INSURANCE
FIRE
SCHOOL DISTRICT

District may insure in non-assessable reciprocal insurance.

1/8

January 7, 1937

FILED
53

Reinstated
9-18-56

Hon. Alva F. Lindsay
Attorney for St. Joseph
School District
Kirkpatrick Building
St. Joseph, Missouri

Dear Mr. Lindsay:

We are in receipt of your communication of recent date wherein you request the opinion of this office on the following proposition:

> "I am writing you as attorney for the St. Joseph School District.
>
> I amherewith enclosing copy of policy in the Lumbermen's Underwriting Alliance. We will appreciate your opinion as to whether or not the St. Joseph School District can legally carry fire insurance in the form provided in the enclosed policy."

After an examination of the policy submitted, being #56350 in the Lumbermen's Underwriting Alliance of Kansas City, Missouri, and particularly the Guaranty Deposit against assessment agreement attached thereto and made a part thereof and executed by the U.S. Epperson Underwriting Company, we have reached the conclusion that such policy may be purchased by your District.

I.

School District of St. Joseph may legally carry fire insurance in the form submitted.

In dealing with the problem presented we assume that the question does not deal with the right of the school board in the first instance to carry fire insurance on the district property, nor does it deal with the power of an insurance exchange or reciprocal to issue non-assessable policies, this latter issue being covered in an opinion of this office dated July 31, 1936, to the Hon. W. W. Graves, Prosecuting Attorney of Jackson County.

Under theprovisions of Section 5971 R. S. Missouri 1929, it is required that cash or securities shall be on hand in the office of the attorney in fact equal to fifty per cent of the annual advanced premiums collected, or in lieu thereof one hundred per cent of the unearned premiums or deposits collected together with a guaranty fund or surplus of not less than Fifty thousand or One hundred thousand dollars, depending upon the kind of risk assumed, and an additional loss reserve in the event employers' liability, public liability, workmen's compensation or automobile insurance is written. It is also provided:

> "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."

By the provisions of this Section the legislature contemplated that the attorney in fact might establish such a fund as provided for in the contract in the instant case, and such being the case it appears that the reserve fund set up and established in the instant case is a supplement to that specifically required by law for the purpose of guaranteeing full compliance with the law. The Guaranty Deposit Agreement reads as follows:

"LUMBERMEN'S UNDERWRITING ALLIANCE
Kansas City, Missouri

GUARANTY DEPOSIT AGAINST ASSESSMENT.

WHEREAS contingent liability of subscribers to pay assessments on account of excess losses, if any, is a desirable feature of the plan of Reciprocal Insurance, and

WHEREAS certain subscribers at Lumbermen's Underwriting Alliance desire to be severally relieved from the payment of any and all such assessments;

NOW, THEREFORE, in consideration of the execution by each such subscriber at Lumbermen's Underwriting Alliance of a Power of Attorney or Subscriber's Agreement appointing U.S. Epperson Underwriting Company at Kansas City, Missouri, as attorney to represent each such subscriber in the exchange of indemnity at Lumbermen's Underwriting Alliance, said U.S. Epperson Underwriting Company does hereby agree as follows:

(1) Said U.S. Epperson Underwriting Company hereby states that he has deposited in the assets of Lumbermen's Underwriting Alliance the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) in cash or securities of the kind required by the Laws of the state of Missouri respecting assets of Reciprocal Insurance Exchanges, said fund to be termed a 'Guaranty Fund' and kept separate from the other assets of Lumbermen's Underwriting Alliance and to be used only for the purpose of paying any assessments on account of excess losses accruing against such subscribers at said Alliance who avail themselves of the provisions of this agreement.

(2) Any assessment made against any subscriber accepting this agreement shall be paid out of said Guaranty Fund by U.S. Epperson Underwriting Company and said payment applied to the credit of such subscriber in discharge of such subscriber's liability to pay such assessment.

