



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

September 10, 1958

Hon. Jesse James
State Treasurer
Austin, Texas

Opinion No. WW- 497

Re: Can the Commissioner of Insurance delegate the responsibility of approving the securities deposited with the State Treasurer under Articles 3.15, 6.09, 8.05, 14.10 and 17.25, Section 4, of the Insurance Code? Is a general court order placing an insurance company in receivership sufficient authority for the Treasurer to release such deposits to the receiver?

Dear Mr. James:

You have requested from this office an opinion on the following questions:

A. Whether the State Board of Insurance and/or the Commissioner of Insurance has the authority to delegate to any employee of the State Board of Insurance other than the Board members or the Commissioner of Insurance the power of approval of securities for deposit with the State Treasurer under Articles 3.15, 6.09, 8.05, 14.10 and 17.25, Section 4, of the Insurance Code, the withdrawal of such securities so deposited and/or the substitution of other securities for the securities withdrawn.

B. Whether a general court order placing a company in receivership is sufficient authority for this department to release any collateral deposited in this office by the affected company to the liquidator.

The articles in question require or permit deposits of securities with the State Treasurer by certain classes of insurers in the State and in connection therewith either refer to action by the "Board of Insurance Commissioners" or "the Board".

All of the "powers, functions, authorities, prerogatives, duties, obligations or responsibilities" formerly vested in the State Board of Insurance Commissioners have been vested in the State Board of Insurance by Article 1.02(b), Acts 1957, 55th Leg., ch. 499, p. 1454, Sec. 2. These powers, functions, etc., by the terms of the same article are to be "exercised, performed, carried out and administered" by the Commissioner of Insurance as the chief executive and administrative officer of the Board. The duties of the Board itself are limited primarily to those of a supervisory nature. Therefore, the Commissioner of Insurance has the authority to perform all of the acts formerly required of the "Board of Insurance Commissioners" or "the Board" in connection with the above mentioned deposits. Opinion No. WW-166. The question then arises as to whether such authority and responsibility can be delegated, it being fundamental that powers and functions which are discretionary or which require the exercise of judgment cannot be delegated by a board or official to a subordinate in the absence of express statutory or constitutional authority. 73 C.J.S. 381. The "approval" of securities for deposit clearly involves the exercise of discretion. See Gustafson v. Wethersfield Tp. High School Dist., 49 N.E.2d 311 (App. Ct. of Ill. 1943). The only provision of the Insurance Code which could possibly be considered as granting such authority is Section (g) of Article 1.09 of the Insurance Code, Acts 1957, 55th Leg., ch. 499, p. 1458, Sec. 2, which provides:

"The Commissioner of Insurance shall appoint such deputies, assistants, and other personnel as are necessary to carry out the duties and functions devolving upon him and the State Board of Insurance under the Insurance Code of this state, subject to the authorization by the Legislature in its appropriations bills or otherwise, and to the rules of the Board." (Emphasis added.)

It is our opinion that this provision, while clearly allowing the Commissioner to delegate his ministerial responsibilities to the assistants appointed pursuant thereto, does not constitute legislative authorization for the delegation of powers and functions which require the exercise of judgment. Public Adm. Law, 42 Am. Jur. 387.

We have been furnished a copy of a letter signed by Commissioner Harrison informing you that two named employees of the Insurance Board "have been authorized to sign on behalf of the Commissioner of Insurance the deposit and withdrawal forms for securities placed with the State Treasurer. ..."

The act of signing such forms on behalf of the Commissioner and at his direction is a ministerial act falling within the purview of Section (g) above cited, provided the actual approval or disapproval of the securities involved is made by the Commissioner himself. See 107 A.L.R. 1477 and annotation following.

To answer your second question correctly it must first be determined whether or not a receiver becomes entitled to these deposits by the mere fact that the depositing company has been placed in receivership. None of the enumerated articles makes any provision for turning such deposits over to the receiver. Article 21.28, dealing with the liquidation, rehabilitation, reorganization or conservation of insurers, provides in Section 2(a) that:

"Whenever under the law of this State a court of competent jurisdiction finds that a receiver should take charge of the assets of an insurer domiciled in this State, the liquidator designated by the Board of Insurance Commissioners as hereinafter provided for shall be such receiver. The liquidator so appointed receiver shall forthwith take possession of the assets of such insurer and deal with the same in his own name as receiver or in the name of the insurer as the court may direct." (Emphasis added.)

Subsection (b), Section 2, of the above article provides that "the property and assets of such insurer shall be in the custody of the court as of the date of the commencement of such delinquency proceedings." It would appear, then, that if the deposits in question constitute "assets" of the depositing corporation, the receiver is entitled to their possession. Section 1(c) defines "assets" for the purposes of this article as meaning "all property, real or personal, whether specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons, or a limited class or classes of persons." The word 'asset', as used in this Article, includes all deposits and funds of a special or trust nature."

