INSURANCE: Marsh & McLennan-Case, Thomas & Marsh Incorporated may not engage in the insurance business in Missouri under their charter.

March 28, 1938

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Honorable Charles L. Henson
Chief Counsel
Insurance Department
Jefferson City, Missouri

Dear Judge Henson:

This is to acknowledge your request for an opinion under date of February 28, 1938, based on the facts contained in an enclosure which reads as follows:

> "We desire to submit to you for your consideration the following situation which exists in Saint Louis.
>
> A Delaware corporation, Marsh & McLennan, with principal offices located in Chicago, Illinois, desired to engage in the business of underwriting insurance in the State of Missouri.
>
> Such corporation could not qualify to write insurance in Missouri nor could its principal stockholders who were non-residents, so a domestic corporation was formed in Missouri under the name of Marsh & McLennan-Case, Thomas & Marsh, Incorporated. It then associated with it the following persons to whom agent's licenses, and in some instances broker's licenses, were issued:
>
> Otis V. Bennett
> Ralph E. Brown
> Edw. G. Marsh, Jr.
> Roger W. Marsh
> Claude D. Meyers
> Jas. D. Row
> John B. Sturges
> Melvin A. Thomas
> A.J. Fellhauer

A Mr. Seabury and a Mr. McLennan, residents of Chicago, Illinois, who operate Marsh & McLennan, Inc., are the principal stockholders in Marsh & McLennan-Case, Thomas & Marsh, Incorporated, and the letterheads of Marsh & McLennan, Incorporated, as a branch office of Marsh & McLennan, Incorporated, with Edward G. Marsh as Resident Vice-President.

It is unquestioned that a share of the profits earned by Marsh & McLennan-Case, Thomas & Marsh, Incorporated, goes to Mr. Seabury, Mr. McLennan and Marsh & McLennan, Incorporated, in Chicago, Illinois.

We submit for your consideration that the corporation known as Marsh & McLennan-Case, Thomas & Marsh, Incorporated, is thus being used to evade the resident agency law of Missouri, in attempting to do what Marsh & McLennan, Incorporated, of Chicago could not do in its own name and what Mr. Seabury or Mr. McLennan could not do as individuals.

If, therefore, it appears that the domestic corporation Marsh & McLennan-Case, Thomas & Marsh, Incorporated, and the agents associated therewith, are operating in violation of law, it would appear to follow that renewal licenses should not be issued to the above named individuals.

We would appreciate very much receiving from you a general ruling covering this and similar situations.

The facts and questions presented may be stated as follows:

A foreign corporation desires to engage in the business of underwriting insurance in the State of Missouri. Such corporation cannot qualify to write insurance in Missouri nor can its principal stockholders who are non-residents. To overcome this difficulty such non-resident stockholders then form a domestic corporation, arrange to have certain persons licensed as resident agents and then proceed to write and place insurance business in the State of Missouri through such domestic corporation which, in turn, forwards a share of the profits to said non-residents and said foreign corporation.

Query: Is such domestic corporation, and are the agents associated therewith, operating in violation of the law in the State of Missouri, and if so, does the Superintendent of Insurance have the right to revoke the licenses of said agents and to refuse to issue new licenses?

In approaching this question it is obvious we must first analyze the law governing such a situation as set forth in the Statutes of Missouri and in the rulings of the Superintendent of Insurance. There exist certain definite unequivocal principles which shall be listed and commented upon as follows:

(1) Only licensed agents can engage in the writing of insurance.

This principle is specifically set forth in its application to agents in Section 5902 R. S. Mo. 1929, as follows:

> "Foreign companies admitted to do business in this state shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed resident agents, who shall countersign all policies so issued. And any such insurance company who shall violate any provision of this section shall suffer a revocation of its authority by the superintendent of insurance to do business in this state, in addition to the penalty prescribed in Section 5909, such revocation to be for the term of one year."

The same principle appears with reference to brokers in Section 5904, R. S. Missouri 1929, as follows:

> "Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section. The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state."

(2) A license to write insurance will be issued to natural persons only.

In the operation of the affairs of the insurance department the principle has long existed that in order for the business of insurance to be properly controlled and policed in this state it is necessary to require that licenses be issued to natural persons only. As a result the insurance department has complete control and supervision over the individuals who are engaged in the business of insurance in this State. The promulgation of such a rule prevents persons from using the fiction of a corporation to avoid the responsibility which logically falls upon the individuals engaged in such business.

It is beyond question that such a ruling by the insurance department is well within the discretion of the superintendent as it is in full accord with the spirit and letter of the law.

In State ex rel. Mackey v. Hyde, 286 S.W. 363, the Supreme Court of Missouri held that inasmuch as the Superintendent of Insurance was authorized to issue licenses to engage in the insurance business that he was entitled to exercise reasonable discretion in the performance of his duties. No one can deny that the instant r ling is within the discretion of the superintendent.

Although from the above it is clear that a license will not issue to a corporation as such, yet it is perfectly proper in Missouri for a corporation to engage in the insurance business through properly licensed associates, if it does so legally.

A case bearing upon this point is James N. Tardy Company vs. Tarver, 39 S. W. (2d) 848 (Tex.) l. c. 850, in which the Court said:

> "It has been held also that while a license cannot issue to a corporation as such, it is competent for the corporation to take out a license in the name of a designated agent or employe, or agents or employes, and the latter may lawfully act in pursuance of the license."