(3) Said U.S. Epperson Underwriting Company agrees to maintain said Guaranty Fund as provided for in paragraph (1), and same shall be and remain the property of said U.S. Epperson Underwriting Company, and said Company may from time to time withdraw from said Guaranty Fund any amount in excess of the annual premium deposits on the policies of subscribers to whom the provisions of this agreement apply.

(4) The provisions of the Power of Attorney or Subscriber's Agreement executed by such subscribers referred to herein and applicable hereto are made a part hereof.

(5) This agreement shall become effective concurrently with the policy contract to which it applies and shall terminate with said policy at expiration or cancellation date.

Subscriber .....The School District of St. Joseph, Missouri

Policy Number 56350...Amount $3,277,500.00
Premium $27,531.00

IN WITNESS WHEREOF, U.S. Epperson Underwriting Company has caused this instrument to be executed at Kansas City, Missouri, this 14th day of December, 1936.

Agency Ferd LaBrunerie & Son.

U.S. Epperson Underwriting Company

By (Signed) J. W. Ward

Assistant Secretary."

By virtue of paragraph (1) the underwriter or attorney in fact for the alliance has set aside and established a fund of Two hundred and fifty thousand dollars made for the sole purpose of guaranteeing the school board and others holding similar policies against any assessment that might otherwise be made against them. This constitutes a revolving fund established and which must be maintained by the attorney in fact from which is to be paid any and all additional premiums which might otherwise under some circumstances in the future be assessed against the policy holders.

Under the provisions of paragraph (3) of the foregoing agreement the U.S. Epperson Underwriting Company agrees to establish and maintain this reserve fund, adding to such fund any such sums as might be required from time to time so as to maintain the fund at the sum of Two hundred and fifty thousand dollars or its equivalent.

By virtue of these provisions liability of the school board of St. Joseph is limited to the payment of the initial premium set out in the policy and no further or additional demands of any kind may be made upon the school board as representing the district for any further or additional sums irrespective of the losses which may be sustained. This Guaranty Deposit Agreement recites that the provisions of the power of attorney executed by such subscribers are made a part of the agreement and we therefore assume that the power of attorney executed by the policy holders contemplates and authorizes the issuance of this policy in the form submitted.

We are unable to find any case in which the Appellate Courts of this State have passed upon the legal effect of such an agreement but in the case of Sysong vs. Automobile Underwriters, 184 N. E. 783, the Supreme Court of Indiana had occasion to pass upon the validity of an agreement of this general character by which policy holders in the alliance were exempted from the payment of additional premiums. The Court in this case stated, page 786:

> "The liability of any subscriber is determined by the terms of the power of attorney executed by and the policy issued to a subscriber. These constitute the contract of each subscriber with all other subscribers. The power of attorney is the controlling factor. The attorney in fact cannot go beyond the powers granted in the power of attorney creating his appointment. He cannot bind the subscriber beyond the limitations expressed in the power of attorney. The limitation set out in each subscriber's power of attorney is known to each subscriber and he also knows that the same limitation is set out in every other subscriber's power of attorney. Each subscriber knows that, in case the amount he has agreed to pay in and the amount other subscribers have agreed to pay is not sufficient to pay his loss, there is no further liability on the part of the subscribers to pay additional sums over and above what they have contracted to pay.
>
> The subscribers have the right to contract among themselves and fix the limit of their liability unless there is some law preventing it, and we are unable to find any holding that the subscribers have not the right to fix the limit of their liability as among themselves, and as to each other. Reciprocal or interinsurance is not a statutory entity, but only regulated by law. It is by private contract that the relations created among and between the subscribers are fixed and determined. * * *"

It therefore appears that the contracts entered into are binding and effective even to the extent of a full release and discharge from liability, while in the instant case although the policy holder is subject to no further demand for premium payment a fund is established which is subject to payment of any excessive loss.

Although the Guaranty Deposit Agreement in the instant case is denominated as the property of the attorney in fact we believe that this does not change the situation existing as by the terms of the contract the fund is liable for the payment of any excess loss which might under the ordinary plan be assessed to the subscribers.