This definition is the result of an amendment to Section 1(c), being Acts 1955, 54th Leg., ch. 267, p. 737, Sec. 1. Prior to such amendment and since 1939, "assets" as used in this section was defined as follows:

"'General assets' means all property, real or personal, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security

or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all in excess of the amount necessary to discharge the sum or sums secured. Assets held in trust and assets held on deposit, for the security or benefit of all policyholders, or all policyholders and creditors, in the United States, shall be deemed general assets."

Deposits similar to those required under the Insurance Code have been construed by the courts as constituting special funds for the benefit of a particular class of creditors, while others have been construed as being nothing more than a deposit as security for the policyholders generally. The importance of the distinction is shown by People v. Granite State Provident Association, 161 N.Y. 492, 55 N.E. 1053, but does not affect the answers to your questions. It will be noted, however, that there is at least a question as to whether or not those deposits constituting special funds were included within the "assets" which the receiver was authorized to take possession of prior to the amendment of Section 1(c).

There is a line of authority construing Article 749F (i) (1897), forerunner of the present Article 698, relating to deposits required to be made by bond investment companies as a condition precedent to doing business in this State. The article, unlike those in question, specifically provided for the receivership contingency in the following terms:

"...In case of the failure of any company covered by this act, the district court of the county or city in which the principal office is located, upon the application of one or more shareholders, shall appoint a receiver for such company, whose duty it shall be to wind up the affairs, liquidate its debts, and distribute its assets, using therefor, upon the order of the court, the deposit previously made, to secure the shareholders, with the State Treasurer, and the State Treasurer is hereby authorized to pay out such deposit in accordance with requisitions made upon the State Comptroller by said receiver, and approved by the court, upon the warrant of the State Comptroller."

It was concluded that such language made the deposit unavailable to the receiver until final adjudication of the

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rights of the parties interested in the fund had been made and the debts established. Ex Parte Stevens, 94 S.W. 327 (Sup.Ct. 1906), and Hart v. Stevens, 100 S.W. 135 (Sup.Ct. 1907).

Phillips v. Perue, 229 S.W. 849 (Sup.Ct. 1921), construed Article 4930, now repealed, relating to deposits required to be made by surety and guaranty companies, said article containing no directions to the State Treasurer as to the disposition to be made of such deposits in the event of insolvency. We find therein the following:

"We think it clear that the District Court of Walker County, under the circumstances shown, had the power to appoint a receiver of the fund, and also to disburse it through its receiver rather than through the State Treasurer. The law makes no provision for the Treasurer's converting the deposit into money, or for its distribution in the case of numerous claimants. To make an equitable distribution under such conditions was peculiarly within the province of a court of equity. ... There is nothing in the law that under the circumstances here present would require the court to disburse the fund through the Treasurer to the exclusion of its receiver."

Also applicable to our problem is the case of Holloway v. Federal Life Insurance Company, 21 F. Supp. 516 (Dist.Ct. W.D. Mo., W.D. 1937). The Superintendent of Insurance rather than the State Treasurer is custodian of the deposits required or permitted to be made by insurance companies doing business in Missouri. The case arose upon his refusal to turn such deposits over to a receiver. In determining he should be required to do so, the Court made the following observations:

"...A paramount question arises as to how the superintendent of insurance can apply the securities now held by him. He is not an executive receiver; he is not authorized to liquidate the company; and, moreover, the Federal Reserve Life Insurance Company is no longer a going concern. It was his duty to hold securities while the company was doing business, and to do so as trustee for policyholders in Missouri.

"A court of competent jurisdiction has taken over the Federal Reserve Life Insurance Company. It becomes the duty of the court to

direct the collection by its receiver of all the assets of the company so that same can be equitably and properly applied to the discharge of the obligations of said company. The court alone is capable of determining what priorities, preferences, and liens may be allowed and enforced against said assets. The responsibility of the superintendent of insurance as an executive officer is completely discharged when a court, whose duty it is to administer the estate, calls for a surrender and delivery of said assets."

In accordance with the reasoning of the Phillips and Holloway cases and in view of the present definition of "assets" in Section 1(c) of Article 21.07 of the Insurance Code, we conclude that the receiver is entitled to any sums deposited with the State Treasurer under the above articles. This being the case, a general Court order placing a company in receivership such as you transmitted to us with your request which directs the receiver to take possession of "any statutory or special deposit made by or for the benefit of" any insurance company "with any officer or agency of the State of Texas" is sufficient authority for your department to release any collateral so deposited.

It should be pointed out that by this opinion we are not to be considered as determining the proper method or forum to be utilized in requiring the Treasurer to turn such deposits over to a receiver in the event of his refusal to do so voluntarily.

SUMMARY

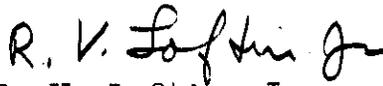
The Commissioner of Insurance is not authorized to delegate the discretionary responsibility of approving securities for deposit with the State Treasurer but may delegate any purely ministerial acts in connection therewith.

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A general Court order placing an insurance company in receivership is sufficient authority for the Treasurer to release the securities deposited with him under Articles 3.15, 6.09, 8.05, 14.10 and 17.25, Section 4, of the Insurance Code.

Very truly yours,

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