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FRATERNAL BENEFIT SOCIETY:

1. MAY PAY DIVIDENDS TO MEMBERS OUT OF SURPLUS FUND—AFTER PROVIDING FOR ADEQUATE RESERVES —BY ACTION OF GOVERNING BODY PURSUANT TO CONSTITUTION AND BY-LAWS.

2. MEMBERS WHO OWN PAID UP CERTIFICATES—ENTITLED TO SHARE IN SURPLUS WHEN DISTRIBUTED BY WAY OF DIVIDENDS EQUITABLY AND IN PROPORTION TO CONTRIBUTIONS TO SURPLUS AND ON MATHEMATICAL PLAN FORMULATED BY GOVERNING BODY.

3. MAY READJUST RATES BY WAIVING MONTH'S PREMIUM OR GIVING MONTH'S PREMIUM CREDIT WITHOUT GIVING CREDIT TO MEMBERS WHO HAVE PAID UP CERTIFICATES—ACTION OF GOVERNING BODY PURSUANT TO CONSTITUTION AND BY-LAWS.

SYLLABUS:

1. A fraternal benefit society may pay dividends to its members out of the surplus fund, after providing for adequate reserves, by action of its governing body pursuant to its constitution and by-laws.

2. Members of a fraternal benefit society whose certificates are paid up are entitled to share in the surplus when distributed by way of dividends equitably and in proportion to their contributions to the surplus and on a methematical plan formulated by the governing body.

3. A fraternal benefit society may readjust its rates by waiving a month's premium or giving a month's premium credit without giving credit to members who have paid-up certificates, by action of its governing body pursuant to its constitution and by-laws.

Columbus, Ohio, March 5, 1945

Hon. Walter Dressel, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

I have your letter requesting my opinion which reads as follows:

"I desire an opinion of your office on the following state of facts.

The Central-Verband Siebenburger-Sachsen of the United States was incorporated under the laws of the State of Ohio and is licensed to do business in Ohio. During the past years it has been the custom and practice of the Board of Grand Trustees to waive or give every paying member of the organization one monthly premium credit.

At the present time about one thousand of the members' certificates are paid up, and it has been the custom of the Society, in order to maintain a high percentage with regard to its solvency, not to give or extend any credit to those members who were holding paid-up certificates. This Society has been operating under the Fraternal Benefit Societies, Section 9462-2 et seq.

During the past the Society under the above mentioned section had waived monthly premiums but have never made any returns in cash to any members, and I would desire your opinion upon the following questions.

1. If a member's certificate becomes paid up on a twenty-year paid life policy and he is making no further payments thereon, is he entitled to any waived premiums, and if so, how can the Society pay the same and from what fund?
2. Can a Fraternal Benefit Society such as that in question pay dividends to its members, and if so, how are they to be determined and from which fund?
3. If dividend payments are legal under the laws of Ohio, should members whose certificates are paid up further share in those dividend payments and to what extent?
   Kindly let me have your opinion upon the above questions at your earliest convenience."

I desire to take the liberty of answering your questions in a different order from that presented. Your question No. 2 states as follows:

"Can a Fraternal Benefit Society such as that in question pay dividends to its members, and if so, how are they to be determined and from which fund?"

Sections 9462 to 9509, inclusive, of the General Code, are the general sections pertaining to fraternal benefit societies. Section 9465 of the General Code provides as follows:

"Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

We must look, therefore, to the above cited sections of the General Code for our answers. There is no specific section contained in the above statutes pertaining to fraternal benefit societies giving them specific authority to pay dividends. However, there is a general statute, Section 9470, General Code, which, I believe gives this power to such societies at least by implication providing it is done in accordance with the society's laws and provided for in its contracts.

Section 9470 General Code, investment, disbursement and application of funds, Subsection 1, provides as follows:

> "Any society may create, maintain, invest, disburse and apply an emergency, surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection 2 of Section 5 (G. C. Sec. 9466) of this act. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of such funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent. per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum."

It is to be noted that the first part of this section gives the society the authority to create and disburse these funds. The second sentence of the statute provides that "unless otherwise provided in the contract", such funds are for the purposes set out in Section 9466 of the General Code.

Section 9466 of the General Code provides as follows:

> "Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical

disability, either as the result of disease, accident or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence, shall not be under seventy years, and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all, or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon death or disability of the member occurring within the term for which the benefit certificates may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate with interest payable or compounded annually at a rate not lower than three and one-half per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment."

The above quoted Section 9466 does not provide for the payment of dividends but this section is not exclusive as indicated by the phraseology of Section 9470, General Code.

Fraternal insurance is mutual and not for profit. See Section 9462, General Code. It would seem, therefore, that after a surplus is created it would be in keeping with the theory of such insurance to distribute the same in the form of dividends if the necessary by-laws and contract so provide. See 29 Am. Jur., page 93, Section 64, wherein is found the following statement:

"* * * Clearly it is competent for a mutual insurance corporation, where there is no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business. * * *."

