

3008

1. TITLE GUARANTEE AND TRUST COMPANIES—FORMED UNDER PROVISIONS OF SECTION 9850 ET SEQ., GC., SECTION 1735.01 RC, PRIOR TO AUGUST 6, 1941—INSURE TITLES TO PROPERTY AGAINST LOSS BY REASON OF DEFECTS, ENCUMBRANCES OR OTHER MATTERS—INSURE CORRECTNESS OF SEARCHES FOR INSTRUMENTS, LIENS, CHARGES OR OTHER MATTERS AS TO TITLE TO PROPERTY—NOT UNDER SUPERVISION OF SUPERINTENDENT OF INSURANCE—TITLE INSURANCE COMPANIES—SECTION 9510, PARAGRAPH 5 GC—SECTION 3939.01 RC.
2. TITLE GUARANTEE AND TRUST COMPANIES—ORGANIZED SINCE AUGUST 6, 1941—SECTION 9850 ET SEQ., GC, SECTION 1735.01 RC. — UNAUTHORIZED TO INSURE TITLES TO PROPERTY IN OHIO.
3. SUPERINTENDENT OF INSURANCE—NO DUTY TO VERIFY FACT AND DETERMINE ADEQUACY OF DEPOSIT MADE WITH TREASURER OF STATE—TITLE GUARANTEE AND TRUST COMPANIES—INSURING, GUARANTEEING TITLES, CORRECTNESS OF SEARCHES—SECTION 9851 GC.

SYLLABUS:

1. Title guarantee and trust companies, formed under the provisions of Section 9850 et seq., General Code, Section 1735.01, R.C., prior to August 6, 1941, which insure titles to property in this state against loss by reason of defects, encumbrances or other matters, and insure the correctness of searches for instruments, liens, charges or other matters affecting the title to property within this state, are not under the supervision of the superintendent of insurance in the same manner as title insurance companies formed under Section 9510, paragraph 5, General Code, Section 3939.01, R.C., in so far as the insuring and/or guaranteeing of titles and the insuring and/or guaranteeing the correctness of searches are concerned.

2. Title guarantee and trust companies, forming under the provisions of Section 9850 et seq., General Code, Section 1735.01, R.C., since August 6, 1941, are unauthorized to insure titles to property in this state.

3. The superintendent of insurance has no duty to verify the fact and determine the adequacy of the deposit made with the treasurer of state pursuant to Section 9851, General Code, by title guarantee and trust companies insuring and/or guaranteeing titles or insuring and/or guaranteeing the correctness of searches.

Columbus, Ohio, August 31, 1953

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

Dear Sir:

Your request for my opinion reads as follows:

"1. Did the addition of Paragraph 5 to Section 9510 have the effect of placing title guarantee and trust companies, formed under the provisions of Section 9850 and following, which insure titles to property in this state against loss by reason of defects, encumbrances or other matters, and insure the correctness of searches for instruments, liens, charges or other matters affecting the title to property within this state, under the supervision of the Superintendent of Insurance in the same manner as title insurance companies formed under Section 9510 insofar as the insuring of titles and the correctness of searches of records is concerned? Is your answer the same whether the guarantee title and trust company was organized before or after the effective date of the act amending Section 9510 by the addition of Paragraph 5?"

"2. In determining the answer to question No. 1, what distinction, if any, do you make between guarantee title and trust companies which 'insure' titles and those which merely guarantee the correctness of the search of certain records?"

"3. What duty, if any, does the Superintendent of Insurance have to verify the fact and determine the adequacy of the deposit made with the Treasurer of State pursuant to Section 9851 by title guarantee and trust companies insuring titles and/or insuring the correctness of searches and/or guaranteeing titles and/or guaranteeing the correctness of searches?"

"4. Is a title guarantee and trust company, organized under Section 9850, since the amendment of Section 9510 by the addition of Paragraph 5 became effective, insofar as the insuring of titles and/or insuring the correctness of searches is concerned, subject to the supervision of the Superintendent of Insurance and to the insurance laws in the same manner as a title insurance company organized under Section 9510? If not, is the deposit of securities with the Superintendent of Insurance the only requirement of the insurance laws with which such a company must comply?"

