

and your Commission is required by virtue of this section to determine the amount of the taxes to be refunded and certify the same to the Auditor of State.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2901.

INSURANCE—DOMESTIC MUTUAL CASUALTY COMPANY MAY
WRITE FIDELITY AND SURETY BUSINESS—DEPOSIT RE-
QUIRED BY SECTION 9568, GENERAL CODE.

SYLLABUS:

1. *A domestic mutual casualty company organized under Section 9607-2, General Code, may write fidelity and surety business under the provisions of Section 9607-2, General Code, sub-paragraph 7.*

2. *A domestic mutual casualty company which writes fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, is required to make a deposit in accordance with the provisions of Section 9568, General Code.*

3. *Where a domestic mutual casualty company, engaged solely in the business of writing casualty insurance, has voluntarily deposited two hundred thousand dollars (\$200,000.00) with the Superintendent of Insurance in trust for the benefit of its casualty insurance policy-holders, which amount is required under Section 9568, General Code, to be deposited by a company engaged in the fidelity and surety business, such company may not thereafter, in applying for the right to engage in the fidelity and surety business under Section 9607-2, sub-paragraph 7, General Code, utilize such two hundred thousand dollars (\$200,000.00) deposit to meet the requirements of Section 9568, General Code, but must make an additional deposit therefor.*

COLUMBUS, OHIO, July 9, 1934.

HON. CHARLES T. WARNER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“We have before us the proposal by a domestic mutual casualty company organized under the provisions of Section 9607-2 et seq., of the General Code, to engage in the business of writing fidelity and surety bonds in addition to the casualty business they are writing at the present time. This company has a surplus in excess of \$100,000.00, and, consequently, may take the advantage of the provisions of Section 9607-2, of the General Code, providing for the writing of a non-assessable policy. The company making this proposal has on deposit with this Division securities in the sum of \$200,000.00 made originally as a voluntary deposit, and, of course, maintained at the present time. In addition to being licensed to operate in Ohio, this com-

pany is licensed to operate in numerous other states including the State of Kentucky. The statutes of Kentucky provide specifically that a mutual company such as this may write fidelity and surety business (Paragraph D of Section 743A-7, K.S.), however, the only provision made therefor in the Ohio statutes is the general provision contained in Section 9607-2, sub-paragraph 7, Section 9568, of the General Code, requires a deposit in the sum of \$200,000.00 for any company organized under the laws of this State to transact business of fidelity and surety insurance.

By reason of the various provisions herein mentioned, we are confronted with five specific questions which we feel must be determined before this Ohio Company may go forward with their proposal to write such fidelity and surety business, and, therefore, respectfully request your opinion on the following questions:

1. May a domestic mutual casualty company organized under Section 9607-2 etc., write fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7?

2. If a domestic mutual casualty company may write fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, is such company required to make a deposit in accordance with the provisions of Section 9568 of the General Code?

3. If a domestic mutual casualty company has previously made a voluntary deposit in at least the amount required by the provisions of Section 9568 and is permitted to write fidelity and surety business under the provisions of section 9568, of the General Code, or will it be obliged to either withdraw the voluntary deposit and re-deposit same, or make an additional deposit?

4. In the event it is desired to withdraw such a voluntary deposit, do the provisions of Section 9607-38 governing withdrawal of deposits made by domestic mutual fire insurance companies prevail in the absence of a specific provision for withdrawal of a voluntary deposit by a domestic mutual casualty company; if not, what procedure should be followed in such a withdrawal?

5. Mutual casualty companies being permitted by the statutes of Kentucky to write fidelity and surety business, may this company do so in Kentucky even in the event Section 9607-2, sub-paragraph 7, would not permit same in Ohio?"

The questions presented by your inquiry require a consideration of the laws of Ohio regulating insurance companies engaged in the business of writing insurance "upon property and against certain contingencies." That the general statutory provisions governing the organization of private corporations as contained in Sections 8623-3, et seq., General Code, are not applicable to insurance companies was decided by the Supreme Court of Ohio in *State vs. Live Stock Co.*, 38 O. S., 347.

The special statute relating to the powers of insurance companies engaged in the business of insuring property and against certain contingencies was formerly contained in Revised Statutes 3641 and was carried into the General Code as Section 9510. Such section then and now provides in part as follows:

"A company may be organized or admitted under this chapter to

* * * guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed, * * *.”

No distinction was made by that statute between stock and mutual insurance companies. Consequently both types of companies were organized and conducted business pursuant to that section.

In 1914 the General Assembly enacted what might be termed a new code relating to the organization of mutual insurance companies other than life. This Act recorded in 104 Ohio Laws 202, was given the supplemental sectional numbers 9607-1 to 9607-29, General Code.

Section 9607-2 as enacted in 1914 merely provided in so far as the powers of domestic mutual companies are concerned that such companies may be organized with such powers to transact the business of insurance as are, or may be, granted by law to stock fire insurance companies organized under the laws of this state.

