

OPINION
51-86

April 28, 1951 (OPINION)

INSURANCE

RE: Reserve Fund - Assessments

After considering the situation explained in your letter of April 20, addressed to the Attorney General, and consulting the records, reports and statutes relative to the Fire and Tornado Fund, it would appear that several changes were made in 1947 with respect to the amount of reserve required and the manner by which the Fire and Tornado Fund was to be brought up to this new reserve requirement.

For the purpose of this discussion and to arrive at proper answers to your questions, for comparison, we will quote section 26-2413 as it was in 1947, before it was amended by chapter 219 of the 1949 Session Laws, and as it now appears in the 1949 Supplement.

Following is the law as it appeared after being amended by chapter 28 of the 1944 Special Session Laws. We have capitalized the items changed or omitted since that time.

26-2413. Assessments. BETWEEN THE FIRST DAY OF JULY AND THE FIRST DAY OF AUGUST, 1945, AND EACH ODD NUMBERED YEAR THEREAFTER if the reserve fund shall have been depleted below the sum of THREE MILLION DOLLARS the commissioner shall determine the amount of money which may be necessary AS OF THE FIRST DAY OF JULY IN SUCH YEAR to bring the said reserve fund up to the sum of THREE MILLION DOLLARS and he, thereupon shall levy an assessment against each and every policy on ALL PUBLIC PROPERTY, EXCEPT AS HEREINAFTER PROVIDED IN PROPORTION OF THE LENGTH OF TIME SUCH POLICY SHALL HAVE BEEN IN FORCE DURING THE PRECEDING TWO YEAR PERIOD, said assessment shall be completed as follows: The 80% or 90% co-insurance rate established by the Fire Underwriters Inspection Bureau for each insured property to which said 80% of 90% co-insurance rate may be applicable, and the full rate established for properties to which the co-insurance rate is not applicable under the rules of the said Fire Underwriters Inspection Bureau, shall be applied to the amount of insurance provided in each policy and the result of the application of said rate to the amount of insurance shall set the tentative assessment to be made against such policy. The total of all such tentative assessments shall then be ascertained. The percentage of such assessment necessary to restore the reserve fund to the sum of THREE MILLION dollars shall then be computed and collected on each policy BUT IN NO CASE SHALL ANY ASSESSMENT BE GREATER THAN 50% OF THE RATE ESTABLISHED BY THE FIRE UNDERWRITERS INSPECTION BUREAU FOR SUCH RISKS. In case of a fractional percentage the next higher whole percent shall be used in such computation."

The law now reads:

26-2413. ASSESSMENT. If the reserve fund shall have been depleted below the sum of Four Million Dollars, the commissioner shall determine the amount of money which shall be necessary to bring the said reserve fund up to the sum of Four Million Dollars and he, thereupon shall levy an assessment against each and every policy in force with the Fund on all public property. Said assessment shall be computed as follows: The 80% or 90% co-insurance rate established by the Fire Underwriters Inspection Bureau for each insured property to which said 80% or 90% co-insurance rate may be applicable, and the full rate established for properties to which the said co-insurance rate is not applicable under the rules of the said Fire Underwriters Inspection Bureau, shall be applied to the amount of insurance provided in each policy and the result of the application of said rate to the amount of insurance shall set the tentative assessment to be made against such policy. The total of all such tentative assessments shall then be ascertained. The percentage of such assessment necessary to restore the reserve fund to the sum of Four Million Dollars shall then be computed and collected on each policy. In case of a fractional percentage the next higher whole percent shall be used in such computation. APPROVED MARCH 21, 1947, EMERGENCY."

Section 1, chapter 219, 147 Session Laws, is the same act (S.L. 1947, chap. 219). In section 2 a change was made in 26-2414, R.C. 1943, pertaining to new construction insurance rates being added to the 1943 version of 26-2414, as follows:

Any additional insurance shall be regarded as new risks upon which premiums must be paid until such additional insurance has been in force for a period of five years."

Also the sentences appearing as

after any such property shall have been insured in the Fund for a period of five years it shall not thereafter be chargeable with any insurance premium but shall be subject to assessment as provided in this chapter."

was changed to read:

after any such property shall have been insured in the Fund for a period of five years AND THE RESERVE FUND IS NOT UP TO FOUR MILLION DOLLARS ON AUGUST 1, 1947, it shall thereafter be charged a premium EQUAL TO TWENTY-FIVE PERCENT OF SUCH BUREAU RATE. However, after the reserve Fund is up to Four Million Dollars and any property shall have been insured in the fund for a period of five years it shall thereafter be subject only to the assessment as provided in this chapter."

