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INSURANCE—RECIPROCAL EXCHANGE—DOING BUSINESS IN THIS STATE—MAY ISSUE CONTRACTS OF INSURANCE LIMITING SUBSCRIBERS' LIABILITY TO INITIAL DEPOSIT PREMIUM—REPRESENTATIVE, AN ATTORNEY, IF POWER OF ATTORNEY SO AUTHORIZES.

SYLLABUS:

A reciprocal exchange doing business in this state, through its attorney, may issue contracts of insurance limiting the subscribers' liability to the initial deposit premium if the power of attorney so authorizes.

Columbus, Ohio, June 11, 1952

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

Dear Sir:

Your request for my opinion reads as follows:

"Section 9556-1 dealing with reciprocal organizations authorizes subscribers to exchange reciprocal or inter-insurance contracts with each other providing indemnity among themselves from any loss which may be insured against by any fire insurance company.

"May a reciprocal doing business in this State, through its attorney, issue contracts limiting the subscriber's liability to the initial deposit premium?"

The statutes with reference to reciprocal contracts are found in Sections 9556-1 to 9556-13, General Code. These statutes alone regulate such insurance exchanges and no other statutes apply unless expressly made applicable. See Section 9556-1, General Code, which reads as follows:

"Individuals, partnerships and corporations of this state, herein designated subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, and with individuals, partnerships and corporations of other states, districts, provinces and countries, providing indemnity among themselves from any loss which may be insured against by any fire insurance company or association under other provisions of the law.

Such contracts and the exchange thereof and such subscribers, their attorneys and representatives shall be regulated by this act and by no other insurance law unless such law is referred to in this act, and no law hereafter enacted shall apply to them, unless they be expressly designated therein." (Emphasis added.)

As provided for in Section 9556-3, General Code, the attorney must file with the superintendent of insurance a declaration showing, among other things, that there is in his possession assets of not less than $50,000 available for the payment of losses. And Section 9556-10, General Code, provides that upon compliance with the requirements of the act, a license to make such contracts of indemnity shall be issued the attorney by the superintendent of insurance. This section also provides for suspension or revocation of the license in the event that the $50,000 in assets as required by Section 9556-3 is not maintained. Section 9556-5, General Code, also requires the maintenance of a reserve fund as set forth therein, and further provides that:

"* * * If, upon examination or otherwise, it appears to the superintendent of insurance that the assets, invested as permitted by the laws regulating the investments of insurance companies, and moneys accumulated by any such attorney, after deducting therefrom a reserve fund computed as herein provided, are less than the liabilities incurred and unpaid, such reserve fund shall be restored within thirty days from the service of a requisition for that purpose by the superintendent of insurance upon the attorney. If any such attorney or other person shall make any advancements to restore any such impairment, the claim for the same against his subscribers shall be deferred to claims for losses. If such reserve fund is not restored as so required, the superintendent of insurance may revoke the license of the attorney."

These provisions I submit are solvency provisions and not requirements which in any sense impose contingent liability upon the subscribers.

However, in passing, it should be noted that Section 9556-7, General Code, imposes a tax on reciprocals and provides the manner of computing and of paying the same, and also provides that:

"* * * If such attorney shall cease doing business in the state, he shall thereupon make report to the superintendent of insurance of the premiums or deposits subject to taxation, not theretofore reported, and forthwith pay to the superintendent of insurance a tax thereon computed according to law. If such attorney fail to

> make any report for taxation, or fail to pay any tax as herein required, his subscribers shall be liable to the state for such unpaid taxes, and a penalty of not more than twenty-five per cent per annum after demand therefor. Service of process in any action to recover such tax or penalty shall be made according to the requirements of the law relating to actions against the attorney and his subscriber."

The result is that if the attorney fails to make any report for taxation or fails to pay the tax, the subscribers are liable for such unpaid taxes and penalty as set forth in the above statute.

