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SURETY COMPANY, LICENSED—MAY BECOME SURETY ON BOND, SUPERINTENDENT OF INSURANCE, EXECUTED BY HIM—SECTIONS 3.32, 121.11 RC.

SYLLABUS:

Under the provisions of Section 3.32, Revised Code, a licensed surety company may properly become a surety on the bond of the superintendent of insurance executed by that officer in compliance with Section 121.11, Revised Code.

Columbus, Ohio, March 12, 1956

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Statutes of Ohio require that all officers provided for by RC. 121.04 are to give a bond as provided by RC. 121.11. The State Superintendent of Insurance comes within that requirement.

"With reference to the bonds of public officers, RC 3929.16 requires such sureties to come within the provisions of RC 3929.14 and RC 3929.15. However, RC Section 3929.16 specifically excepts the Superintendent of Insurance from furnishing a bond by any guaranty company as described in the sections cited.

"It would seem that the Superintendent of Insurance can only furnish a personal bond signed by two or more freeholders. While the Statutes require that such a bond shall be not less than $10,000.00, the Governor has required the bond to be $100,000.00. The present bond is written by a surety or guaranty company licensed to do business in Ohio.

"An opinion is requested:

"1. As to whether or not under the provisions of law as set forth a bonding company licensed to do business in Ohio can furnish a bond for the Superintendent of Insurance for the State of Ohio.

"2. Whether or not a surety company *not licensed* to do business in Ohio could furnish such a bond.

"3. Whether such assistants to the Superintendent or any employees in the Division of Insurance may be bonded by a surety company doing business in the State of Ohio.

"4. Whether or not under existing law it is mandatory that such sureties shall be freeholders whose contract of surety-ship be approved by the Governor.

"An early reply will be appreciated."

The office of Superintendent of Insurance is created by the provisions of Section 121.04, Revised Code. As to the incumbents of offices so created, Section 121.11, Revised Code, provides:

"Each officer whose office is created by sections 121.02, 121.04 and 121.05 of the Revised Code shall, before entering upon the duties of his office, take and subscribe an oath of office as provided by law and give bond, conditioned according to law, with security to be approved by the governor in such penal sum(,) not less than ten thousand dollars, as is fixed by the governor. Such bond and oath shall be filed in the office of the secretary of state.

"The director of each department may, with the approval of the governor, require any chief of a division, or any officer or employee in his department, to give like bond in such amount as the governor prescribes. The premium on any bond required or authorized by this section may be paid from the state treasury."

The use of a "guaranty company" as surety on the bond required by law of state officers, "except the superintendent of insurance," is authorized in Section 3929.16, Revised Code, as follows:

"Sections 3929.14 and 3929.15 of the Revised Code authorize such a guaranty company as is described therein to become surety upon the bond required by law of any state officer, except the superintendent of insurance, and of any county, township, or municipal officer. Such company may be accepted by the officers required to approve such bond, in lieu of the sureties required by law."

The payment of premiums on the bonds of public officers is authorized by Section 3929.17, Revised Code, as follows:

"The premium of *any licensed surety company* on the bond of any public officer, deputy, or employee shall be allowed and paid by the state, county, township, municipal corporation, or other subdivision, or board of education, of which such person giving the bond is such officer, deputy, or employee." (Emphasis added.)

Because this section was originally enacted (Section 9573-1, General Code) as a *supplement* to former Section 9573, General Code, 112 Ohio Laws, 135, it is necessary to conclude that the term "licensed surety company" as therein employed has reference to a "guaranty company" of the sort to which reference is made in Section 3929.16, Revised Code. The nature of business such companies are authorized to carry on is evident from the following provisions of Section 3929.14, Revised Code:

"When a bond, recognizance, or undertaking is required or permitted by law, with one or more sureties, its execution or the guaranteeing thereof, as sole surety, is sufficient if done by a company authorized to guarantee the fidelity of persons holding places

of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or allowed by law. When a bond, recognizance, or undertaking is so executed and guaranteed by such a company, it is a full compliance with every requirement of law, ordinance, rule, or regulation that such bond or recognizance must be executed and guaranteed by one surety or two or more sureties, or that such sureties shall be residents, householders, or freeholders."

Because Section 3929.17, supra, refers to any "licensed" surety company we may properly note the following provision in Section 3905.42, Revised Code:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, *or engage in the business of guaranteeing against liability, loss, or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with.*" (Emphasis added.)