Until the enactment of 9607-2, General Code, the group of statutes introduced by Section 9510, General Code, dealt with all stock insurance companies other than life. With the enactment of 9607-2, in 1914, the possible charter powers of a mutual company and a stock company were exactly the same. It was, therefore, the settled policy of the state at that time to afford no favors to either class of companies at the expense of the other in the matter of charter powers pertaining to the kind of risk that might be insured (See Opinions of the Attorney General for 1919, Vol. I, p. 925).

In 1917 Section 9607-2 was amended (107 O. L., 647). Although said section was also amended in 1923 (110 O. L., 116) those provisions which concern the subject of your inquiry remain the same now as enacted in 1917.

Said section 9607-2, insofar as material now reads:

“A domestic mutual company may be organized by a number of persons, not less than twenty, to carry on the business of mutual insurance and to reinsure and to accept reinsurance as authorized by law and its articles of incorporation. * * * A mutual or a stock insurance company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following:

1. Fire Insurance
2. Liability Insurance
3. Disability Insurance
4. Automobile Insurance
5. Steam Boiler Insurance
6. Use and Occupancy Insurance
7. Miscellaneous Insurance.”

No mention of fidelity or surety business is contained in Section 9607-2. If it were the intent of the legislature that Mutual Insurance Companies organized under Section 9607-2, General Code, are authorized to engage in the business of writing fidelity or surety business such authority must be found

in sub-paragraph 7 entitled, "Miscellaneous Insurance." When combined with the general purpose clause such subsection reads:

"A mutual or stock company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following; * * * against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance."

It is clear that no statute prohibits domestic mutual casualty companies from writing fidelity and surety business. Those mutual companies organized under Section 9510 were specifically authorized to write such insurance.

In the absence of any prohibition against the writing of fidelity and surety business it is reasonable to conclude that the legislature meant by the enactment of sub-paragraph 7, entitled "Miscellaneous Insurance", of Section 9607-2, General Code, to authorize mutual companies to conduct such business. At any rate the legislature did not see fit to prohibit such companies from writing such business and there is little basis for the conclusion that the legislature intended by the amendment of Section 9607-2 in 1917 to depart from the settled policy of the state by prohibiting mutual insurance companies from doing the type of business which stock and mutual companies organized under Section 9510, General Code, have always been permitted to do.

In view of the history of the insurance laws of the state as reviewed above, in the light of the settled policy of the state with respect to the equality of powers existing between stock and mutual companies, and because of the broad grant of powers contained in sub-paragraph 7 of Section 9607-2, it is my opinion in answer to your first question that a domestic mutual casualty company organized under Section 9607-2, General Code, may write fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, providing such company is not engaged in the business of writing fire insurance, and further provided the articles of incorporation of such company are amended to include the writing of fidelity and surety business in the manner prescribed by law.

You next inquire if a domestic mutual casualty company may write fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, is such company required to make a deposit in accordance with the provisions of Section 9568, General Code.

Said Section 9568, General Code, reads as follows:

"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, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, or of executing or guaranteeing bonds or undertakings required or permitted in actions, proceedings or by law allowed, shall commence business until it has deposited with the superintendent of insurance two hundred thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen, which shall be held for the benefit and security of all the policyholders of the com-

pany, and not be received by him at a rate above their par value.”

My examination of Sections 9607-2 et seq. fails to reveal any requirement with respect to the deposit of certain funds with the Superintendent of Insurance by those insurance companies, organized pursuant to Section 9607-2 and engaging in the business of writing fidelity and surety business. However, your attention is directed to Section 9607-26, General Code, which contains the following provisions:

“The laws of this state governing corporations and the laws relating to insurance, to the extent they are now or hereafter may be applicable to any such mutual companies and not in conflict with the provisions of this act are hereby made specifically applicable to such mutual companies.”

Clearly, such section requires that the provisions of Section 9568, General Code, be made applicable to mutual insurance companies organized pursuant to Section 9607-2 when such companies transact fidelity and surety business.

It is therefore my opinion with respect to your second question that domestic mutual casualty companies organized pursuant to Section 9607-2, General Code, and engaging in the writing of fidelity and surety business are required by virtue of the provisions of Section 9607-26, General Code, to make a deposit with the Superintendent of Insurance in accordance with the provisions of Section 9568, General Code.

Coming now to your third question you state that the domestic mutual casualty company making the proposal to engage in the business of writing fidelity and surety bonds, in addition to the casualty business which it is writing at the present time, has on deposit with your Division securities in the sum of \$200,000.00 made originally as a voluntary deposit, and maintained at the present time. You desire to know if such company may utilize such voluntary deposit to meet the provisions of Section 9568, General Code, in the event that it writes fidelity and surety business, or will such company be obliged to either withdraw the voluntary deposit and re-deposit same or make an additional deposit.

Your letter does not disclose the purpose for the voluntary deposit of the securities by the company in question. The statutes do not require a domestic mutual casualty company to make such a deposit. It is true that Section 9568, General Code, requires all companies which are organized under the laws of this state to transact fidelity and surety business, to make a deposit with the Superintendent of Insurance. It is also true that all foreign companies doing insurance business within the state are required to make such deposit.

