Insurance Companies, Reinsurance With Non-Licensed Company—Insurance Commissioner, Authority Of to Revoke License.

Where an insurance company reinsures with a non-licensed company contrary to the orders of the investment commissioner, the license may be revoked.

May 24, 1920.

Hon. Geo. P. Porter,
Commissioner of Insurance,
Capitol.

Dear Sir:

I have your letter of March 26th, 1920, in which you ask for an opinion upon the proposition of whether or not you have authority over the matter of placing re-insurance by an insurance company duly licensed by the State of Montana with an insurance company not licensed by the State.

The legislature has the general power to regulate, and through its properly constituted officers, supervise the insurance business. It may prohibit any foreign insurance company or association from doing an insurance business within the State. It may prescribe as a condition for doing business within the State that the insurance company apply for and receive a license, for which it must first pay a license fee. It may also regulate the matter of re-insurance by one company in another company and require that such re-insurance be placed only with companies duly licensed by the State of Montana. By appropriate provisions it may punish acts violating such statutes.

The question then presents itself: Has the Legislature of Montana prescribed such requirement? Section 4037 expressly prohibits any fire insurance company from re-insuring any portion of its risks on property located within this State in any insurance company not authorized to do business in this State. Therefore, so far as insurance covering fire risks is concerned, there is no doubt upon the proposition. In such

case the re-insurance must be placed in a duly licensed and admitted company. Section 4040 prescribes a penalty for the violation of this provision by any insurance company.

Section 4163 provides that no accident insurance company doing business upon the assessment plan shall transfer or re-insure its risks to or in another company unless such company shall first be duly licensed and admitted to do business within the State of Montana. Therefore, as to this particular kind of insurance, there is no doubt upon the question you submit.

I am, however, unable to find any express provision regulating the matter of re-insurance of any other kind of insurance business. The question arises as to whether or not the Commissioner under the general power has authority to compel such re-insurance to be placed with an admitted and licensed company.

The nature and operation of a re-insurance contract is discussed in the case of Strong vs. Phoenix Insurance Company, 62 Mo. 289, 21 Am. Rep. 417, where it is said:

> "The contract for re-insurance is totally distinct from, and unconnected with, the primitive insurance; the original insured has no kind of claim against the re-insurer, and the re-assured remains solely liable on the original insurance, and alone has a claim against the re-insurer. * * * It thence follows that there is no privity between the original insured and the re-insurer, and that the liability over of the re-insurer is exclusively and solely to the re-insured."

Again, in Joyce on Insurance, Vol. 1, Section 112, it is said:

> "Re-insurance is a contract whereby one for a consideration agrees to indemnify another against loss or liability assumed by the latter as insurer of a third party, other definitions have been given as folows: 'A contract by which one insurer causes the sum which he has insured to be re-assured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility.' 'Re-insurance is an indemnity against a risk incurred by the assured in consequence or a prior insurance upon the same property or some part of it.'"

The same author in Section 113, says that the contract of re-insurance is not one of guaranty, but is one of indemnity. This is generally supported by authority and is undoubtedly the correct interpretation of a contract of re-insurance. In Section 117, the same author discusses the relation existing between the various parties to a contract of re-insurance, and says as follows:

> "The re-insured sustains after the re-insurer the same relation which the original insured bears to the re-insured, but the contract of re-insurance does not inure to the benefit of the assured, and he has no claim, legal or equitable, against the re-insurer, nor any interest in the contract, and the re-insurer is not liable to him either as surety or otherwise. There is no privity of contract between them and the re-insured remains

solely liable on the original insurance, and he alone has a claim against the re-insurer, * * * The rule that there is no privity of contract between the insured and the re-insurer is subject, however, to such exceptions as may arise from the agreement of the parties, as where the contract provides that the assured may sue the re-insurer; or in case of transfer of a business and consolidation of the insurer with another company the re-insurer becomes directly liable, or where the re-insurer assumes all risks and liabilities of the insurer here, the insured may sue the re-insurer."