As to domestic "guaranty" or "surety" companies, in order to comply with "the laws regulating it," a deposit must be made as required by the following provisions in Section 3929.10, Revised Code, as amended effective October 4, 1955:

"No company organized under the laws of this state to transact the business of guaranteeing the fidelity of persons holding places of public or private trust, who are required to, or in their trust capacity do, receive, hold, control, or disburse public or private property, and to transact the business of guaranteeing the performance of contracts other than insurance policies, or of executing or guaranteeing bonds or undertakings required or permitted in actions or proceedings, or allowed by law, shall commence business until it has deposited with the superintendent of insurance two hundred thousand dollars in the securities permitted by sections 3925.05 to 3925.08, inclusive, of the Revised Code, which shall be held for the benefit and security of all the policyholders of the company, and shall not be received by him at a rate above their par value.

"No mutual company organized under the laws of this state to transact such business shall commence business until it has an unimpaired surplus of not less than two hundred fifty thousand dollars and no such company shall continue to transact such business unless unimpaired surplus of at least two hundred fifty thousand dollars is at all times maintained."

A foreign "guaranty" or "surety" company must comply with Section 3929.11, Revised Code, which provides in part:

> "No guaranty company mentioned in Section 3929.10 of the Revised Code organized under the laws of another state, territory, district, or country shall be licensed to transact such business in this state unless at least two hundred thousand dollars of its assets are invested in the securities permitted by sections 3925.05 to 3925.08, inclusive, of the Revised Code, or in securities permitted by the laws of the state, district, or territory in which it is organized, and until such securities are deposited with the superintendent of insurance in this state, or the superintendent of insurance or other officer of another state, district, or territory designated by the laws thereof to receive them. * * *

Coming now to consider the first specific question you present, it is evident from the foregoing that there is no statutory distinction between "surety" and "guaranty" companies, whether foreign or domestic, and the exception in the case of the superintendent of insurance set out in Section 3929.16, Revised Code, would appear to be applicable to companies commonly referred to as "surety" companies, and applicable also to the provision in Section 3929.17, Revised Code, for the payment of the premiums of such companies on the bonds of public officers. It is necessary, however, to consider the effect on this provision of the amendment in 1923, 110 Ohio Laws, 128, of former Section 6, General Code. By that amendment the following language was added to this section:

> "* * * In *all* cases where an elective or appointive state officer is required by law to furnish bond, a surety company bond may be given and the annual premium in such cases shall be paid from the funds appropriated by the General Assembly to the various departments, boards and commissions for such purpose. The provisions of this section shall not be deemed to prevent the giving of a personal bond with sureties approved by the officials authorized by law to give such approval." (Emphasis added.)

By referring to the history of what is now Section 3929.16, Revised Code, it will be observed that the exception therein relative to the superintendent of insurance was enacted in 1896. We are confronted, therefore, with a conflict between an earlier special enactment and a later general provision.

The usual rule of statutory construction in such cases is that such later general enactment does not repeal such earlier special provision unless

the intent to do so is evident in the later enactment. In the case at hand the use of the word "all" in the 1923 enactment suggests such an intent, for the legislature must be presumed to have chosen this expression deliberately, knowing of the then existing exception in Section 9573, General Code, now Section 3929.16, Revised Code.

In any event, whatever doubts I might entertain on this point if the question were presented to me as one of first impression, it can at least be said that the conflict in these two provisions was such as to make the 1923 enactment one of some ambiguity, and hence properly the subject of interpretation. Such interpretation was made administratively, it appears, for since 1923 the practice of utilizing personal sureties on the bond of each succeeding superintendent of insurance was discontinued, and Section 6, General Code, as thus amended has since been relied upon as authority for the use of licensed surety companies in this connection. Such interpretation "is, if long continued, to be reckoned with most seriously and is not to be disregarded or set aside unless judicial construction makes it imperative so to do." Industrial Commission v. Brown, 92 Ohio St., 309, 311.

In the case at hand I perceive no imperative need to disregard this interpretation of more than thirty years standing and so conclude that your first specific question must be answered in the affirmative. This conclusion would appear to be sufficient to dispose of, or to render academic, your remaining questions and it seems unnecessary to give separate consideration to them here.

For these reasons, in specific answer to your inquiry, it is my opinion that under the provisions of Section 3.32, Revised Code, a licensed surety company may properly become a surety on the bond of the superintendent of insurance executed by that officer in compliance with Section 121.11, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General