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1. INSURANCE, SUPERINTENDENT OF—HOLDS DEPOSIT OF FOREIGN INSURANCE COMPANY—CAPACITY OF TRUSTEE—PRIMARY BENEFIT OF COMPANY'S OHIO POLICY HOLDERS—SECTION 9510, PARAGRAPH 2, G. C.
2. \$60,000.00 DEPOSIT MADE BY NEW YORK INSURANCE COMPANY—SUPERINTENDENT NOT AUTHORIZED BY LAW TO SURRENDER DEPOSIT TO LIQUIDATOR APPOINTED BY NEW YORK COURT—CLAIMS OF POLICY HOLDERS FOR WHOSE BENEFIT DEPOSIT WAS MADE MUST BE PAID OR EXTINGUISHED.

SYLLABUS:

1. The Superintendent of Insurance holds a deposit made with him by a foreign insurance company pursuant to Section 9510, paragraph 2, General Code, in the capacity of trustee, for the primary benefit of the company's Ohio policy holders.

2. The Superintendent of Insurance, in holding a \$60,000 deposit made with him by a New York insurance company pursuant to Section 9510, paragraph 2, General Code, is not authorized by law to surrender said deposit or any part thereof, to the liquidator appointed by a New York court in which the company is being liquidated, unless and until the claims of policy holders for whose benefit the deposit was made have been paid or extinguished.

Columbus, Ohio, December 31, 1952

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

Dear Sir:

Your request for my opinion reads as follows:

“A certain insurance company, domiciled in the state of New York, has been adjudged to be insolvent by the Supreme Court of New York and is in the process of being liquidated by the Superintendent of Insurance of New York. At the time of the entry of the order adjudging said insurance company to be insolvent, it was licensed to do business in this state and had on deposit with this Division, pursuant to Paragraph 2, Section 9510 of the General Code of Ohio, United States Treasury bonds having a face value of \$60,000. The original deposit was made on November 23, 1911 in the amount of \$50,000 and was later increased to

\$60,000, apparently because the securities then on deposit were not considered worth their face value.

“The Superintendent of Insurance has not been appointed ancillary receiver in this state and has not filed a petition for such appointment, pursuant to Section 628-26 of the General Code of Ohio, since he has not found that there are sufficient assets of the insurer located in this state to justify the appointment in view of the fact that in excess of four hundred claims amounting to nearly \$700,000 has been filed by Ohio residents with the New York liquidator, and since no petition for the appointment of an ancillary receiver has been filed with him by claimants residing in Ohio.

“The last date fixed for the filing of claims in the New York proceedings has long since passed.

“The Superintendent of Insurance of New York has indicated that a first partial dividend on allowed claims will be declared and paid in the near future but that no distribution can be made to Ohio claimants until agreement is reached as to the disposition of the \$60,000 deposit referred to above.

“Your advice is requested as to whether the Superintendent of Insurance of Ohio is authorized to surrender the \$60,000 deposit to the liquidator appointed by the New York court.

“In view of the fact that Ohio claimants cannot participate in the partial dividend to be distributed in the near future, until this matter has been decided, your prompt attention to this matter will be appreciated.”

The portion of paragraph 2, Section 9510, General Code, material to this opinion reads as follows:

“* * * But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance *for the benefit and security of all its policy holders*, fifty thousand dollars in bonds of the United States or of the state of Ohio, * * * which shall not be received by the superintendent at a rate above their par value. * * *” (Emphasis added.)

Before April 24, 1904, Section 364I, paragraph 2, Revised Statutes, the predecessor statute of Section 9510, paragraph 2, General Code, stated that the deposit with the superintendent “shall be held * * * for the benefit * * * of the *policy-holders* of the company *residing* within this state.” (Emphasis added.) The deposit in question was made in 1911 when Section 9510, paragraph 2, General Code, quoted above, was in effect. It will

be noted that Section 9510, General Code, required a deposit "for the benefit of *all* its policy-holders," unlike the requirement of a deposit for Ohio policy holders found in Section 3641, Revised Statutes. That this change of language is of no significance, was decided in the case of *State, ex rel. Turner v. Union Casualty Insurance Company*, 8 O. App., 285, where the court held that the deposit required by Section 9510, paragraph 2, General Code, is to be held for the primary benefit of Ohio policy holders, even though the Act reads: "for the benefit and security of *all* its policy-holders."

The court reached this conclusion by construing this section alongside Sections 642, 643 and 656, General Code, all of which deal with defaulting or dissolving companies. The courts of Ohio have never deviated from this interpretation.