In accord with this also is the case of Rogers vs. Ramey, 248 S. W. 254 (ky.)

The business of writing insurance in Missouri may be handled only by licensed natural persons but such persons may be associated with a corporation in the business of insurance if such licensed persons and the corporation comply with the other provisions of the insurance law of this state.

(3) A natural person must be a <u>resident</u> of Missouri in order to qualify as an agent.

This principle of law is contained in Section 5902, R. S. Missouri 1929, which is as follows:

> "Foreign companies admitted to do business in this state shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed <u>resident</u> agents, who shall countersign all <u>policies</u> so issued. And any such insurance company who shall violate any provision of this section

> shall suffer a revocation of its authority by the superintendent of insurance to do business in this state, in addition to the penalty prescribed in section 5909, such revocation to be for the term of one year."

The intent of the Legislature is clearly expressed herein to the effect that the issuance of licenses shall be confined to residents of this state.

See Noble v. English, 183 Iowa, 893, 167 N.W. 629.

In this case the Supreme Court of Iowa held that even though the Statutes of Iowa did not provide that foreign companies could be represented only by resident agents, yet the State Insurance Commissioner had the power and the right to hold that no license would be issued to an agent of a foreign company who was a non-resident of Iowa.

(4) A licensed agent may not share or divide the whole or any part of any commission, except with another duly licensed agent or broker.

This principle is contained in the following section of the Missouri Statutes, Section 5904 R. S. Missouri 1929, as follows:

> "Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section."

It is clear from the above section that the Legislature intended that whoever aids in placing insurance for compensation, if he is not an agent, must be a broker.

If A, a layman, assists B, an insurance agent, in selling a policy of insurance, then A, in order to receive part of the commission, must have either an agent's license or a broker's license.

It, of course, follows logically that if A assists B to obtain a commission and if A accepts part of said commission without having an agent's or broker's license A is violating the law. If A and B form a partnership in which A aids in placing insurance and receives therefor part of the commission, the situation is still unchanged for A would still be receiving part of the commission unlawfully.

In the event A and B should form a corporation and A holds part of the stock from which he receives dividends which are merely his share of the commissions for assisting in placing business, does this make it legal for A to accept his share of the commissions, in the form of dividends, even though he does not hold an agent's or broker's license?

Obviously not.

If it is unlawful for A to receive part of the commissions as a partner of B, then it is just as unlawful if it is done through the artifice or device of setting up a corporate entity.

Applying this reasoning to the present question presented, it is clear that should the licensed resident agents involved, forward their commissions to the foreign corporation, which, of course, does not hold an agent's or broker's license, they would be doing so unlawfully. If their commissions were forwarded to such foreign corporation under a partnership agreement, it would still be in violation of the law of Missouri. So also it is just as unlawful if in order to circumvent the clear intent of the law the licensed resident agents deliver their commissions to the domestic corporation which in turn forwards such earnings to the foreign corporation. The forming of the domestic corporation, which merely adds another step to the chain of transactions which culminate in the splitting of commissions between the licensed resident agents and the non licensed foreign corporation, will not legalize the attempt to circumvent the law.

The rule is well recognized that individuals may not use a corporation as a means to accomplish those acts which they are prohibited from doing as individuals. A general statement of this principle of law is found in 14a Corpus Juris, 309, Section 2158, which reads as follows:

> "It may be stated as a general rule that to the extent and within the limits discussed elsewhere in this work, corporate transactions which are illegal as distinguished from merely ultra vires, contemplate the doing of some essentially unlawful act, violate some public duty, or contravene some rule of public policy, are, like similar transactions between individuals, void, and cannot support an action nor become enforceable by performance, ratification, or estoppel."

If, therefore, it appears that the agents and brokers heretofore referred to are operating illegally and unlawfully, the question arises as to whether or not the Superintendent of Insurance has the right to revoke any license issued to agents and brokers and to refuse to issue new licenses.

With reference to agents, the statutes provide as follows, Section 5892 R. S. Missouri 1929:

> "* * *The superintendent of insurance for cause shall have the authority to refuse to issue a license to an agent or may suspend or after 15 days' notice of its intention to do so given in writing to the agent and the company represented by such agent revoke any such license after a hearing before the superintendent of insurance. If the ruling of the superintendent of insurance be adverse, then, within thirty days after receiving notice of the revocation, suspension, or refusal to license, the person aggrieved shall have the right to petition any court of record of the county wherein the applicant resides to require said superintendent of insurance to show cause why the license so revoked, suspended, or refused, should not be reinstated or issued."

With reference to brokers the statutes provide as follows, Section 5904 R. S. Missouri 1929:

> "* * *The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance, or place risks, or effecting insurance or re-insurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state. Such certificate shall remain in force one year, unless revoked by the superintendent of insurance for cause."

Upon a thorough consideration of the questions involved we are of the opinion that the operation of the domestic corporation and its associated agents and brokers as outlined above is clearly illegal andunlawful under the law of Missouri and that the Superintendent of I surance has the right, the power and the duty to revoke the licenses issued to such agents and brokers and to refuse to issue new licenses to such persons.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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