It is important to note with reference to the liability of the subscribers for claims of third parties that under Section 9556-3, General Code, the attorney must file a declaration with the superintendent of insurance showing, among other things, "a copy of the form of power of attorney under which such insurance is to be effected," this being the power of attorney provided for in Section 9556-2, General Code, which reads in part as follows:

> "Such contracts may be executed by an attorney or other representative, herein designated 'attorney', duly authorized by and acting for such subscribers under powers of attorney, and such attorney may be a corporation. * * *"

An examination of the Ohio reciprocal act discloses that it contains no provision with reference to limiting the subscriber's liability to the initial deposit premium and no provision imposing any liability upon a subscriber other than the payment of the initial premium. In other words, there is complete silence in the act as to whether the exchange shall issue a policy with contingent liability or a non-assessable policy. While reciprocal exchanges may be likened to mutual companies, the latter companies are organized under different sections, namely, Sections 9607-1 to 9607-38, General Code, and Section 9607-9 thereof provides for an additional contingent premium not less than the cash premium unless the company has a surplus as provided for in that section.

Our problem then becomes one of deciding, in the absence of any statutory provision, whether a reciprocal doing business in this state may issue contracts limiting the subscriber's liability to the initial deposit premium, that is, whether such exchanges may issue non-assessable policies.

Those cases, such as the case of Neel Insurance Co. v. Williams, 45 Atl. Rep (2d) 375, decided in those states under statutes which impose a contingent liability, are of course not very helpful to the solution here. In other states, which like Ohio do not have any statutory provision with reference to any contingent liability, the decisions are to the effect that the members have a right to contract among themselves and to fix the limits of their liability. See Wysong v. Automobile Underwriters, 204 Ind., 493, 184 N. E., 783, 94 A. L. R., 826, decided in 1933.

In the case of Sergeant v. Goldsmith Dry Goods Co., 110 Tex., 482, 221 S. W., 259, decided in 1920, the court in effect held that while the members of the exchange could contract and fix their liability among themselves in conformity with the amount of contingent liability imposed by statute, the members' liability could not be limited as to third person creditors, they being held liable jointly and severally as principals. On this latter point a different conclusion was reached in the Wysong case as is pointed out later in this opinion.

Decisions of various courts may be found in notes in 94 A. L. R., 836, 141 A. L. R., 765 and 145 A. L. R., 1121. There does not appear to be any decisions in Ohio on this question. However, reciprocal exchanges doing business in Ohio have, over a long period of time, been writing non-assessable policies without the division of insurance questioning their authority to do so.

The Wysong case hereinbefore mentioned is I believe a case squarely in point, it having been decided under statutes similar to the Ohio statutes, for in Indiana, like Ohio, the statutes are silent as to whether a non-assessable policy may be written. The Wysong case was a case in which the plaintiff, a reciprocal insurance exchange, brought an action to enjoin the defendant Wysong from promulgating, enforcing or attempting to enforce a threatened order made by the defendant insurance commissioner prohibiting issuance of insurance contracts containing provisions against assessment liability and limiting the liability of subscribers, and from revoking the authority of plaintiff to do business in the state. A finding was made and judgment of permanent injunction was entered against the insurance commissioner, which was affirmed by the Supreme Court of Indiana, the court holding that such policies were non-assessable.

The Indiana court in its opinion with reference to the subscriber's right to limit the liability, says as follows:

"The subscribers have the right to contract among themselves and fix the limit of their liability unless there is some law preventing it, and we are unable to find any holding that the subscribers have not the right to fix the limit of their liability as among themselves, and as to each other. Reciprocal or interinsurance is not a statutory entity, but only regulated by law. It is by private contract that the relations created among and between the subscribers are fixed and determined. And the policy issued by the attorney in fact and the power of attorney executed by each subscriber determines the rights and liabilities of the subscribers between themselves, providing that said power of attorney and the policy issued do not contravene the law of the state. There must be an attorney in fact for the reason that under the plan of insurance in question all the business is done and transacted by an attorney in fact and an attorney in fact presupposes a power of attorney. When we look to the policy in consideration and the power of attorney, we find both in accordance with the plan of reciprocal insurance prior to the enactment of the reciprocal law in this state in limiting the liability of the subscribers. As between themselves, the subscribers are liable as their contracts with each other make them liable."