It would appear that the company in question made the deposit for either of two purposes. (1) Having been organized pursuant to Section 9607-2, General Code, such company may, by virtue of Section 9607-31, deposit with the Superintendent of Insurance of Ohio securities in such an amount as shall be necessary to enable such company to transact business in any other state under the laws of said state. If the said securities were deposited pursuant to such section, then the possible withdrawal or transfer of such deposit is governed by Section 9607-38, General Code, wherein it is provided that no part of the securities so deposited shall be surrendered by the Superintendent of Insurance to the depositing company until liability shall have terminated on all

policies for whose benefit the securities have been deposited. (2) Assuming that the deposit was not made pursuant to Section 9607-31, General Code, then since there is no other statutory authority for such voluntary deposit it would appear that the same was made for the purpose of assuring its policyholders that such security exists for their protection. It is my understanding that prospective insurers have been advised that such security exists, and that the fact that such deposit has been made with the Superintendent of Insurance has been used as a sales argument by the agents of such company to indicate its strength and to compete with similar statements made by foreign insurance companies who are required by law to make a deposit with the Superintendent of Insurance.

If such is, or is not, the purpose for having made the deposit, the fact remains that the policyholders have been informed of such deposit, and no doubt many of them purchased policies from said company by virtue of that fact. Upon the bonds deposited by said company with the Superintendent of Insurance and now in the custody of the Treasurer of State are printed these words, "Deposited with the Superintendent of Insurance of the State of Ohio, in trust for the benefit and security of the policyholders of the of"

Your attention is directed to Joyce on Insurance, 2nd Edition, Vol. V, Section 3595, which reads as follows:

"A deposit with a state treasurer of securities as a guaranty for the payment of policies of an insurance company, whether made as a statutory requirement *or voluntarily*, and whether held by him in his official or in his individual capacity, creates a trust for the benefit of such policyholders in case of the insolvency of the company, to the exclusion of other claims except a paramount claim for taxes." (Italics the writer's.)

It is my opinion, in answer to your third question, that inasmuch as the said voluntary deposit was made, in trust for the benefit and security of the policyholders of the company, that such deposit may not be withdrawn or transferred for another purpose, until liability shall have terminated on all policies for whose benefit the securities have been deposited. If said company desires to engage in the writing of fidelity and surety business it will be necessary to make an additional deposit of \$200,000.00 in securities with the Superintendent of Insurance in the manner provided by Section 9568, General Code.

In view of the answer to your third question it is unnecessary to answer your fourth question regarding the procedure to be used in the event a withdrawal of the voluntary deposit may be made.

Your fifth and last question is whether or not since mutual casualty companies are entitled by the statutes of Kentucky to write fidelity and surety business, may this company do so in Kentucky even in the event Section 9607-2, sub-paragraph 7, would not permit same in Ohio.

It is my opinion that domestic mutual casualty companies are permitted by Section 9607-2, sub-paragraph 7 to write fidelity and surety business and therefore an answer to your question is unnecessary. I might add that it is not within the province of this office to determine what an Ohio corporation may or may not do in another state. That is a question which must be decided by the officials of the other state, just as Ohio must decide what a foreign corporation may or may not do within this state.

Summarizing, and in specific answer to your inquiry it is my opinion that:

1. A Domestic Mutual Casualty Company organized under Section 9607-2, General Code, may write fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, General Code.

2. A domestic mutual casualty company which writes fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, is required to make a deposit in accordance with the provisions of Section 9568, General Code.

3. Where a domestic mutual casualty company, engaged solely in the business of writing casualty insurance, has voluntarily deposited two hundred thousand dollars (\$200,000.00) with the Superintendent of Insurance in trust for the benefit of its casualty insurance policy-holders, which amount is required under Section 9568, General Code, to be deposited by a company engaged in the fidelity and surety business, such company may not thereafter, in applying for the right to engage in the fidelity and surety business under Section 9607-2, sub-paragraph 7, General Code, utilize such two hundred thousand dollars (\$200,000.00) deposit to meet the requirements of Section 9568, General Code, but must make an additional deposit therefor.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2902

APPROVAL—CANAL LAND LEASE FOR THE RIGHT TO OCCUPY AND USE FOR COTTAGE SITE AND AGRICULTURAL PURPOSES THAT PORTION OF THE ABANDONED MIAMI AND ERIE CANAL PROPERTY, IN CONCORD TOWNSHIP, MIAMI COUNTY, OHIO.

COLUMBUS, OHIO, July 9, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a canal land lease in triplicate executed by the State of Ohio through you as Superintendent of Public Works and as Director of such department to one Amy H. Wood of Dayton, Ohio. By this lease, which is one for a term of fifteen years and which provides for an annual rental of nine dollars, there is leased and demised to the lessee above named the right to occupy and use for cottage site and agricultural purposes that portion of the abandoned Miami and Erie Canal property including the full width of the bed and banks thereof located in Concord Township, Miami County, Ohio, and which is more particularly described as follows:

Beginning at a line drawn through Station 8085+30, of H. E. Whitlock's survey of said canal property and running thence southerly six hundred seventy (670') feet, as measured along the transit line of said survey to a line drawn at right angles to said transit line through Station 8092+00, of said survey, and containing one and fifty-eight hundredths (1.58) acres, more or less.