"5. May a guarantee title and trust company which has made the deposit with the Treasurer of State required by Section 9851 insure the correctness of searches of records in addition to insuring titles?"

Title guarantee and trust companies are formed under Section 9850 et seq., General Code, Section 1735.01 et seq., R.C., Section 9850, General Code, which deals with the powers of such companies, reads as follows:

“A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it.”

Section 9851, General Code, requires title guarantee and trust companies to deposit with the treasurer of state fifty thousand dollars in securities before commencing business.

In determining whether title guarantee and trust companies now come under the supervision of the division of insurance with regard to their insuring titles, a useful purpose would be served by tracing the legislative history of those provisions dealing with such companies and those provisions dealing with the insuring of titles to realty.

A glance at the 1898 Revised Statutes discloses no separate or special chapter of the code dealing with the organizing of title guarantee and trust companies, I find, however, in Section 3641, Revised Statute (a section dealing with the organization and underwriting powers of *insurance* companies) a clause in paragraph two thereof, to the effect that a company may organize to “guarantee the validity of titles to real estate.” This section was the forerunner of Section 9510, General Code, discussion of which must be deferred temporarily.

There was also at this time a section 3641d, Revised Statutes, to the effect that a company organized for the purpose of guaranteeing titles to real property should deposit an amount equal to one-half of its capital stock with the superintendent of insurance. In 1902 this section was repealed. In the repealing act, 95 Ohio Laws, 222, the legislature also supplemented Section 3821, Revised Statutes, which theretofore dealt with savings and loan associations, by adding paragraph ggg, which section enumerated the powers of title guarantee and trust companies. Section 3821

ggg, Revised Statutes, provided for reports to the auditor of state, and stated that these companies "shall be governed by this Act, and section 3641 of the Revised Statutes shall not apply to such companies."

In repealing Section 3641d, the deposit section referred to above, the legislature substituted under Section 3821 ggg, the following provision:

"Any company heretofore organized for the purpose of guaranteeing titles to real property, which may have made deposits with the superintendent of insurance, as required by Section 3641d of the Revised Statutes, may request said superintendent to transfer said deposit to the treasurer of state * * *."

When the General Code became effective in 1910, the insurance section, which was Section 3641, Revised Statutes, became Section 9510, General Code, and the title guarantee and trust section, namely, Section 3821 ggg, Revised Statutes, became Sections 9850 to 9856, inclusive, General Code. It is worthy of note that at this time companies could no longer organize *under the insurance acts* to guarantee the validity of titles to realty, due to the fact that the language of paragraph two, Section 3641, Revised Statutes, authorizing the organization of an insurance company for the purpose of guaranteeing titles, had been removed.

It was the opinion of one of my predecessors, in Opinion No. 426, Opinions of the Attorney General for 1917, page 1157, that a title guarantee and trust company formed under Section 9850, General Code, is not in the insurance business in the sense that it is under the control and supervision of the insurance department of the state. The guaranteeing of a title by such a company is collateral to the furnishing of an abstract. It was emphasized in that opinion that the company guarantees the correctness of its own work, and hence it is actually not guaranteeing titles generally.

Even though Section 9850, General Code, appears to preclude these companies from doing a general title insurance business, it should be recognized that a few title guarantee and trust companies did in fact write contracts of title insurance long before the enactment of paragraph 5, Section 9510, General Code, evidently basing their authority upon certain language found in Section 9853, General Code, which read as follows:

"Any company so organized shall be limited in its operation to only one county in this state, which shall be designated in its application for a charter, except, that if it desires to issue *its poli-*

cies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of \$50,000 in securities as above provided, for each additional county in which it proposes to operate.” (Emphasis added.)

Opinion No. 1049, Opinions of the Attorney General for 1923, page 842, held that a title guarantee and trust company chartered to operate in a designated county, may insure titles to real estate situate in another than the designated county without making an additional deposit of securities, if such policies are *issued* in the designated county. The opinion assumed that such companies were empowered to insure titles generally, and was concerned only with the deposit aspects of the law.