Section 9469 of the General Code, certificate shall constitute agreement, is the so-called "open contract" section and provides as follows:

"Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, of (or), if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his beneficiaries and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

It would appear that under this section a provision of the company's by-laws for the paying of dividends would be binding on all policyholders irrespective of the time they became members.

The statutes in regard to fraternal societies provide for several funds. Section 9462-1, General Code, authorizes fraternal societies to write insurance upon the lives of certain children. Section 9462-3, General Code, provides for the maintenance of a reserve and a separation of these funds from the other funds of the society. Section 9462-4 General Code, provides for separate financial statements as to this fund "nor shall the funds be diverted for any use other than as specified in Section 9462-3."

Section 9466, General Code, provides for the writing of health and accident insurance. Section 9472, General Code, provides as follows:

"Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of such funds shall be used for expenses."

This section speaks of the other funds—the mortuary fund, disability fund and expenses.

Section 9470, General Code, previously quoted, permits the creation by the society of a surplus fund.

Section 9485-1, General Code, charge for cost of insurance, provides in part as follows:

> "Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis as the society may provide by or pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society."

It would seem, therefore, that ample provision has been made for the creation of a surplus fund over adequate reserves and that dividends may be paid and could only be paid out of the surplus fund and that at the direction of the governing body of the fraternal society. See Section 9464, General Code.

Your question No. 3 reads as follows:

> "If dividend payments are legal under the laws of Ohio should members whose certificates are paid up further share in those dividend payments and to what extent?"

As previously pointed out, Section 9470, General Code, in its first sentence provides as follows:

> "Any society may create, maintain, invest, disburse and apply an emergency, surplus or other similar fund *in accordance with its laws.*" (Emphasis added.)

Generally speaking, a surplus in a mutual company equitably belongs to the policyholders who contributed to it in proportion to their contributions and the excess in the premiums over the actual costs of the mutual insurance, as later ascertained, is to be returned to the policyholders. See 29 Am. Jur., page 94.

The apportionment of the distributable surplus of an insurance company among the different policies entitled to share in it would appear to depend, from the legal point of view, upon the applicable statutes, the character of the company and the pertinent provisions of the policies in question. It has also been recognized that a mutual insurance company can not discriminate among its policyholders, and any agreement which would result in the payment of larger proportionate dividends to one of its policyholders than to others in the same class would be illegal and void. See 29 Am. Jur., page 95.

It would appear, therefore, that members with paid-up certificates having contributed to the surplus should share proportionately to contributions in the distribution of this surplus and on an equitable basis. Since the apportionment of the distributable surplus of an insurance company between the different policyholders entitled to share in it necessarily depends upon complicated mathematical calculations, the method or plan of such apportionment has been recognized as a matter largely within the discretion of the company. 108 A. L. R., 119. While the above answer is general in character this must be necessarily so as no method of calculating the distribution of the surplus is provided for in the statute.

Question No. 1 reads as follows:

> "If a member's certificate becomes paid up on a twenty-year paid life policy and he is making no further payments thereon, is he entitled to any waived premiums, and if so, how can the Society pay the same and from what fund?"

Section 9473, General Code, articles of incorporation, provides in part as follows:

> "Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society."

The power to readjust rates means the power to either raise or lower rates. It would seem to me that waiving a month's premium or giving a month's credit each year to each paying policyholder is simply another method of readjusting rates—a power granted to each society.

In the event that the society should readjust the rates in any year to a lower figure, the paid-up policyholders have no statutory basis to complain. I can see no basis for an objection if the same is accomplished by waiving a month's premium or giving a month's credit.

Fraternal Societies were at first limited to writing policies on adults and the general statutes first cited herein had been in force for several years when the legislature in 1917 added Sections 9462-1, 9462-2, 9462-3, 9462-4, 9462-5 and 9462-6, General Code, to provide for the writing by the societies of insurance on the lives of certain children.

Section 9462-2, General Code, provides in part as follows:

> "* * *; provided that contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws, * * *."

Here the statute specifically provided for "waiving contributions" and returns from surplus. The general statutes in my opinion had provided for the same result—"readjusting rates", Section 9473, General Code,—disbursing surplus, Section 9470, General Code, and that Section 9462-2, General Code, above noted, simply makes certain that those powers exist in the society as to this special fund.

In specific answer to your questions, I am of the opinion that:

1. A fraternal benefit society may pay dividends to its members out of the surplus fund, after providing for adequate reserves, by action of its governing body pursuant to its constitution and by-laws.

2. Members of a fraternal benefit society whose certificates are paid up are entitled to share in the surplus when distributed by way of dividends equitably and in proportion to their contributions to the surplus and on a mathematical plan formulated by the governing body.

3. A fraternal benefit society may readjust its rates by waiving a month's premium or giving a month's premium credit without giving credit to members who have paid-up certificates, by action of its governing body pursuant to its constitution and by-laws.

Respectfully,

HUGH S. JENKINS

Attorney General