In the same act, chapter 219, S.L. 1947, at section 3 thereof, section 26-2417 of the Revised Code of 1943, was also changed to read as follows: (we quote only the new matter)

However, if at any time due to a catastrophe or disaster, or a succession of catastrophes or disasters, the reserve fund shall

have been depleted below the sum of Two Million Dollars, the Commissioner may, with the approval of the Industrial Commission, issue Premium Anticipation Certificates in an amount sufficient to bring the reserve fund up to Two Million Dollars. Such Premium Anticipation Certificates shall be issued for a period of from ten to twenty years, as determined by the commissioner with the approval of the Industrial Commission, and the interest and principal shall be paid and retired by assessments levied on all policies in force with the Fund. To retire these Premium Anticipation Certificates, the commissioner of insurance shall levy a special assessment against all property insured in the Fund, provided, however, that the total of all assessments and premiums provided for in this act shall not exceed the full Bureau rate. Any state department shall have the right to invest its funds in the purchase of such Premium Anticipation Certificates."

The foregoing amendments and additions result in a number of significant changes, all important to this discussion, and being as follows:

1. The \$2,000,000 reserve requirement provided for in chapter 128, 1944 Special Session Laws, in force until changed by the 1947 Legislature, became \$4,000,000 on March 21, 1947. (26-2413, 1949 Supp.)
2. Specific dates provided for by chapter 28, Special Session Laws of 1944, as to the time when the commissioner shall determine the amount of money required to bring the reserve fund up to minimum requirements were eliminated. (26-2413, 1949 Supp.)
3. The limitation of the assessment, should one be required, to fifty percent of the bureau rate was eliminated. (26-2413, 1949 Supp.)
4. Additional insurance was to be considered a new risk and subject to specific premium rates for the first five years, or until the reserve fund was up to \$4,000,000, and after it was up to \$4,000,000 subject to twenty-five percent of bureau rate until the expiration of the five-year period. (26-2414, 1949 Supp.)
5. Section 26-2417 was amended to provide that if the reserve fund should fall below \$2,000,000 by a series or succession of catastrophes or disasters that in such even the commissioner may issue Premium Anticipation Certificates to bring the reserve up to \$2,000,000 and that he should levy a special assessment against all property insured in the fund for that purpose, provided, however, that the total of all assessments and premiums provided for in the entire act (chapter 219, S.L. 1949) should not exceed the full bureau rate. It also provided that nay state department should have the right to invest its funds in the purchase of such Premium Anticipation Certificates.

It is also essential in this discussion to take into consideration

the following facts:

- (a) On or about March 31, 1947, the reserve fund was \$2,135,315.33.
- (b) On August 1, 1947, the reserve fund was \$2,508,990.73.
- (c) On March 21, 1947, the fund began to charge premiums equal to fifty percent of the bureau rate on all new construction and new insurance, and twenty-five percent on all risks which had been carried in the fund for over five years and no assessments of any kind other than the above fifty percent and twenty-five percent of bureau rates, has ever been made since the effective date of this law, which was March 21, 1947.
- (d) The reserve fund as of March 31, 1951, is \$2,437,366.01.
- (e) As far as this office is able to ascertain no attempt has ever been made since March 21, 1947, to apply the formula prescribed under the 1947 Session Laws, chapter 219, section 1, which is 26-2413 of the 1949 Supplement, for the purpose of bringing the reserve fund up to \$4,000,000.
- (f) Risks carried by the fund increased from \$71,846,904.20 on December 31, 1948 to \$102,279,924.31, of which \$9,140,876.00 has been reinsured as of March 31, 1951.

There are also several principles and conclusions which must be considered with respect to the management of this fund. They are:

I.

The object of the fire and tornado fund is to furnish insurance for buildings and property of the state, counties, municipalities, and school districts at the lowest possible cost consistent with good insurance practice.

II.

The fire and tornado fund operates primarily on the nonprofit mutual assessment plan rather than on the so-called stock company fire insurance fixed rate plan.

III.

The fire and tornado fund is to make no charge for insurance after the reserve is up to the amount set by the legislature, except the policy fee and premium requirements on "new construction".

