

Opinion No. 42-4005

January 29, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. R. F. Apodaca Superintendent of Insurance State Corporation Commission
Santa Fe, New Mexico

{*152} In your letter of January 27, 1942 you have referred to my former opinion No. 3688, written on January 14, 1941 with reference to a certain agreement made and entered into by the Home Owners' Loan Corporation and the Stock Company Association on February 1, 1940, wherein I held the agreement between the HOLC {*153} and the S. C. A. was at that time in violation of the insurance laws of our state, forbidding discrimination and rebate.

You have now submitted to us an amended agreement entered into between HOLC and S. C. A. on May 12, 1941, and also a supplemental agreement to the amended agreement, which was likewise entered into between HOLC and the S. C. A. in the month of May, 1941. In view of these amendments which have been made to the original agreement, you request our opinion as to whether or not the said contract or agreement, in its present form, violates any of the insurance laws of the State of New Mexico.

By virtue of the terms of the original agreement between the HOLC and the S. C. A., the S.C.A. agreed to insure the HOLC against all fire, loss or damage that might be sustained upon all properties where the latter had an insurable interest, as defined in the contract.

By virtue of paragraph 116, as set forth in my former opinion No. 3688, it was provided for the payment of a flat twenty-five percent out of the premiums to the HOLC for its "superior inspection and fire prevention service" on all properties in which it had an insurable interest. It was this provision in the original agreement which was primarily responsible for the adverse ruling which we gave in Opinion No. 3688 heretofore rendered.

We now come to the consideration of the agreement in its amended and supplemental amended form, as per request.

The original agreement, in its final amended form, now specifies in greater detail the service to be performed by the HOLC, and does not provide for the payment by the S.C.A. of twenty-five percent of the premiums collected to the HOLC, but, to the contrary, now provides for the payment of "such sum as may be agreed upon by the corporation and the association, as reasonable compensation for such services". If there be any serious legal objection to the agreement in its present form it is to be found in this quoted provision of the contract. Although we entertain a few misgivings, we

conclude that the contract in its present form is not, on its face, in violation of our insurance laws. It occurs to us, however, that the validity of the contract will depend upon the manner and fairness which is followed in the actual operation of the scheme, and particularly, whether or not the amounts paid for the services of the HOLC are reasonable and fair amounts for the services actually rendered rather than excessive amounts which would, in effect, amount to an extra bonus or inducement.

In view of the foregoing conclusion of law on our part, we believe the true legality of the contract to now be a question of fact, which facts can only be procured by permitting the HOLC and the S.C.A. to enter into their plan of operation for a reasonable length of time. It is therefore our suggestion that you approve the agreement as it now stands for a period of, say, six months. At the end of the six months period, or whatever length of time you may decide upon, it is our further suggestion that you examine the operations under the contract of the said corporation and association, and ascertain whether or not the compensation which is allowed to the HOLC for its services is reasonable or excessive. If the former, we believe their plan of operation to be legal. If the latter fact is found to exist, we believe their plan of operation to be in violation of the insurance laws of the State of New Mexico.

Many complications may arise in the future under such an arrangement, and we suggest that you keep a rather close supervision over the entire plan of operation.

I return herewith your entire {*154} file in connection with the matter.

Trusting that the foregoing sufficiently answers your inquiry, I am.

By HOWARD F. HOUK,

Asst. Atty. General