Summarizing the state of the law just prior to the amendment of Section 9510, General Code, in 1941, I find that there was no provision in the insurance code authorizing the organization of a title insurance company; that title guarantee and trust companies, formed under Section 9850, General Code, did in fact write title insurance, apparently basing their authority upon Section 9853, General Code.

Section 9510, General Code, being an enumeration of purposes for which an *insurance company* might organize, the enactment of paragraph 5 in 1941 added the authority to organize for the purpose of insuring titles. Section 9510, General Code, Section 3929.01, R. C., in so far as pertinent to this opinion, reads as follows:

“A company may be organized or admitted under this chapter to:

“5. Insure titles to property in this state against loss by reason of defects, encumbrances or other matters, and insure the correctness of searches for instruments, liens, charges or other matters affecting the title to property within this state. A company organized or admitted to transact the business of insuring titles to property as aforesaid, shall deposit with the superintendent of insurance for the benefit and security of all of its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state * * *.

“Provided, however, that a title guarantee and trust company organized and now engaged in business in this state under and by virtue of sections 9850 to 9855 of the General Code, both inclusive, and having on deposit with the treasurer of state the sum of \$50,000.00 as provided in section 9851 of the General Code, *in addition to its present powers, may, write title insurance without making an additional deposit therefor.*”

(Emphasis added.)

Your basic question is whether the proviso of paragraph 5, Section 9510, General Code, had the effect of placing title guarantee and trust companies under the supervision of the Superintendent of Insurance, in so far as they insure titles.

It should be recognized that Section 9853, General Code, limiting the operation of title guarantee and trust companies to one county designated in its charter, was repealed in the same act which added paragraph 5 to Section 9510, General Code. See 119 Ohio Laws, 165.

It is my opinion that regardless of whether or not title guarantee and trust companies were empowered to write title insurance prior to 1941 under authority of Section 9853, General Code, the legislature, by enacting paragraph 5, Section 9510, General Code, intended to make it clear that those companies organized under Section 9850, General Code, *prior to the enactment*, have the power to write title insurance risks, and furthermore that these companies may write it under cover of their original deposit of \$50,000 made with the treasurer of state. Even more important was the intention to remove the "one county operation" limitation, and the burdensome requirement of putting up a \$50,000 deposit for each county wherein the company proposed to operate by issuing title insurance policies therein. By the repeal of Section 9853, General Code, a company may now operate in as many counties as it desires, all under the original qualifying and single deposit provided for in Section 9851, General Code, Section 1735.02, R. C.

Hence, I am of the opinion that the wording at the end of the proviso, to the effect that a title guarantee and trust company "may write title insurance without making an additional deposit therefor," is clearly as referable to the old requirement of an "additional deposit" for title insurance operation in counties other than the charter county, as it is to the requirement of a \$50,000 qualifying deposit provided for in the title insurance company portion of Section 9510, General Code.

The placing of the change in the title guarantee and trust law under Section 9510, General Code, is misleading. Upon initial examination of Section 9510, General Code, one might naturally conclude that title guarantee and trust companies having been given authority to write title insurance, now come under the supervision of the insurance division, though they are exempted from the \$50,000 deposit requirement.

It should be recognized that the proviso of paragraph 5, Section 9510, General Code, could just as readily have been placed under Section 9850 or 9851, General Code, the Title Guarantee and Trust Company chapter, and that its true position in the legislative scheme is in that chapter.

This interpretation is fortified by the fact that Section 9510, General Code, commences:

“A company may be *organized or admitted* under this chapter to * * *.”
(Emphasis added.)

Manifestly, a title guarantee and trust company is organized under Section 9850 et seq., General Code. Of course, any title *insurance* company organized under Section 9510 et seq., General Code, being an insurance company, is clearly subject to supervision by the superintendent of insurance.

Although Section 625, General Code, Section 3901.07, R.C., grants the superintendent of insurance broad powers of examining into the affairs “of any *insurance company* doing business in this state,” it would appear that the legislature contemplated placing under the superintendent’s supervision only those companies organized or admitted under the insurance laws of the state.

