substantial change in the financial condition of the company between December 31, 1942 and the date of the payment of interest, the question arises whether the interest payment was authorized by Section 9607-12, General Code, which reads in part:

“* * * such interest thereon as may have been agreed upon, * * *, shall not be a liability or claim against the company, or any of its assets, except as herein provided, and shall be repaid only out of the surplus earnings of such company;”

1. By using the term ‘repaid’ does this section limit ‘payment’ of interest out of ‘surplus earnings’ only?

2. If the answer to this question is in the affirmative does the term ‘surplus earnings’ as applied to the above case mean surplus earnings in a particular year or surplus earnings on the basis of the entire period of the company’s existence?”

Section 9607-12, General Code, which you have quoted in part, provides as follows:

“Any director, officer or member of any domestic mutual insurance company, or any other person, may advance to such company any sum or sums of money necessary for the purpose of its business, or to enable it to comply with any requirement of the law, or as a cash guarantee fund. Such moneys, and such interest thereon as may have been agreed upon, not exceeding eight per centum per annum, shall not be a liability or claim against the company, or any of its assets, except as herein provided, and shall be repaid only out of the surplus earnings of such company; and, except as otherwise approved and ordered by the superintendent of insurance, no part of the principal thereof shall be repaid until the surplus of the company remaining after such repayment is equal in amount to the principal of the money so advanced. Such advancement and repayment shall be subject to the approval of the superintendent of insurance, provided that this section shall not affect the power to borrow money which any such company possesses under other laws. No commission or promotion expenses shall be paid by the company, in connection with the advance of any such money to the company, and the amount of any such unpaid advance shall be reported in each annual statement.”

The word “repay” ordinarily means to pay back or return that which has been received or the equivalent thereof. However, the use of the word does not necessarily imply such meaning and it is sometimes used in the same sense as the verb “pay.” See Webster’s International Dictionary where the words “compensate,” “remunerate” and “satisfy” are given as synonyms for “repay.” Interest, of course, strictly speaking, is never repaid to the creditor because it is never advanced by him. Since the verb “repay” is used as the predicate of both the words “moneys” and “interest” in the section under consideration, it must therefore have been used therein in the sense of “paid” with respect to the word “interest.” When the word is given such meaning in the statute, it is clear that inter-

est may be paid only out of "surplus earnings" as such term is used in the statute.

I come now to a consideration of your second question. It must at all times be remembered that the business of insurance is affected with a public interest and is subject to legislative regulation. Numerous examples of such legislative regulation might be given, but suffice it to say that the underlying purpose thereof has almost invariably been to protect the members of the public who deal with insurance companies. In my Opinion No. 272, found in Vol. I of the Opinions of the Attorney General for 1939, at page 331, I said:

"In the interpretation of a statute, it is necessary to keep in mind the legislative policy and the evil which it was trying to correct or the situation it was attempting to remedy. For many years Ohio has had a system of strict supervision over companies engaged in the business of insurance. The Legislature has prescribed definite conditions which must be met before such companies can commence business and has also provided for examinations and reports. In addition, the investments which a domestic insurance company may legally make have been definitely limited by statute. All this evidences a definite legislative policy to regulate insurance companies in such manner that those who deal with them will not suffer any loss as a result thereof."

In support thereof, I quoted from 37 O. Jur., 675, as follows:

"In construing a law of doubtful meaning or application, the policy which induced its enactment, or which was designed to be promoted thereby, is a proper subject for consideration. Unless precluded by the language of the statute, it should be given effect in furtherance of the policy it was designed to introduce or assist. Accordingly, a construction should be avoided which would defeat the policy of the statute."

In enacting Section 9607-12, General Code, the General Assembly provided that neither the advancements made pursuant to such section nor interest thereon should be a liability or claim against the company, except as provided in such statute, and it is specifically and unqualifiedly stated therein that no payments on account thereof should be made except from surplus earnings of the company. Since the obvious purpose of the General Assembly in enacting this section was to protect members of the public who deal with mutual insurance companies and to prevent such companies from becoming insolvent, it follows that the section should be given such construction as would further such legislative purpose.

A mutual insurance company might operate for several years at a

loss. And if it should then operate profitably for a year, it seems to me that it would be contrary to the legislative policy and the proper construction of the section under consideration to permit such company to pay interest out of the earnings for such year unless the accumulated deficit were overcome. To construe the statute otherwise would certainly result in danger of insolvency and would have the effect of thwarting the legislative intent. I therefore believe that such interest can not be paid until the company has accumulated a surplus based upon its earnings during its entire history.

You are therefore advised, in specific answer to your question, that the term "surplus earnings" as used in Section 9607-12, General Code, has reference to the entire period of the company's existence and not to any particular year.

Respectfully,

THOMAS J. HERBERT,
Attorney General.