Your request concerns a New York insurance company which has been adjudged insolvent by the Supreme Court of New York and is in the process of being liquidated by the Superintendent of Insurance of that state. To further facilitate an understanding of your duties as depository of a fund which this insolvent company has, by statute, been required to deposit and to maintain at par value, it is necessary to refer to certain sections of the code dealing with liquidation procedure, namely, Section 641, General Code, and the more recent Uniform Reciprocal Liquidation Act, Sections 628-24 to 628-35, inclusive, General Code.

First of all, Section 641, General Code, in its entirety reads:

"If any company, corporation, or association required by law to make a deposit with the superintendent of insurance, or any other state officer, to secure the contracts of such company, corporation or association, or for any other purpose, fails to pay any of its liabilities upon such contracts, or other obligations, according to the terms thereof after the liability thereon has been determined, or if such company, corporation or association, having ceased to do business within this state, leaves unpaid any such liability or has become insolvent, the attorney general of the state, on behalf of the superintendent of insurance, or such other officer, and upon the application of any person entitled to participate in such deposit, or the proceeds arising therefrom, shall commence a civil action in the court of common pleas of Franklin County, making the company, corporation, or association, a party defendant, to determine the rights of all parties claiming any interest in such deposit, to subject the deposit to the payment or satisfaction of all liabilities and to distribute such fund among the persons entitled thereto."

It was decided in the case of *State ex rel. v. Crabbe*, 114 Ohio St., 504, that a writ of mandamus will not issue to compel the Attorney General to bring an action under Section 641, General Code until after some person entitled to participate in the deposit has applied to the Attorney General therefor; and that until the claims of domestic policy holders and creditors have been settled, an alien receiver is not "a person entitled to participate" under said section.

From an examination of the following noted decisions, it appears quite conclusively that the Superintendent of Insurance holds required deposits in the capacity of "trustee" for which policy holders are the *cestuis*.

When a foreign insurance company issues contracts of insurance to Ohio policy holders, the law at once vests in them a contingent interest in the trust fund deposited with the Superintendent of Insurance. *Lawson v. Bricker*, 20 Ohio Law Abs., 643.

To like effect see *In Re Southern Surety Co.*, 9 N. Y. S., (2d) 567, where the New York court held that under Ohio law, statutes relating to deposit of securities by foreign insurance companies are construed to mean that deposit is security only for claims of Ohio policy holders and that the Ohio superintendent of insurance is trustee of express trust for their exclusive benefit. The syllabus of the case recites:

"The New York court, on liquidation of a New York insurance company, would, on principle of comity, give effect to the Ohio courts' decision holding that deposits of securities by foreign insurance companies in Ohio are security only for the claims of Ohio policy holders."

The court cited Sections 641-643 and 9510, General Code of Ohio.

Although this decision was handed down February 3, 1939, (about a year before the New York Legislature adopted the "Uniform Insurers Liquidation Act,") I am unable to detect any change wrought by the enactment in Ohio on August 10, 1939, of the "Uniform Reciprocal Liquidation Act" and/or the enactment in New York in 1940 of the same Act under the title "Uniform Insurers Liquidation Act," upon the status and duties of the Superintendent of Insurance of Ohio with regard to the deposits.

Section 628-26, General Code, part of the Uniform Liquidation Act, reads as follows:

“After the commencement of delinquency proceedings in another state against an insurer domiciliary in such state, a court of competent jurisdiction in this state may on the petition of the superintendent of insurance of this state appoint such superintendent of insurance as ancillary receiver in this state of such insurer. The superintendent of insurance shall file such petition (a) if he finds that there are sufficient assets of such insurer located in this state to justify the appointment of an ancillary receiver, or (b) if ten or more persons resident in a state having claims against such insurer file a petition or petitions in writing with the superintendent of insurance requesting the appointment of such ancillary receiver. As ancillary receiver the superintendent of insurance shall have the right to sue for and reduce to possession the assets of such insurer in this state, and, subject to the rights of the domiciliary receiver, he shall have the same powers and be subject to the same duties, with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this state.”

Thus, though Section 64I, General Code, which was quoted earlier in this opinion, and which was not repealed by the enactment of the Uniform Reciprocal Liquidation Act, sets up a procedure for distributing the deposited securities, such procedure is no longer exclusive.

