INSURANCE - Reciprocal contracts in insurance may be issued that are non-assessable.

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Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This department is in receipt of your letter of July 23 requesting an opinion from this department as follows:

> "Consolidated Underwriters of Kansas City, Missouri, is a reciprocal exchange organized and existing under the laws of the State of Missouri. It has been in existence for many years and at the present time has a surplus on hand over all legal liabilities of substantially $1,115,210.00. The attorney-in-fact in charge of the management for such exchange is T. H. Mastin & Company, through whom subscribers thereat exchange indemnity contracts. This exchange of indemnity contracts is authorized by power of attorney executed by each subscriber (copy of which is hereto attached). By virtue of such power of attorney and upon recommendation of the attorney-in-fact, additional subscribers are admitted from time to time to this exchange. (Copy of contract issued by attorney-in-fact to said subscribers is hereto attached.)
>
> In the light of the foregoing, will you please advise me whether in your opinion the power of attorney and policy, supra, constitute a non-assessable insurance contract, and whether subscribers at the foregoing exchange may legally exchange

> non-assessable policies or indemnity contracts, upon which contracts of indemnity by virtue of the foregoing no liability is attached to such subscribers for the payment of an assessment upon the happening of contingencies in the future."

Article XI, Chapter 37 R. S. Mo. 1929 contains the statutory law of Missouri governing this form of insurance and Section 5966 thereof expressly authorizing individuals, partnerships and corporations of this state to exchange reciprocal or inter-insurance contracts with each other or with individuals, partnerships and corporations of other states and countries.

Section 5971 R. S. Mo. 1929 provides for the required reserves of the nature and amount of guarantee funds and it also provides for funds deposited to make up any deficiency. If there be any prohibition against the exchanging of reciprocal and inter-insurance contracts, upon which contracts no liability is attached to the subscribers for the payment of an assessment upon the happening of contingencies in the future, it is by reason of the following provision in Section 5971 supra:

> " * * * If at any time the amounts on hand are less than the foregoing requirements, the subscribers or their attorney for them shall make up the deficiency. * * * "

However, the Supreme Court of Indiana in the case of Automobile Underwriters Incorporated v. Wysong, 184 N. E. 783, has recently passed on a question substantially similar to that here involved and has construed that section of the Indiana law substantially the same as the provision heretofore referred to in Section 5971. That section of the Indiana law reads as follows:

> "If at any time the assets so held in cash or such securities shall be less than required above or be less than $25,000 the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the Auditor of State to do so."

The court in holding that this section of the Indiana law did not require the deficiency to be made up by assessment but that the failure to keep up the standard of solvency furnished ground for the revocation of the right to continue business said:

> "The law authorizes the organization of reciprocal insurance associations of this kind. Those who join the association, do so voluntarily and also voluntarily subscribe to all of the conditions and limitations. While the plan of association of members in a reciprocal association is different from that of an ordinary corporation, yet the idea of limited personal responsibility is practically the same. The members or stock holders of a corporation limit their personal liability in the business conducted to the amount of the face value of their stock, while the members of a reciprocal association limit their personal liability by an agreement between themselves. The degree of limitation may vary. It may be fixed at one annual premium or deposit, or it may be one additional annual deposit, or it may be unlimited. The statute gives the attorney in fact authority to insert in any form of policy any provision or condition not inconsistent with nor in conflict with the laws of the State of Indiana. This authorizes a limitation clause as to personal liability and as a stock holder in a corporation is not liable personally beyond the face value of this stock, unless in cases where the statute specifically fixes an additional stock holders liability, so a member of a reciprocal association is not liable beyond the terms of the policy issued by his association unless the statute fixes an additional liability. The question then arises, does the statute contemplate any personal liability beyond that fixed by the terms of the policy issued? The only provision of the statute that defendant claims to fix such liability is found in Section 6 and reads as follows:

'If at any time the assets so held in cash or such securities shall be less than required above or be less than twenty-five thousand dollars, the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the Auditor of State to do so.' This language certainly does not impose an assessment upon the members who by authority of the statute have contracted between themselves that no assessment shall be made after the initial payment or premium on the policy has been paid. It does require, however, that a certain standard of solvency shall be maintained by the subscribers or their attorney. A failure to do this may result in a forfeiture of the right to do business. The statute then does not exact arbitrarily an assessment but gives the alternative of a refusal, suspension or revocation of a certificate of authority or license to do business. Under this statute, if an assessment is required, who would be assessed? The statute says the subscribers or their attorney shall make up the deficiency. One would be just as liable to be assessed as the other. If both are to be assessed, upon what basis? What part is to be assessed to the attorney and what part to the subscriber? Are the subscribers to be assessed alike? Are the responsible subscribers liable for the pro rata share of the irresponsible subscribers? Can the attorney in fact assess the subscribers for the deficiency that the statute says he is also required to maintain or visa versa? Other suggestions could be made that would almost make it conclusive that the Legislature did not intend to and is not requiring that the deficiency shall be made up by assessment, but that the alternative for failure to keep up the standard of solvency as required is to revoke the right to continue business. This construction gives harmony and practicability to the whole statute.

"* * * If the policy issued is non-assessable by the terms and conditions of the policy itself, the plaintiff by issuing the policy as non-assessable is not representing it to be anything different from what the members of the association have directed it to be and from what the statute permits to be done. The members contract that in issuing the policy their attorney do not make them jointly liable with any other subscriber but bind them for not more than their pro rata share on any one contract, the maximum liability to be limited to the premium deposit or application fee provided for in the policy. The attorney in fact is not authorized to contract or incur obligations unlimited in any respect but all the liability he may incur has the limit fixed at the amount of premium the members pay for his policy and every one dealing with the attorney in fact is bound to know of that limitation. Third party creditors are not innocent creditors if they contract with the attorney in fact beyond his authority to bind. The policy holders or members of the association are not in the association for profit but for reciprocal protection among themselves. It is not a commercial venture with them nor can we assume that it is their purpose to obtain safety insurance to the extent of risking individually all they are worth to attain such an end but rather their purpose is to obtain insurance at a minimum cost upon the standard of solvency fixed by the Legislature.

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"Any stranger dealing with a reciprocal insurance association must know that he is not dealing with an ordinary agent merely acting within apparent authority in binding his principal while in fact acting beyond the scope of his authority as between him and his principal, but that he is dealing with an attorney in fact with written authority limiting his powers, beyond which limitation he cannot bind.

* * * * * * * * * * *

"Unless these subscribers have the right to limit their liability in any way they choose, they cannot limit it to their pro rata share or equitable portion of any loss and if they can limit it at all, they can limit it in any degree by terms that they may mutually agree upon. They have limited their liability by agreement among themselves in effect that no assessment shall be made against them for any purpose. Hence the policy is non-assessable."

CONCLUSION

In view of the above we are of the opinion that individuals, partnerships and corporations of this state are authorized to exchange reciprocal and inter-insurance contracts with each other or with individuals, partnerships and corporations of other states and countries, and that said contracts may legally provide that no liability shall extend to said subscribers beyond that specifically provided in the contract. In other words if the provisions of Article 11, Chapter 37 R. S. Mo. 1929 are fully complied with, subscribers may definitely limit their liability by their contracts of insurance, and if it is so provided in said contracts, policies may be issued which are non-assessable. As was said by the Supreme Court of Indiana, if the subscribers can limit their liability at all, they can limit it in any manner upon which they may mutually agree. If by agreement they limit their liability to the extent that it is provided that no assessment shall be made against them for any purpose, the policy is non-assessable.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
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