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INSURANCE—MUTUAL PROTECTIVE ASSOCIATION—ORGANIZED PURSUANT TO SECTION 9593 G. C.—MAY NOT LEVY AND COLLECT ASSESSMENTS TO MEET ANTICIPATED LOSSES AND EXPENSES, INCLUDING REINSURING INDIVIDUAL RISKS OR PORTIONS THEREOF—EXCEPTION, FORM OF SURPLUS ACCUMULATED AS SECTION PROVIDES.

SYLLABUS:

A mutual protective association organized pursuant to Section 9593, General Code, may not levy and collect assessments to meet anticipated losses and expenses, including the expense of reinsuring individual risks or portions thereof, except in the form of surplus accumulated as provided for in said section.

Columbus, Ohio, April 21, 1950

Hon. Walter A. Robinson, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"May an insurance association organized under Sections 9593 et seq., of the General Code, bill, and collect, funds from its members for periods of time in advance of the date of the billing and collecting?"

"One association in this State, operating under the above sections, has been following the above procedure, for the claimed purpose of paying for reinsurance of the individual risks.

"We will appreciate receiving your opinion of the matter."

The sections of the General Code to which you refer pertain to the organization and operation of mutual protective or assessment associations. The pertinent provisions thereof for purposes of your inquiry read as follows:

Section 9593. "Any number of persons of lawful age, not less than ten in number, and owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss on property in this state caused by fire and lightning, smoke, smudge, cyclones, tornadoes or wind

storms, hail storms, explosion except explosion by steam boilers or fly-wheels, riot, riot attending a strike, civil commotion, falling or moving bodies except loss or damage to motor vehicles caused by collision, and also to assess upon and collect from each other sums of money, from time to time, as are necessary to pay expenses and losses which occur from the above causes. The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association, which shall require such assessments to be made directly and specifically upon the members and to be paid directly and specifically by them and not out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner except that any such association may borrow money for the payment of losses and expenses, such loans not to be made for a longer period than the collection of their next assessment; and such association may also accumulate a surplus from its assessments not exceeding five dollars on each one thousand dollars of insurance in force, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections 9518 and 9519 of the General Code. Such associations may only insure farm buildings, detached dwellings and outbuildings, school houses, churches, township buildings, grange buildings, farm implements, farm products, livestock, household goods, furniture, pleasure and utility vehicles, motor vehicles, steam, gas, gasoline and oil engines, motor trucks, tractors, electric motors, electric appliances, lighting systems and other similar property except property used exclusively for commercial or industrial purposes.

“Such property may be classified only for the purpose of determining and levying assessments and such property may be located within or without the limits of any municipality. Provided, however, that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined in any particular kind or description of property may insure property used exclusively for such commercial or industrial purposes located in any county or counties in this state; and an association whose membership is so restricted and whose insurance is so confined and which insures such property may also accumulate from its assessments a surplus not exceeding five times the average yearly losses and expenses of the association as shown by the reports of the association to the department of insurance of the state of Ohio for the preceding three years, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections 9518 and 9519 of the General Code.

“Any association organized under the provisions of this section may collect an initial charge, on each contract of insurance, in accordance with its constitution and by-laws and in

addition thereto an amount not in excess of one-tenth ($1/10$) of one percent of the amount of each individual contract of insurance; provided, however, that the total amount of such charges shall not exceed the sum of fifteen (\$15.00) dollars."

Section 9593-1. "Any association organized under the provisions of section 9593 is empowered and authorized to make contracts of reinsurance or accept reinsurance on any portion thereof, for the kinds of insurance authorized by this chapter."

The provisions of Section 9593, above, relating to assessments, lend themselves only to one interpretation. With exceptions concerning specific provisions for accumulation of surplus and the right to borrow money to pay losses and expenses, mutual protective associations are prohibited from meeting losses and expenses "out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner." To me, this is unequivocal language prohibiting a mutual protective association from levying and collecting assessments in anticipation of losses.

The limited powers of mutual protective associations were noted by the Supreme Court of Ohio in *State ex rel. The Clinton Mutual Ins. Assn. v. Bowen*, 132 O. S. 583, 585, as follows:

"A mutual protective association, such as the relator is, can insure only members (Section 9597, General Code) and can make assessments only upon its membership for the payment of losses of its members, and for incidental purposes which include the necessary expenses of administration of the trust (save that it has limited power to create a surplus and to borrow money to pay expenses and to meet losses in anticipation of assessments). Sections 9593 and 9594, General Code. * * *"

You call attention to the fact that a mutual protective association in this state has been collecting assessments in anticipation of losses on the theory that such assessments are to cover the cost of reinsuring a portion of the member's risk. This conduct of the association is apparently based on Section 9593-1, quoted above, which became effective on July 11, 1933. This section simply authorizes mutual protective associations to make contracts of reinsurance or to accept reinsurance on any portion of their risks. I can find no authority in this section to authorize such associations to make assessments, even to cover individual reinsurance costs, prior to the time losses are incurred. For present purposes, the most

which can be said for said section is it establishes reinsurance expenses as a legitimate expense of mutual protective associations.

The conclusion indicated by the preceding is reinforced by the history of Section 9593, et seq. General Code. Prior to 1910, it was provided that the assessment and collection of moneys necessary to pay losses incurred by mutual protective associations "shall be regulated by the constitution and by-laws of the association." (97 v. 150) The provision prohibiting such associations from meeting losses "out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner * * *" was added in 1910. (101 v. 294)

In 1905, the Circuit Court for Hamilton County, in *State, ex rel. Ellis v. Ohio Fire Ins. Assn.*, 23 G. C. (NS) 1, 17 C.D. 838, held that a mutual protective association was authorized by the laws then in existence to collect sums of money from its members in advance of any loss being sustained and assessment made therefor. See also *State, ex rel. Richards v. Manufacturers' Mutual Fire Association*, 50 O. S. 145, and *State, ex rel. Attorney General v. Monitor Fire Association*, 42 O. S. 555.

The conclusion I have reached with respect to the question you have raised is further strengthened by the general weight of authority throughout the United States with respect to the right of mutual protective associations to make assessments in anticipation of losses. The rule appears to be that in the absence of contract or statutory authorization such assessments may not be made. The rule has been stated as follows in *Appleman, Insurance Law & Practice, Vol. 14, Section 7885, page 97*:

"Normally, it has been held that an assessment to create a surplus, or to provide for future or anticipated losses is invalid."

See also *Couch, Cyclopedia of Insurance Law, Vol. 3, Section 596b; Farmers Mutual Fire Ins. Co. v. Knight*, 162 Ill. 470, 44 NE 834 (If the legislature had intended to give the association power to make assessments in anticipation of losses, it would have so provided.); *Michigan Mutual Windstorm Co. v. Goodrich*, 225 Mich. 687, 196 NW 612. (The right to assess to pay losses and expenses does not include the right to assess to create a surplus or to pay anticipated losses.)

In view of the preceding, I am of the opinion that a mutual protective association organized pursuant to Section 9593, General Code, may not

levy and collect assessments to meet anticipated losses and expenses, including the expense of reinsuring individual risks or portions thereof, except in the form of surplus accumulated as provided for in said section.

Respectfully,

HERBERT S. DUFFY,
Attorney General.