The Supreme Court of Wisconsin in the case of Schoetz vs. Insurance Commissioner, 247 N. W. 839, had before it the question as to the status of a similar guaranty fund insofar as stock holders of the attorney in fact were concerned. In this reported case stock holders of the attorney in fact had deposited securities which were used by the attorney in fact as a guaranty fund for the benefit of policy holders in the Reciprocal Exchange. In the course of time the guaranty fund was exhausted, the securities being liquidated and the proceeds paid on claims of the exchange. The stock holder and the attorney in fact were denied recovery of the securities and the Court in the course of the opinion stated, page 841:

> "The evidence does not disclose that the policyholders who were members of the 'Association' were ever advised that this $50,000 guaranty fund was a part of their liability. No mention of it appears in the application for a policy or in the policy itself, and the course of conduct of the directors and officers of the corporation are consistent only with the idea that the obligation rests upon the corporation to refund to the contributors the securities so deposited or the proceeds thereof.
>
> The facts and circumstances thus briefly reviewed furnish sufficient evidence to sustain the ruling of the trial court that no assessment can legally be made against the policyholders or the 'Association' for these claims of the stockholders of the corporation arising out of the agreement by which it secured their stock. * * *"

It is quite certain from a reading of the agreement in the instant case that the guaranty fund of Two hundred and fifty thousand dollars established by the attorney in fact is in no sense a liability of the alliance but is a fund established for the benefit of certain policy holders for a valid consideration. It appears that the attorney in fact in the instant case has construed the provisions of Section 5971 as authorizing the attorney in fact to make up any deficiency and have established this fund as one means of accomplishing the statutory requirement. The school district and the other contracting parties are charged with full knowledge of the agreement and understanding. As stated in the case of Griffith vs. Associated Employers' Reciprocal, 10 S. W. (2d) 129, 132:

> "Griffith thus being a party to the contract, he, as well as all other parties thereto, could and did, in the instant case, limit their rights and liability as among themselves in such manner that the subscribers do not owe their liability to an individual claimant but to all claimants through the association to the limited extent of two premiums in any year; * * *"

So in the instant case the school district has limited itself by its agreement to the cash premium deposited and all of the subscribers and parties are charged with knowledge of this limitation of liability.

In an opinion dated January 17, 1934, to the Honorable Edward H. Miller, the question was discussed as to the power of directors of a school district to insure property of the district in mutual companies, but in that opinion it was held that where the liability or obligation of the policy holder is fixed in amount on the date of the issuance of the policy and does not depend on losses of similar policy holders the acceptance of such a contract would not constitute the policy holder a stockholder of a mutual insurance company. Page two of the opinion reads in part:

> "If the liability and obligation of a policy holder under his insurance contract is fixed or determinable in amount at the date of the issuance of the policy or if the obligation and liability of the policyholder does not depend on the losses of similar policyholders or other such contingencies, then the acceptance of such a contract would not make the holder thereof a member of nor stockholder in a mutual insurance company in the real and strict sense of mutual insurance. In other words, such insurance would not be mutual insurance. The character or classification of a fire insurance company, generally speaking, is to be determined from the contract or policy issued by the company and not from the name employed and in use by such company."

The liability and obligation of the school district under the insurance contract is fixed and determined in amount at the date of the issuance of the policy and is limited to the initial premium which has been paid. The obligation and liability of the district does not depend on the losses of similar policy holders or other such contingencies and therefore the district does not become a member of or stockholder in the reciprocal exchange. Such being the case the conclusion which we have reached in this opinion is inescapable.

CONCLUSION

It is therefore the opinion of this office that the school district of St. Joseph, Missouri, may accept the policy of insurance submitted without violating the provisions of Section 47 of Article IV of the Constitution of the State of Missouri.

We are herewith returning to you the policy submitted for examination.

Respectfully submitted,

APPROVED:

HARRY G. WALTNER, Jr.,
Assistant Attorney General

ROY McKITTRICK,
Attorney General

Enclosure.