INSURANCE: Stock casualty companies under Article VI, Chapter 37, R. S. Mo. 1929, may issue participating contracts.

January 23, 1941

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Honorable Ray E. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

On July 9, 1936, R. E. O'Malley, then Superintendent of Insurance, asked this department whether a joint stock insurance company organized or licensed under the provisions of Article VI, Chapter 37, R. S. Mo. 1929, might issue participating policies of insurance. In response to that request, we wrote an opinion, dated August 14, 1936, holding that stock casualty companies operating under said Article VI could not issue insurance contracts, the terms of which permitted the policyholder to participate in the surplus or excess earning of the company.

On October 17, 1939, you asked this department for an opinion on substantially the same question; that is, whether a stock casualty company could write a Workmen's Compensation policy on the participating basis. You particularly asked us to consider whether Section 3327, R. S. Mo. 1929, which is contained in the article dealing with Workmen's Compensation, had any bearing on the question.

We answered this last request with an opinion dated November 3, 1939, in which we followed our earlier opinion of August 14, 1936, and further came to the conclusion that the said Section 3327, which provides in part that "nothing contained in this section shall affect the right of any insurance carrier or carriers to issue participating policies or to pay savings or dividends actually earned or saved" was not an enabling act; that this section did not create any new powers for insurance companies in regard to the issuance of participating policies, but merely reserved that right if the company in question was otherwise possessed of such powers.

We are still of the opinion that Section 3327 is not an enabling act giving any such powers, and we reaffirm that portion of the opinion of November 3, 1939. However, it is our purpose herein to again consider the fundamental powers of stock casualty companies doing business under the terms of Article VI, Chapter 37, R. S. Mo. 1929, and particularly as to their powers to issue contracts on the participating basis.

It will be observed that the 1936 opinion was decided chiefly on a construction given Section 5796 of said Article VI, which section provides in part as follows:

> "Corporations may be formed for the purpose of doing business mentioned in the first class or division named in Section 5793 either on the stock or mutual plan and for the purpose of doing the business mentioned in the second and third classes or divisions on the stock plan * * * ; and it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized * * * ;"

After setting out the above quoted part of Section 5796, the opinion then proceeded in the following language:

> "The Legislative intent is thereby made clear. Corporations organized for doing business under the first class named in Section 5793 must be formed either on the stock or mutual plans, and not both, and corporations formed for doing business under the second and third classes must be formed only on the stock plan. We believe that the General Assembly intended that corporations doing business on the stock plan should be

> corporations owned and controlled entirely by the stock-holders and in neither the management nor the profits of which the policyholders participate."

In other words, the provision that "it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized," was construed to mean that a stock company could not issue a participating contract.

We have been unable to find any other statute which deals either directly or indirectly with the subject. There is no statute which states in so many words that a stock casualty company cannot issue participating contracts. Furthermore, there appears to be no decision of any appellate court in this state prohibiting a stock company from writing such a policy or any decision construing Section 5796 in any such way. Therefore, unless the language used in Section 5796 can be so construed, it would follow that the stockholders would have a right to give back a part of the excess earned to the policyholders by contract, if and when they might so desire. And this would appear to be true whether the articles of incorporation of any stock company or any statute specifically authorized such a contract or not.

We have found no authority exactly in point as to whether the articles of incorporation must authorize the issuance of this type of policy. The case of Jacobs v. Wisconsin National Life Insurance Company, (Wis.) 156 N. W. 159; however, has some bearing on the question. In that case, the defendant insurance company issued what was called a profit-sharing bond, which was, in substance, a contract to set apart annually from the earnings of the company and place in a special fund a sum of money equal to $1.00 for each $1,000.00 worth of insurance outstanding and in force for a period of thirty years. The insurance company was a capital stock company, and was capitalized for $100,000.00. The lower court held that "said so-called profit-sharing bonds are void for want of authority in the defendant life insurance company to issue and sell the same." In other words, the lower court held that neither the articles of incorporation or any statute permitted

the issuance of such a contract. In reversing the case, the court said, l. c. 160:

> "We are referred to no statute which forbids either expressly or by implication the making of such contract by a corporation like defendant. * * * The only ground assigned for holding the so-called income bond void is the speculative character of the investment therein. This affects only the obligee in the bond. It is not speculative, but quite certain as regards the obligor insurance company. The transaction amounts to this: The insurance company, instead of waiting for profits to accumulate and using these profits to promote and advance its insurance business, makes a contract whereby these anticipated profits are sold as above indicated, and thereby money is at once and in the early years of the insurance company available with which to advance its insurance business the purchaser of the bond taking his chances of reimbursement out of profits created or aided by his own money, and the insurance company assuming no other obligation than that of setting apart annually for a limited period from the annual premiums collected for life insurance $1 for each $1,000 of life insurance outstanding and in force.
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> "A contract is not to be condemned merely because it is ingenious (Govier v. Brechler, 159 Wis. 157, 161, 149 N. W. 740), nor unless it contravenes some rule of positive law or conflicts with public policy. Sheppard v. Pabst, 149 Wis. 34, 45, 135 N. W. 158. All stock corporations, when not expressly or by implication forbidden to do so, have general power to make contracts furthering the objects of their creation. This authority exists by necessary inference from the general powers conferred

on the corporation to do business. Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Clark v. Barrington, 11 Wis. 306; Winterfield v. Cream City Brg. Co., 96 Wis. 239, 71 N. W. 101; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921.

"We discover nothing in the contract here in question contravening any statute conflicting with the objects or purposes of the corporation or offending against public policy, and therefore the bond must be held to be valid."

As we have already stated, there is no statute which forbids either expressly or by implication the making of such a contract on the participating basis by a stock casualty company. Such a contract would not contravene any statute conflicting with the objects or purposes of the corporation, and surely public policy would not be offended by a stock company giving back a part of its excess earnings to its contract holders.

Stock casualty companies are given broad powers to issue insurance contracts, and "when not expressly or by implication forbidden to do so, have the general power to make contracts furthering the objects of their creation." The Jacobs case above held that no specific statutory authority or specific powers given by the articles of incorporation were necessary to permit the issuance of contracts, the broad power of which the company had, unless the specific matter was specially forbidden by law, and, therefore, not included in the broad general powers.

The case of General Insurance Company v. Earle, 65 Pac. (2d) 1414, decided by the Supreme Court of Oregon on March 16, 1937, is largely in point. In that case, the plaintiff was a stock company domiciled in the State of Washington, and sought to compel the Insurance Commissioner of Oregon to permit it to write participating policies in the State of Oregon. The plaintiff was authorized by its

charter to write participating policies in the State of Washington, but no such authority was given by statute in Oregon, and, conversely, no statute in Oregon specifically prohibited such a practice by stock companies. The court said, l. c. 1416:

> "The two main contentions urged in support of the commissioner's ruling are substantially as follows: (1) That a policy containing this provision fails to specify on its face, as required by section 46-141, Oregon Code 1930, the amount of the premium to be paid thereon, since the amount which will ultimately be distributed to the holder is an indefinite sum which cannot be determined until the expiration of the policy period; and (2) that the payment by the insurer to the insured, under a participating policy, of any part of the premium stated in the policy, is unlawful under subdivision 7 of section 46-107, Oregon Code 1930, when made by a stock company.
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> "Section 46-141, in part, provides: 'Every insurance policy issued in this state shall bear on its face a true statement of the premium paid or to be paid and no insurance company * * * shall * * * offer, promise, * * * or pay directly or indirectly, any rebate of, or part of, the premium payable on the policy, * * * or any other valuable consideration or inducement * * * for insurance, on any risk * * * which is not specified in the policy of insurance; nor shall any company * * * offer, promise, give, sell or purchase any * * * property, or any dividends * * * or other thing of value whatsoever, as inducement to insurance * * * which is not specified in the policy.'