Under Section 64I, General Code, the Attorney General, on behalf of the superintendent, shall commence a civil action in the Court of Common Pleas of Franklin County to determine the rights of all parties claiming any interest in such deposit, and to have the fund distributed. Yet under that section this cannot be done except *upon the application of any person* entitled to participate in the deposit.

From the fact you recite, none of the Ohio policy holders has seen fit to apply for the initiation of such a procedure. However, under Section 628-26, General Code (part of the Uniform Liquidation Act), a court “of competent jurisdiction in this state *may* on the petition of the superintendent of insurance of this state appoint such superintendent * * * as ancillary receiver in this state of such insurer.”

This section goes on to provide that the superintendent *shall file* such a petition “(a) if he finds that there are sufficient assets of such insurer located in this state to justify the appointment of an ancillary receiver.” It would appear that a deposit of \$60,000 is “sufficient assets” located in this state to justify the appointment of an ancillary receiver, and perhaps enough to make it mandatory upon the superintendent to appoint such an ancillary receiver.

Section 628-28, General Code (part of the Uniform Liquidation Act), provides that if there is an ancillary receiver in this state, claimants who reside within Ohio may file claims either with the ancillary receiver or with the domiciliary receiver.

Section 628-30, General Code, another part of the Uniform Liquidation Act, deals with what are termed "special deposit claims." The section commences:

"The owners of special deposit claims against an insurer for which a receiver has been appointed in a delinquency proceeding in this or any other state shall be given priority against their several special deposits, in accordance with the provisions of the statutes requiring the creation and maintenance of such special deposits."

"Special deposit claims" is defined elsewhere in the Act as "any claim secured generally by a deposit of a fund or property or bond, which deposit has been made to secure the payment * * * of all claims of persons resident in a particular state." See Section 628-25, General Code.

Section 628-30, General Code, quoted above, goes on to state that if there be a deficiency in any such special deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the *general* assets, but such sharing shall be deferred until general creditors, also claimants against other special deposits who have received a smaller percentage from their respective special deposits, have been paid.

Section 628-32, General Code, also a part of the Uniform Liquidation Act, provides that the ancillary receiver of assets in Ohio of insurers domiciliary in other states, shall as soon as practicable, arrange the liquidation of special deposit claims proved in ancillary proceedings in this state, and if there are remaining assets after payment, he shall promptly transfer them to the domiciliary receiver.

None of the foregoing provisions of the Uniform Liquidation Act reveals any legislative intention to authorize the Superintendent of Insurance of Ohio to surrender the \$60,000 deposit to the New York liquidator when that deposit is not adequate to pay all the Ohio policy holders their claims.

The policy of protecting Ohio policy holders is manifest in another related area. Section 9510-7, General Code, authorizes a foreign insurance

company which has made a \$50,000 deposit under Section 9510, paragraph 2, General Code, to deposit in lieu thereof \$100,000 in securities, in another state, for the benefit of *all* the company's policy holders. Yet, this "take down" of securities is not permitted unless and until the Superintendent of Insurance of Ohio, pursuant to Section 9510-10, General Code, has examined the books of the company and is *satisfied* that all the obligations and liabilities which the deposit was made to secure have been paid or extinguished.

The only effect of the Uniform Liquidation Act upon the superintendent is the authorization of an additional method of proceeding to liquidate. He can now initiate action without the application of an insured Ohioan.

Whether the superintendent is moved to take action to liquidate or not, he is nonetheless a "trustee" of the securities deposited with him pursuant to Section 9510, paragraph 2, General Code.

The Superintendent of Insurance, being a trustee of the special deposit for *all* Ohio policy holders first and foremost, his duty cannot be altered or sidetracked by the wishes of a certain number of these creditors who would be content to claim in the foreign state's proceedings, as general creditors only, ignoring any claim upon a deposit which by law was required to be maintained in this state primarily for their protection.

The General Code, as interpreted by our courts and adhered to by the New York courts, regards the deposit of securities in Ohio by a foreign insurance company as security first for the claims of Ohio policy holders. I see no way in which the superintendent may, under the present law, pay the fund over to the New York liquidator so long as it is not sufficient to meet all the Ohio claims to the extent of one hundred per cent.

Accordingly, it is my opinion that the Superintendent of Insurance is neither authorized nor required to release the special deposit of securities deposited pursuant to Section 9510, paragraph 2, General Code, to the liquidator of the New York domiciliary insurance company being liquidated in that state, unless and until the claims of the Ohio policy holders have been paid or extinguished.

Respectively,

C. WILLIAM O'NEILL

Attorney General.