Title guarantee and trust companies have for many years come under the supervision of the state auditor. Section 710-171, General Code, reads as follows:

“Title guaranty and trust companies shall make such reports to the auditor of state as are required to be made by trust companies to the superintendent of banks, and shall be subject to like examination, penalties and fees; such examination to be made by and such fees and penalties assessed by and paid to the auditor of state.”

Section 710-171, General Code, Section 1107.23, R. C., was interpreted in an opinion of one of my predecessors in Opinion No. 977, Opinions of the Attorney General for 1933, page 960, as granting the state auditor the authority with relation to title guarantee and trust companies to require reports, to impose the penalties prescribed by Section 710-33, General Code (Sec. 1111.24, R. C.), for failure to make such reports, to make examinations, as provided in Section 710-153, General Code, and assess fees for making such examinations, as provided in Section 710-17, General Code. Companies organizing under Section 9850, General Code,

having been placed under the general supervision of the auditor of state, it is my opinion that they remain under his supervision even though the legislature has clearly empowered such companies to engage in the business of title insurance.

Certain other considerations merit mention with respect to the question regarding supervision of title guarantee and trust companies which write title insurance. Title guarantee and trust companies have always paid only the general corporation franchise tax provided for in Section 5495, General Code, Section 5733.01, R. C. Domestic *insurance* companies pay an annual franchise tax upon the privilege of "being an insurance company" pursuant to Sections 5414-8 and 5414-9, General Code, Sections 5725.01 and 5725.18, R. C. Although the statutory definition of "insurance company" accompanying these latter sections might conceivably be held broad enough to include a title guarantee and trust company writing contracts of title insurance, it should be recognized that no provision has been made in the code requiring annual statements to be filed by title guarantee and trust companies with the superintendent of insurance. Since title guarantee and trust companies are not required to file annual statements with the insurance division, there is nothing from which the division might compute the annual franchise tax levied upon domestic insurance companies. This is in contrast with *title insurance companies*, organized or admitted under Section 9510, General Code, which are required to file reports with the division, pursuant to Section 0561-1, General Code, Section 3929.12, R. C.

To require title guarantee and trust companies to pay the domestic insurance company franchise tax in addition to the general corporation tax they now pay, would in effect be the equivalent of "double" or "discriminatory" taxation, since both taxes are based upon the capital and surplus of the company. I would also point out the fact that Section 5414-10, General Code, provides that the domestic insurance company franchise tax shall be in lieu of all other taxes on the property and assets of such company and of all other taxes, charges and excises on or against such companies.

In answer to the first part of your first question, it is my opinion that the addition of paragraph 5 to Section 9510, General Code, in 1941, did not have the effect of placing existing title guarantee and trust companies, formed under the provisions of Section 9850 et seq., General Code, under the supervision of the superintendent of insurance in the same manner as *title insurance companies* formed under Section 9510 et seq., General Code,

in so far as the insuring of titles and the insuring of the correctness of searches of records is concerned.

I understand that the division of insurance has never undertaken to supervise the activities of title guarantee and trust companies in so far as they write title insurance. The effect of my opinion on this matter would be to leave these companies where it finds them, and where, in my opinion the legislature intended to keep them, namely, under the general supervision of the auditor of state.

The second part of your first question and the first part of your fourth question appear to be identical. In short, who supervises the writing of title insurance done by title guarantee and trust companies which form under Section 9850, General Code, *since* the enactment of paragraph 5, Section 9510?

I am brought to the inescapable conclusion that title guarantee and trust companies forming under Section 9850, General Code, since August 6, 1941, (the date upon which paragraph 5, Section 9510, General Code, took effect), may *not* write title insurance at all. It will be recalled that Section 9510, General Code, speaks in terms of those companies "*organized and now engaged* in business in this state under Sections 9850 to 9855, General Code, and having on deposit the sum of \$50,000." It is my opinion that the legislative intent was to make it plain that *existing* title guarantee and trust companies might write title insurance under cover of their original deposits made with the treasurer of state, and leaving them under the supervision of the auditor of state, but that henceforth incorporators desirous of forming a company for the purpose of insuring titles, must form under the insurance laws, notably Section 9510, paragraph 5, General Code. A title guarantee and trust company forming since 1941, under the provisions of Section 9850 et seq., General Code, is limited to transacting only those forms of business therein enumerated, which most certainly does not include the insuring of titles generally.

