11/24/44 This does not conform to the policy adopted by this department. F.P.C.

no

May 16, 1944

To F. K. Purinton, Executive Secretary, Executive Department
From Abraham Breitbard, Deputy Attorney General

In answer to your memo to me, inquiring whether the State may insure its public buildings in mutual fire insurance companies, I have the honor to advise you that there can be no objection to the State's insuring its public buildings in mutual fire insurance companies, providing that the same is non-assessable and is written on a cash premium basis by companies authorized to write insurance on a non-assessable plan.

In a number of States including our own (See Laws of 1943, c. 334), mutual insurance companies are authorized to write insurance on a cash premium basis and the policy holder is subject to no further liability.

I can find no statute or constitutional provision which prohibits the State from insuring with a mutual company on the non-assessable plan.

The only provision in the Constitution that would have any relation or bearing would be Article IX, §14, that

> "The credit of the State shall not be directly or indirectly loaned in any case."

The constitutional question was raised and decided in the State of Oregon in Johnson vs. School District No. 1, 128 Oregon 9 (1929). There the question was raised by the plaintiff, who sought to cancel the policies written on the non-assessable plan for a county school district, and the contention was that the policies violate the spirit and intent of Article XI, §9, of the Oregon Constitution, which, so far as is material to the question, provided,

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association."

After interpreting the statute relating to the writing of non-assessable policies by mutual insurance companies, the Court said:

> "We conclude that the statute authorizes the issuance of nonassessable policies and, since liability to assessment ceases on payment of the cash premium (Schimpf & Son v. Lehigh Valley Mutual Incs. Co., 86 Pa. St. 373; Farmers & Breeders' Mutual Reserve Fund Live Stock Ins. Co. v. Beck, 66 Pa. Super Ct. 528; In re Minneapolis Mutual Fire Ins. Co., 49 Minn. 291 (51 N.W. 921; 21 C.J. 121, there is no violation of the letter or the spirit of Article XI, Section 9, of the Constitution.

> The conclusion reached is strongly supported by French v. Millville, 66 N.J.Law, 392 (40 Atl.465), rendered under a similar constitutional provision providing that no municipal corporation 'shall directly or indirectly be the owner of any stock or bonds of any association or corporation.' In that case, although there was a contingent liability under the policy, the court said:
>
> 'The scheme of mutual insurance in such associations does not fasten upon the members any liability which municipal corporations may not with reasonable safety assume, for the limit of obligation is always fixed at the time the insurance is obtained and is rarely enforced beyond what would be charged for insurance on the non-mutual plan.'
>
> The court concluded that the city, by giving its premium notes, did not loan its credit to the company in violation of the Constitution.
>
> We do not go so far as the New Jersey case, holding that there is no lending of credit even though a contingent liability exists. In the instant case there is no liability contingent or otherwise. . . "

The prohibition contained in Section 14 of Article IX of the Constitution of Maine that "The credit of the state shall not be directly or indirectly loaned in any case," would not be violated, according to this authority, by insuring with a mutual company on the non-assessable plan, although it is very strongly intimated that if the policy provided for a contingent liability, this constitutional provision would be offended. See also McMahon v. Cooney, 95 Mont.138 (1933).

It has been suggested that under R. S. 1930, Chapter 60, §36, the future contingent liability may be, and in actual practice is, definitely fixed by our mutual companies so that at the time the policy is written the extent of the future liability to assessment is definitely determined and fixed. The argument is then advanced that where the limit of future liability is definitely known there can be no objection to the State's carrying insurance with companies writing on the strict mutual plan. This is the theory we follow.

The difficulty, however, with that proposal is that under §§39-48, a procedure is set up for the making of the assessment by the directors and its enforcement against the policyholders by application to the courts. As the sovereign State is immune from any process or from being subjected to any suit or proceeding, these provisions could not be applied to the State as a policyholder. This, in my judgment, would be an obstacle which would prevent a mutual company from accepting an application of the State for a policy of insurance.

I am therefore of the opinion that the State may properly become a policyholder in a mutual company, where the charter of the company and the policy expressly provide that it may be written on a non-assessable basis and that no liability is incurred by the insured beyond the cash premium paid. This would exclude both domestic and foreign mutual companies writing on the strict mutual plan, which provides for a fixed or unlimited contingent future liability.

AB:c

Abraham Breitbard
Deputy Attorney General