"In the nature of things, no insurance company writing a participating policy can tell in advance what losses it may sustain during any policy period, nor what amount of earnings it will have on hand for distribution to its policyholders at the expiration of such period. It therefore is impossible for it to specify on the face of the policy the exact amount which will be distributed to the holder upon the termination of the policy. Like all other insurance companies, the plaintiff was required to file its schedule of rates in the office of the insurance commissioner and, in writing its policies, was compelled to exact from its policyholders payment of the rate stated in the schedule filed with the commissioner. The amount thus to be paid was a definite and fixed amount and was stated on the face of the policy itself. This we think conformed to the provisions of section 46-141, Oregon Code 1930, which requires that every insurance policy shall bear on its face a true statement of the premium paid or to be paid, and that no rebate or other consideration for insurance shall be promised or paid unless specified in the policy. Whatever sum would later be repaid to the policyholder under this participating clause was of benefit to the policyholder and in the public interest. There is nothing wrong or immoral in the making or execution of such a contract and, unless forbidden by some other statute, the contract was lawful and in the interests of the public.

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"It is contended that, under the proviso contained in subdivision 7 of section 46-107 Oregon Code 1930, stock companies

are prohibited from returning to their policyholders any part of their unabsorbed premiums. That subdivision directs that every insurance company, excepting a marine insurance company, before receiving a license or a renewal of a license to transact insurance business, shall file its rating schedules and policy forms in the office of the insurance commissioner, and shall observe its rating schedules and not deviate therefrom until amended or corrected rating schedules have been filed and, in its application of rates between risks of essentially the same hazard, shall make no discrimination. Following these provisions is a proviso reading as follows: ' * * * provided, that nothing herein contained shall prevent any mutual insurance company or any interinsurance or reciprocal insurance exchange from making return of unabsorbed premiums to members at the end of the policy period.'

"To this proviso we are asked to apply the rule that the expression of one thing is the exclusion of another. One of the offices of a proviso is to exclude some possible ground of misinterpretation of it, and this, we think, was the purpose sought to be accomplished by this proviso, for it could answer no other purpose so far as the return to its members of its unabsorbed premiums by a mutual company or interinsurers or reciprocal insurance exchanges are concerned. Their common-law right to distribute among their own members their surplus profits exists independent of statute, and this proviso merely confirms that right and places it beyond dispute. Moreover, if the interpretation sought to be given to section 46-141 could be upheld as to a stock company, it must be upheld as to a mutual company writing participating policies, for it applies to all insurance companies, whether stock or

> mutual companies, and the failure to specify on the face of the policy the exact amount to be returned to the policyholder would be as fatal in one case as in the other and would be as much a bar to a mutual company as to a stock company.
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> "In construing statutes containing the same terms as are written into our statute, the Supreme Court of the state of Ohio, in State ex rel, v. Conn., 110 Ohio St. 404, 144 N. E. 130, overruled both the objections urged here and, in doing so, we think clearly interpreted these particular provisions.
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> "The further contention that, in permitting the plaintiff to issue participating policies, it might cause a rate war, is answered by the fact that these policies have been in force for the last thirteen years and no rate war has ensued." (Italics ours)

As stated in the Oregon case, a participating contract is of "benefit to the policyholder and in the public interest." Further, that "There is nothing wrong or immoral in the making or execution of such a contract and, unless forbidden by some other statute, the contract was lawful and in the interests of the public."

This, therefore, brings us to a consideration of the clause in said Section 5796, which provides that "it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized * * *;" This clause is very broad and indefinite. It does not describe what is meant by the mutual plan or what is meant by the stock plan of insurance. It certainly does not say that a stock company cannot write a participating policy in so many words. It also does not say that companies doing business on the mutual plan can write a nonassessable policy despite the fact that it has no capital stock fund to protect the policyholders, although we are informed that most mutual companies do write nonassessable policies. The principal question is then, what

is the mutual plan and what is the stock plan?

Mutual companies are described in Cooley's Briefs on Insurance, Second Edition, Volume 1, page 67, as follows:

> "Mutual companies ordinarily possess no capital stock, but are made up of all the policy holders who take the place of the stockholders in an ordinary corporation, and act through agencies selected by themselves. The capital of such organizations usually consists of either cash or assessable premium notes, or both, contributed by the members to the common fund out of which each is entitled to indemnity in case of loss."

Mutual companies are described in 36 Corpus Juris, 1018, as follows:

> "Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. It is that form of insurance in which each person insured becomes a member of the company, and members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid on all members. * * * If policies are issued to persons who are not members of the association, it is not mutual insurance."