IV.

Except as restricted specifically by the legislature, the director or manager, who in this case is the Insurance Commissioner, must administer the fire and tornado fund in such a way that it will, in his discretion and in the use of sound business judgment, protect the risks insured in the fund.

V.

If inconsistencies develop in the statutes under which such fund operates because of matters unforeseen by the legislative assembly at the time of their enactment or because of several possible interpretations of single sentences or phrases, then the entire act or chapter involved must be considered and the inconsistencies resolved in favor of a fair and workable interpretation of the whole. Originally, when the law providing for the fire and tornado insurance fund was enacted, a straight assessment basis was contemplated and no difference was made between so-called old risks and "new construction". Assessments were required to be made depending on the amount of insurance carried in relation to the amount of reserve required to be carried in the fund.

The reserve was at one time required to be about ten percent of the risks insured, then later reduced to five percent of the risks insured, and in 1931 it was set at a fixed sum of \$2,000,000. Proportionate refunds were required to be made on January first of each year following to the insureds of amounts on hand over the required reserve as of that time. In 1935 the reserve was lowered to \$1,500,000 and at that time it was provided that before any new insureds could participate in free insurance that they must have been insured for at least five consecutive years at the full bureau rate. This was the beginning of the present law on "new construction" rates, now section 26-2414, 1949 Supplement.

In other words, new risks were not to be participants in benefits built up by older insureds until they had likewise paid something into the reserve fund. The rates these new insureds were to pay were set by section 189c13 of the 1925 Supplement, as amended by the 1937 Session Laws, at the full bureau rates.

Chapter 159 of the 1943 Session Laws then set the reserve up to \$3,000,000, and new insureds to pay fifty percent of the bureau rate for at least five years regardless of the fund condition, and thereafter to be subject only to assessments in case the fund went below the reserve requirement. This was section 26-2414, 1943 Revised Code. In 1947, by chapter 219, section 2, the changes first above quoted were made, namely, that any additional insurance was to be a new risk and must pay the fifty percent of the bureau rate for a five-year period provided however that if the reserve fund should reach \$4,000,000 that new insureds or new risks insured should pay twenty-five percent of the bureau rate for the balance of the five-year qualification period.

Therefore, it is our opinion:

1. That on March 21, 1947, and until the reserve fund reached \$4,000,000, all risks insured in the fund for a period of five years or more, became subject to an annual assessment in an amount that was to be determined by the formula provided for under chapter 219, section 2, of the 1947 Session Laws, now 26-2413, 1949 Supplement.
2. That such annual assessment was limited by chapter 219,

section 2, 1947 Session Laws, to not to exceed the full bureau rate.

3. That no twenty-five percent of the bureau rate premium was ever authorized to be given or quoted as concerning any risks as long as the reserve fund was below \$4,000,000.
4. That all insureds, whether old risks, new construction risks, or additional insurance risks, are subject to an annual assessment limited only by the full bureau annual rates until the \$4,000,000 reserve is reached, or changed by legislative action.
5. That when the \$4,000,000 reserve is reached all risks that have been with the fund for over five years receive the so-called "free insurance" but that new risks and additional insurance risks must continue to pay twenty-five percent of bureau rates until they have been with the fund for five years.

Consequently, your first question is answered in this way: It is clearly apparent that rates and assessments for the years 1947, 1948, 1949 and 1950 were not calculated and made according to procedure prescribed by the 1947 Session Laws, chapter 219, sections 1 and 2, now section 26-2413, N.D.R.C. 1949 Supplement, by the commissioner in charge of the fund during those years. And, further, that no means of collecting such assessments is now available and it would also appear that the time has expired for making a levy that would be enforceable under section 26-2415, N.D.R.C. 1943.

Your second question is answered as follows: The insurance commissioner as director of the fund is authorized and required to make equal annual assessments on all risks, old or new, up to the full bureau rate until the fund stands at \$4,000,000, assessments to be calculated as provided in section 26-2413, N.D.R.C. 1949 Supplement. After the fund stands at \$4,000,000 all risks that have paid into the fund for five years receive "free insurance" until the fund again drops below \$4,000,000.

Further, all new or additional risks pay twenty-five percent of the full bureau rate after the fund arrives at \$4,000,000 until they have been with the fund for five years when these also become qualified for "free insurance" as long as the fund is at the required reserve.

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