INSURANCE: Proposed "Indemnity Agreement" in which restaurant operators operating under franchise from common franchisor pay into a fund for the purpose of indemnifying each other against specified losses constitutes "insurance contract" which may not be entered into without complying with insurance laws of the State of Missouri.

OPINION NO. 173

June 9, 1969

FILED
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Mr. William Y. McCaskill
Superintendent of Insurance
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. McCaskill:

This official opinion is issued in response to the recent request for an official opinion submitted by your predecessor with which request he included a proposed "Indemnity Agreement" and asked the opinion of this office "as to whether or not this agreement is beyond the insurance laws of the State of Missouri."

The parties to the agreement referred to as "members" are described as "restauranteurs" who are "affiliated organizations and franchisees of Hilleary and Partners, Ltd." You say that it is your understanding that there are no other contracts among the members and we assume that each operates his own individual restaurant business, independent of the others. Some of the indicated members are corporations and some are partnerships.

The agreement recites that:

> ". . . said members are desirous of becoming members of a mutual fund for the mutual benefit of said members against criminal extraction of funds and other assets from their respective establishments. . ."

The agreement provides for the establishment of an "Indemnity Fund" and for a "Governing Committee" of the members to manage and control the fund as attorney-in-fact.

Each member is obliged to pay $1400 into the Fund, and to make additional payments at three-year intervals. The agreement also provides that:

> ". . . said fund shall be held for the sole purpose of indemnifying a given member for loss due to a criminal extraction of funds and other assets from their respective establishments. . ."

There follow three "Indemnity Agreements" for "Coverage A - Robbery Inside the Premises;" "Coverage B - Robbery Outside the Premises;" and "Coverage C - Safe Burglary." The agreement lists ten "exclusions" and several definitions.

A member may withdraw his support at will but is not entitled to refund of the payments he has made. If there are insufficient funds to pay a loss, each member is obliged to contribute his pro-rata share of the deficiency. A majority of the members may terminate the agreement at any time, in which event the proceeds after payment of expenses are to be refunded to the members.

The Indemnity Agreement provides that it is to be governed by the law of Missouri.

Section 375.310 RSMo. Supp. 1967 provides in part as follows:

> "Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state . . . shall be subject to suit by the superintendent. . ."

Such statute goes on to provide for injunctive relief against continuance of the business and for a civil penalty.

The statutes of this state do not define "insurance" or "insurance business."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 165 S.W. 1084, the Supreme Court of Missouri said, S.W., l.c. 1086:

> "The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss. . . ."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 132 Mo. App. 275, 111 S.W. 592, the Kansas City Court of Appeals said, S.W., l.c. 593:

> ". . . Indemnity signifies reimbursement making good, and compensation for loss or injury. . . ."

These definitions are found, in substance, in cases from other jurisdictions and in law dictionaries.

It is apparent that the proposed "Indemnity Agreement" is a contract of insurance within these definitions. Each "Member" pays a consideration, in return for which he is entitled to indemnity against robbery and burglary from the Fund, to the extent that it is adequate, and from the other members if there is a deficiency. The member cannot withdraw his contribution.

It is of no significance that the arrangement is one by which the members insure each other. Sharing of risk is a feature of all insurance. The arrangement bears some similarity to a "Reciprocal or Interinsurance Exchange" as described in Sections 379.650 to 379.790 RSMo. Supp. 1967. Those statutes authorize individuals, partnerships and corporations to "exchange either assessable or nonassessable reciprocal or interinsurance contracts with each other . . ." covering specified perils, subject to licensing by the superintendent of insurance. The clear inference from these statutory sections is that individuals or corporations may exchange indemnity contracts only to the extent permitted by, and only in accordance with, the insurance laws of the state.

Nor is it of any significance that the parties are engaged in the same line of business, or that they operate as franchisees of a common franchisor. Each member receives a promise of indemnity against certain losses to his own, individual business. He therefore receives "insurance".

The fact that no "policies" or other documents besides the Indemnity Agreement are to be issued is unimportant. As the opinion in State ex rel. Inter-Insurance Auxiliary Company v. Revelle, supra. shows, the form of contract is not significant.

The insurance business is closely regulated, so that those who contract for indemnity will receive what they are entitled to. For that reason, the business is limited to those who comply with the statutes. The proposed "Indemnity Agreement" has all the features of an insurance contract, and therefore its consummation would constitute the doing of an insurance business.

CONCLUSION

It is the opinion of this office that the Indemnity Agreement described in the foregoing opinion, by reason of which restaurant operators who are franchisees of a common franchisor contribute to a fund to be used to indemnify the contributors against specified perils, is an "insurance contract." It follows that the parties entering into such a contract would be transacting "insurance business," and would violate Section 375.310 RSMo. Supp. 1967 if they did not comply with the insurance laws of the state.

The foregoing opinion which I approve was prepared by my Special Assistant, Charles B. Blackmar.

Sincerely yours,

JOHN C. DANFORTH
Attorney General