Again, in 32 Corpus Juris, 1020, we find the following:

> "There is an essential difference between stock and mutual insurance companies. A stock insurance company is

> a corporation with a capital stock organized for the profit of its stockholders, who need not be policyholders. * * * The disctinction between joint-stock insurance companies and mutual companies is that the former have a subscribed capital while the latter do not have such a capital but depend on their premiums. A mutual company is somewhat of the nature of a partnership; insured becomes a member of the corporation by virtue of his policy, is entitled to a share of the profits, and is responsible for the losses to the extent of his premium paid or agreed to be paid."

As to stock companies, we find the following in Cooley's Briefs on Insurance, Second Edition, Volume 1, page 66:

> "A stock company is one which possesses a fixed amount of capital stock owned by shareholders, who constitute the corporation, and act through officers selected by them. These companies are in their organization and internal government controlled by the rules of law governing corporations generally, so far as they are applicable, and also by special rules applicable only to insurance companies. The shareholders in an insurance company have, in general, the same rights as the shareholders in any other corporation (Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 14 South. 490, 42 Am. St. Rep. 17), and the officers are generally invested with the powers usually appertaining to coporate officers."

From 32 Corpus Juris, 1005, we quote as follows:

> "A stock insurance company is a corporation having a capital divided into shares, which is liable for the company's losses and expenses, and which is contributed by the stockholders who take the profits of the business. As distinguished from a mutual insurance company, it is a proprietary company established and carried on solely for the purpose of providing profits to its stockholders by the insurance of others. Although many proprietary companies carrying on ordinary life insurance business combine the mutual element with the proprietary, and divide their profits, apportioning a limited percentage to the stockholders as dividends on their shares and the balance of the policyholders, this practice does not transform the company into a mutual company."

The mutual plan of insurance, therefore, seems to be principally the lack of a capital stock fund, and, further, that the control of the company is exercised by the policyholders, each of whom must be a member of the company. The stockholders of a mutual company consist entirely of its members, all of whom are policyholders, and the members retain entire control of the company and elect the officers and director. In a stock company, the policyholders have no control whatsoever in the management of the company, and this power is vested entirely in the owners of the capital stock who need not be policyholders. Policyholders are not stockholders in a stock company and have no voice in the management of its affairs unless they might otherwise have acquired a share or shares of stock. Therefore, the control and management of the company, and the fact that each policyholder is a member of the company and is also insured, as well as an insurer, seems to be the distinguishing feature.

It cannot be said that the issuing of a participating contract by a stock company changes its character to that of a mutual. As stated in 32 Corpus Juris 1005, quoted above, "this practice does not transform the company into a mutual company."

The 1936 opinion of this office, and the concurring 1939 opinion, proceeded on the theory that the issuing of a participating policy was the one and principal distinguishing feature between the mutual plan and the stock plan of insurance. We do not believe this to be true.

The several cases on the subject, and also the textbooks on insurance, generally say that the stockholders of the stock company "take the profits of the business," or are "entitled" to receive the profits. In a stock company, the stockholders undoubtedly are "entitled" to the profits in the first instance, and no such company could be forced to divide the profits with its contract holders. However, being "entitled" to take the profits, and being forced to take and retain the same, appear to be two different things. We do not believe the Legislature ever had in mind the thought that the stockholders of a stock company should be forced, even against their will, to not only accept but also at all times to retain and personally keep each and every profit the company might make. Surely, if the Legislature had meant to say that, it would have used direct, clear and positive language to have accomplished that purpose.

It would follow, therefore, that if any stock casualty company, organized or licensed under Article VI of Chapter 37, desires to return a part of its earnings to the policyholders, it is not prohibited from so doing. In the absence of a specific statutory prohibition, the stockholders of a stock company are at liberty to give away to their contract holders as much of the profits as they might desire, and any such practice would not contravene any provisions of the Missouri statutes nor public policy. It would be to the interest of the public to permit a participation, and of benefit to the policyholder.

## CONCLUSION

It is therefore the opinion of this department that there is nothing contained in Article VI, Chapter 37, R. S. Mo. 1929, which either directly or indirectly prohibits the issuance of participating policies of insurance by stock casualty companies, and that any such

participating clause would be of benefit to the policyholders and in the public interest. Further, that there is nothing wrong or immoral in the making of such a contract whereby policyholders will be permitted to share in the profits of stock casualty companies.

Respectfully submitted,

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