You next ask what distinction, if any, is to be made (relative to the division's supervisory powers) between title guarantee and trust companies which "insure" titles and those which merely guarantee the correctness of the search of certain records.

All of the foregoing material has been concerned with the *insuring* of a title by a title guarantee and trust company. Suffice it to say that there is

no question but that title guarantee and trust companies could always guarantee the correctness of their searches. Such a transaction is not insurance so much as it is warranty. Whether the company "insures" titles or "guarantees" a title incident to an abstract it gives, it appears that no supervisory powers reside in your division concerning either type of transaction.

In answer to your third question, you are advised that the superintendent of insurance has no duty to verify the fact and determine the adequacy of the deposit made with the treasurer of state pursuant to Section 9851, General Code, by title guarantee and trust companies insuring titles and/or insuring the correctness of searches or guaranteeing titles and/or guaranteeing the correctness of searches.

It was held in Opinion No. 977, Opinions of the Attorney General for 1933, page 960, that the treasurer of state has the duty to determine the value and sufficiency of securities deposited by title guarantee companies under Section 9851 to 9854, General Code. I find nothing since that time which would grant the superintendent of insurance any concurrent duty in the matter.

As part of your fourth question you inquire, in effect, whether the deposit of securities with the superintendent of insurance is the only requirement of the insurance laws with which a title guarantee and trust company organized since 1941 must comply. Since I have held that those companies organizing since 1941 are not authorized to write title insurance, your question has been rendered meaningless.

It is my opinion that only those companies forming under the first part of paragraph 5, Section 9510, General Code, which are organizing to write title insurance exclusively, and are not abstracting, etc., need make the deposit with the division of insurance.

In answer to your fifth and final question, it is my opinion that a title guarantee and trust company formed prior to 1941, which has made the required deposit with the treasurer of state pursuant to Section 9851, General Code, may insure the correctness of searches of records in addition to insuring titles. The proviso in paragraph 5, Section 9510, General Code, empowers title guarantee and trust companies to write "title insurance," and it is my opinion that the term is to be defined by the opening words of paragraph 5, "insure titles * * * and insure the correctness of searches * * *." Such companies could always guarantee their own searches.

Terminology fails us in this area, for the words "guarantee the correctness of searches" and "insure the correctness of searches" are often, in practice, used interchangeably. To look through the form to the substance, I would say that in so far as the company insures or guarantees the correctness of others' searches, it engages in what is known as "title insurance."

It seems both logical and equitable that if a new company organizing to do business solely under Section 9510, General Code, may *insure titles and insure the correctness of searches*, a title guarantee and trust company, which is empowered by statute to "write title insurance" must likewise be deemed granted authority to insure both.

Regrouping your various related questions so as to avoid repetition in answering them, I am of the opinion, and you are advised:

1. Title guarantee and trust companies, formed under the provisions of Section 9850 et seq., General Code, Section 1735.01, R. C., prior to August 6, 1941, which insure titles to property in this state against loss by reason of defects, encumbrances or other matters, and insure the correctness of searches for instruments, liens, charges or other matters affecting the title to property within this state, are not under the supervision of the superintendent of insurance in the same manner as title insurance companies formed under Section 9510, paragraph 5, General Code, Section 3939.01 R. C., in so far as the insuring and/or guaranteeing of titles and the insuring and/or guaranteeing the correctness of searches are concerned.

2. Title guarantee and trust companies, forming under the provisions of Section 9850 et seq., General Code, Section 1735.01, R. C., since August 6, 1941, are unauthorized to insure titles to property in this state.

3. The superintendent of insurance has no duty to verify the fact and determine the adequacy of the deposit made with the treasurer of state pursuant to Section 9851, General Code, by title guarantee and trust companies insuring and/or guaranteeing titles or insuring and/or guaranteeing the correctness of searches.

Respectfully,

C. WILLIAM O'NEILL
Attorney General