FEBRUARY 17, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, N. J.

MEMORANDUM OPINION P-4.

DEAR MR. ALEXANDER:

You have asked whether the State of New Jersey can become a member of and have an interest in a mutual insurance company and whether the fact that an insurance policy issued by a mutual insurance company states that the policy is non-assessable and there is no contingent liability, would eliminate the possibility of an assessment against the State as a member of such a mutual insurance company.

Our opinion is that the State of New Jersey can become a member of and have an intereset in a mutual insurance company where the insurance contract states that the policy is non-assessable and that there is no contingent liability, provided that such provision in the insurance contract is authorized by the statutes of the state in which the insurance company is incorporated and by the constitution and bylaws of such a mutual insurance company.

The statute governing the purchase of insurance by the State is N. J. S. A. 52:27B-62:

> "The director (referring to the Director of the Division of Purchase and Property) shall, subject to the approval of the commissioner, (referring to the former office of State Commissioner of Taxation whose powers in this respect are now vested in the State Treasurer (N. J. S. A. 52:18A-32), effect and maintain insurance against loss or damage by fire upon the State House and the contents thereof in such sum as may be deemed necessary. The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government."

In the case of *State v. Community Health Service, Inc.*, 129 N. J. L. 427, 429 (E. & A. 1943), the Court approved the following definition of insurance:

> "* * * an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest."

Neither the statute itself nor the common-law definition of the term "insurance" limits the term "insurance" to any particular type thereof.

The distinguishing feature of mutual insurance companies, is the power of mutual insurance companies to levy assessments against their members. The question then arises whether a mutual insurance company, by a provision in its contract with a member, can issue a policy which is non-assessable.

A mutual insurance company may, unless prohibited by statute, issue insurance policies for cash only, without contingent liability attaching to the policyholder. *Mygatt v. N. Y. Protective Ins. Co.*, 21 N. Y. 52 (1860); 18 Appleman, Insurance (1945) † 10054, p. 130.

Where neither the constitution nor the bylaws of the mutual insurance company, nor the policy or certificates issued by such company, authorize the levying of assessments to meet losses, the insured is not liable therefor. *Beaver State M. M. F. Ins. Assn. v. Smith*, 97 Or. 579, 192 Pac. 798 (Sup. Ct. Oregon 1920). Only those members who have assumed a contract obligation to pay assessments can be subjected to assessments. *Stanley v. Northwestern Life Assn.*, 36 Fed. 75 (C. C.), *Com. v. Mass. M. F. Ins. Co.*, 112 Mass. 116, *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913 (Sup. Ct. Mich. 1887).

The New Jersey statute allows mutual insurance companies to issues policies for cash premiums only. This statute, 17:28-3, as amended, reads as follows:

> "The maximum premium shall be expressed in the policy of a mutual company organized under any law of this state, and, in a company other than a life insurance company, it may be solely a cash premium or a cash premium and an additional contingent premium which contingent premium shall not be less than the cash premium, but no such company shall issue an insurance policy for a cash premium and without an additional contingent premium until and unless it possesses a surplus above all liabilities of at least three hundred thousand dollars ($300,000.00).
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> "Wherever any company shall issue policies for cash premiums only, in pursurance of the authority of this section, it may waive all contingent premiums set forth in policies then outstanding. The issuance of policies for cash premiums only in pursuance of this section may not be exercised by any such company until written notice of intention to do so, accompanied with a certified copy of the resolution of the board of directors providing for the issuance of such policies, shall have been furnished the Commissioner of Banking and Insurance."

Nor does the purchase of such insurance violate Art. VIII, Sect. II, Par. 1 of the Constitution of 1947 which provides that "The credit of the State shall not be directly or indirectly loaned in any case." (See *Miller v. Johnson*, 4 Cal. (2d) 265, 48 P. (2d) 956, 958, (Sup. Ct. Cal. 1935). See also *French v. Millville*, 66 N. J. L. 392, 49 Atl. 465, (Sup. Ct. 1901), affirmed on opinion below 67 N. J. L. 349, 51 Atl. 1109, (E. & A. 1902).

Before a contract is entered into by the State with a mutual insurance company, the laws of the State in which the mutual insurance company is incorporated and the certificate of incorporation and bylaws of the company must be inspected to ascertain if they empower the mutual insurance company to issue policies that are non-assessable and without contingent liability and that the insurance contract complies with the statutory conditions, if any.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By. ROBERT E. FREDERICK,
Deputy Attorney General.

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