Acording to the law as indicated in the last paragrahp, it is therefore true that some re-insurance contracts contain more than mere re-insurance. Where such contract assumes the particular risk of the original insured, such person may sue the re-insurer directly, as the contract will be held to be made for his benefit. (Travelers Insurance Company vs. California Insurance Company, 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703; 8 L. R. A. N. S. 862, Note 5). If the re-insurance contract has this effect, I am of the opinion that the re-insured (the original admitted insurance company) may be held to have violated Section 4021 of the Code. This prohibits the aiding in placing insurance in a non-admitted company. If it does violate this Section, the Auditor would have the authority to revoke its license because of the fact that it has violated the law. This, however, would depend upon each particular contract of re-insurance.

Where a regular re-insurance contract is involved, and where such contract is made outside of the State of Montana, that would not be considered as doing busines in the State of Montana by the non-admitted company. Sections 4020, 4021, and 4022 would not reach either company in negotiating and placing re-insurance outside of the State. Re-insurance is a contract of indemnity, and the re-insurer has nothing to do with the adujstment of the original loss nor does he bear any relation to the original insured. It is true that laws regulating the subject of insurance are designed primarily for the protection and benefit of the citizens of the State, but when a commissioner under the law or an executor of the law acts, he must be able to point to authority in the law for such action.

You refer to Senate Bill 178, Laws of 1918, as conferring authority upon you to compel re-insurance to be placed in an admitted company. This is Chapter 149, Laws of 1917. This act provides that foreign insurance corporations licensed to do business in the State shall be subject to all the liabilities and restrictions which are inposed upon domestic corporations. This law has no application to the question here involved. In the first place, the foreign insurance company risks does not do business in the State of Montana, nor is the company admitted to do business here. The company placing the re-insurance, so far as the question submitted by you is concerned, is the only company involved. The re-insurer in fact is not involved as it is a foreign company not licensed to do busines in the State of Montana and could not be reached by your office. The only question with which you are concerned is

whether or not you can compel the original insurance company admitted to do business in this State to place its business or re-insurance in another company which has been admitted to do business in this State.

In 1909 our Legislature passed an act, Chapter 13, which gives to the Commissioner of Insurance authority to examine all companies desiring to do or actually doing business within the State of Montana. Section 2 of said act provides among other things, as folows:

> "If the Commissioner finds upon examination, hearing, of other evidences, that any insurance company, including surety componies, organized in this State or in any other state, territory or foreign country, is in an *unsound* condition, or has failed to comply with a law or with the provisions of its charter, *or that its condition is, or its methods are, such as to render its operation hazardous to the public or to its policy holders,* or that its actual assets, etc. * * * he shall suspend or revoke al certificates of authority granted to sail insurance company and to its officers or agents, and shal cause notice thereof to be published, etc."

As has been said above, the contract of re-insurance is one of indemnity. For this contract the insurance company pays out a part of the premiums it collects from the various persons whose risks it carries. Certainly it is an important feature of the insurance business as to where and to whom the insurance premiums by an insurance company are paid out. There can be no doubt that under the general provisions of our insurance law the Auditor has full authority to make investigations as to this feature of the business and can supervise the companies in their dealings with other insurance companies. There can further be no doubt that, if it is a fact that an admitted insurance company is carrying re-insurance with a non-admitted company, which company is financially unsound, the insurance commissioner may compel the admitted company to desist from this busines or revoke its license. I am further of the opinion that if the Insurance Commissioner deems it unsafe or hazardous to the interests of the policy holders, he may refuse to license any company who places its re-insurance in a non-admitted company. The matter of investigating non-admitted companies as to their financial policy and standing is one which presents many difficulties where such company is not admitted to do business within this State. Upon this ground I am of the opinion that the Insurance Commissioner has the authority under Chapter 13 of the Laws of 1909 to revoke the license of any admitted company who continues contrary to his orders to do business with a non-admitted company.

Respectfully,

S. C. FORD,

Attorney General.