With reference to whether the policies are non-assessable with regard to third parties, the court said:

"The next questions presented are whether or not the policy is nonassessable as to third parties, and whether the attorney in fact had power to incur a liability in favor of third parties as against the subscribers.

"It has often been decided by the highest courts of the land that, where the law requires the agent's authority to be in writing, third parties are bound by the limitations thereof, although they have no actual knowledge of them.

"We find in 2 Corpus Juris, 565, the following statement of law:

'Where a third party dealing with an agent has knowledge that his authority must necessarily be in writing to bind the principal, it is his duty to ascertain whether the agent has such authority and whether it is in proper form, and where there is written authority, whether it is required or not, and such person has or is charged with knowledge thereof, it is his duty to ascertain the nature and extent of the authority conferred, and whether the agent is acting within its scope. When the authority is by law required to be in writing he is charged with knowledge of that fact and of the limitations upon the agent's power contained in such writing.' To the same effect, the following cases are cited:

21 Ruling Case Law, 910; Mechem on Agency, vol. 1 (2d Ed.) §707; Citizens' Bank and Trust Co. v. McGaa, 48 S. D. 45, 201 N. W. 873; Davis v. Talbot, 137 Ind. 235, 36 N. E. 1098; Strong v. Ross, 33 Ind. App. 586, 71 N. E. 918; Blackwell v. Ketcham, 53 Ind. 184; Stainback v. Read & Co., 11 Grat. (Va.) 281, 62 Am. Dec. 648; Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341. This proposition of law is well settled and it is useless to cite other authorities. * * *

"Applying the law, as we find it to be from the foregoing authorities, to the facts in the instant case, we are of the opinion that third parties are held to have had notice of and bound by the terms of the power of attorney executed by the subscribers and on file in the office of the state auditor, and that the attorney in fact has no authority to create a liability against the subscribers beyond the limitations of the power of attorney."

With respect to the liability of the subscribers to third party creditors, the Indiana court decided in the subscriber's favor based on a principle of agency that such third parties were bound by the attorney-in-fact's authority as set forth in the power of attorney given by the subscribers to the attorney-in-fact and required to be filed with the auditor,—in this state, with the superintendent of insurance. This principle of agency appears to me to be sound and fully supported by the authorities.

The kinds of insurance which a fire insurance company may write are found in Section 9556 and Section 9607, General Code, which include third party property damage caused by ownership, maintenance and use of automobiles as set forth in Section 9607-2, General Code, and property damage caused by other vehicles as set forth in Section 9556, General Code. It might be argued that these third party claimants are in a different position than third party business creditors and are not chargeable with notice of the power of attorney required to be filed, and perhaps this is so. But it seems to me that the answer to this is that such insurance which protects the insured from third party property damage claims is not compulsory, and that such third parties have no right to reply upon the assumption that any insurance is being carried for their protection; and in fact there could be no reliance, for such third party claimants do not go forth upon the highways and pick out cars whose owners are insured in reciprocals with which to have accidents.

I understand that the Attorney General of Mississippi, in an opinion rendered in 1935, and reported in Insurance Laws of Mississippi, 1940,

Opinions of the Attorney General, pages 77 and 78, followed the Wysong case, as did the Attorney General of Missouri in rulings in 1936 and 1947, and the Attorney General of Nebraska in a 1948 opinion.

I find myself in accord with the conclusion reached and reasoning found in the Wysong case.

I am of the opinion that if the power of attorney so authorizes, a reciprocal exchange doing business in this state, through its attorney, may issue contracts of insurance limiting the subscriber's liability to the initial deposit premium.

Respectfully,

C. WILLIAM O'NEILL
Attorney General.